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Administrative License Renewal and Due Process -- A Case Study

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ADMINISTRATIVE LICENSE RENEWAL AND DUE PROCESS—A CASE STUDY

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ABSTRACT

Scholars have recently noted the paucity of scholarship on administrative licenses as especially significant given the prevalence—indeed ubiquity—of administrative licenses today. This Article contributes to filling that void by tackling an aspect of administrative licensing that has received especially little attention and, as a result, has been a source of serious confusion: license renewals. As this Article details, administrative license renewal practices raise interesting and important questions about administrative law and procedural due process. Does one have a property interest in a license after that license expires by its terms? Is an agency's decision not to renew a license more akin to denying an initial license application or to suspending or revoking an active license?

This Article answers these questions and then applies those answers to one particular context—the federal Animal Welfare Act (AWA). Our nation's most important animal protection law, the AWA governs more than 2.5 million animals held at nearly eleven thousand locations. By all accounts, it is woefully underenforced. As this Article discusses, that underenforcement is seriously aggravated by the practice of automatically renewing AWA licenses, even in the face of egregious violations. After analyzing recent litigation that has tried to challenge this practice, the Article concludes with policy proposals to address the automatic renewal problem while also ensuring fairness.

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I. INTRODUCTION

On May 27, 2015, the U.S. Department of Agriculture (USDA) inspected Cricket Hollow Zoo, an unaccredited zoo in Manchester, Iowa.[1] During the inspection, the USDA documented violations of eleven different regulatory animal welfare standards affecting at least seventy-seven animals.[2] One of the violations was "direct,"[3] meaning that at the time of the inspection it was "having a serious or severe adverse effect on the health and well-being of the animal, or ha[d] the high potential to have that effect in the immediate future."[4] Five of the violations were "repeats," meaning that the agency had cited Cricket Hollow for violating those exact same welfare standards during its most recent prior inspection.[5] Among other violations, a building holding small primates, chinchillas, porcupines, foxes, and kinkajous had no windows or ventilation and had "a strong, foul odor of fecal waste and ammonia."[6] The facility did not have a plan in place to address the psychological distress of a solitary baboon who "paced nearly the entire time the inspectors observed him" and "repeatedly tossed his head back"—both "abnormal behaviors associated with psychological distress."[7] Due to improper drainage, multiple animal

1. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION REPORT FOR CRICKET HOLLOW ZOO 1 (May 27, 2015) [hereinafter INSPECTION REPORT FOR CRICKET HOLLOW ZOO].

2. *See id.* at 1-5.

3. *Id.* at 4.

4. U.S. DEP'T OF AGRIC., ANIMAL WELFARE INSPECTION GUIDE 2-10 (2013) [hereinafter ANIMAL WELFARE INSPECTION GUIDE] (emphasis omitted), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf [https://perma.cc/L2LF-22GZ].

5. *See* INSPECTION REPORT FOR CRICKET HOLLOW ZOO, *supra* note 1, at 1; ANIMAL WELFARE INSPECTION GUIDE, *supra* note 4, at 2-8.

6. INSPECTION REPORT FOR CRICKET HOLLOW ZOO, *supra* note 1, at 2-3.

7. *Id.* at 2.

enclosures "were severely muddy with large areas of standing water."[8] "Within each of those enclosures, nearly the entire enclosure was covered with mud that was several inches thick and/or puddles . . . ."[9] As a result, numerous animals were forced to "stand in water and/or thick mud," and some of them had "mud/wet fur extending up the entire length of their legs."[10] Numerous animals were also confined with excessive buildups of waste—some of which had maggots—and an excessive number of flies.[11]

The very same day that it inspected and documented these violations, the USDA renewed the license that Cricket Hollow needed under the AWA to exhibit animals to the public.[12]

While Cricket Hollow—with its chronic, consistent, and voluminous violations of the AWA—is an extreme example, it is one of many facilities whose licenses the USDA has renewed despite knowing of ongoing violations. One internal agency audit found that forty-nine facility licenses were renewed "when the facilities were known to be in violation,"[13] while another found twenty-eight instances of renewal of facilities that were "in direct violation" and "potentially jeopardizing the health and well-being of the animals under their care."[14]

Why would an agency tasked with enforcing the AWA—whose stated primary purpose is "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"[15]—renew the licenses of entities that clearly were *not* providing humane care and treatment? AWA licenses are renewed despite ongoing violations because, unlike initial licenses, for which the USDA requires a demonstration of compliance with animal welfare standards,[16] the agency renews licenses pursuant to a "purely administrative" process[17] that it de-

8. *Id.* at 4.

9. *Id.*

10. *Id.*

11. *Id.* at 5.

12. U.S. Dep't of Agric., Administrative Record of 2015 Renewal of Animal Welfare Act License 42-C-0084 (July 27, 2015) [hereinafter Animal Welfare Act License for Cricket Hollow Zoo].

13. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 33002-0001-Ch, ANIMAL AND PLANT HEALTH INSPECTION SERVICE IMPLEMENTATION OF THE ANIMAL WELFARE ACT 2 (1992) [hereinafter 1992 OIG AUDIT REPORT].

14. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 33600-1-Ch, ENFORCEMENT OF THE ANIMAL WELFARE ACT 5 (1995) [hereinafter 1995 OIG AUDIT REPORT].

15. 7 U.S.C. § 2131(1) (2012).

16. Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1220 (11th Cir. 2015).

17. *Id.* at 1209-10.

scribes as "rubberstamping."[18] Under this process, so long as a licensee submits a completed one-page renewal application[19] and pays an annual fee,[20] the USDA will renew the license regardless of violations.[21]

Because this renewal practice authorizes chronic violators to continue doing business as usual, it has come under fire—facing criticism not just from animal advocates[22] but also from the USDA's own Office of the Inspector General[23] (OIG) and from members of Congress.[24] Finding that the automatic renewal of licenses interferes with the USDA's ability to ensure the humane care and treatment of animals—again, the primary stated purpose of the AWA[25]—because it "reduce[s] assurance that animal care facilities will make required corrections to comply with the provisions of the [A]ct," the OIG urged the agency to alter this practice more than a quarter of a century ago.[26]

Despite agreeing that such a change "would enhance its enforcement efforts,"[27] the USDA has not altered its practice and has steadfastly defended it in response to a series of challenges in federal court.[28] In doing so, the agency has relied principally on two core arguments: first, it has suggested that due process and related considerations preclude it from declining to automatically renew licenses; and second, it has maintained that it lacks the resources to condition license renewal on compliance.

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18. Ray v. Vilsack, No. 5:12-CV-212-BO, 2013 WL 5561255, at *1 (E.D.N.C. Oct. 8, 2013).

19. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., FORM NO. 7003, APPLICATION FOR LICENSE: RENEWAL (2010) [hereinafter APHIS FORM 7003], https://www.reginfo.gov/public/do/PRAICList?ref_nbr=201102-0579-002 (select "7003" under "Form No.") [https://perma.cc/67YB-YY6L].

20. This annual licensing fee has not been adjusted—even for inflation—in more than a quarter of a century. *Compare* 9 C.F.R. § 2.6 (2017) (current fee structure), *with* Animal Welfare, 54 Fed. Reg. 36,123, 36,150 (Aug. 31, 1989) (codified at 9 C.F.R. § 2.7(c) (2017)) (setting the fees that remain in effect today).

21. *See Animal Legal Def. Fund*, 789 F.3d at 1223 (citing 9 C.F.R. §§ 2.2(b), 2.6(c), 2.7(d) (2017)). The AWA regulations require an "annual report," 9 C.F.R. § 2.7, and certification of compliance, *id.* § 2.2. Both of these items are included on the one-page application form. *See* APHIS FORM 7003, *supra* note 19.

22. *See infra* Section IV.C.

23. *See infra* Section IV.A.

24. *See infra* Section IV.B.

25. 7 U.S.C. § 2131 (2012).

26. 1992 OIG AUDIT REPORT, *supra* note 13, at 11.

27. 1995 OIG AUDIT REPORT, *supra* note 14, at 8.

28. *See, e.g.*, Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602, 618 (D.C. Cir. 2017); People for the Ethical Treatment of Animals v. U.S. Dep't of Agric., 861 F.3d 502, 507-08 (4th Cir. 2017); Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1224 (11th Cir. 2015); Ray v. Vilsack, No. 5:12-CV-212-BO, 2014 WL 3721357 (E.D.N.C. July 24, 2014).

This Article interrogates both of these assertions, revealing that the USDA has been confused about what due process requires and, as a result, has engaged in an outdated form of procedural maximalism[29] that relies on processes that are often inefficient and excessive.

Beginning with an analysis of the evolution and current state of the law governing the procedures due when license renewal decisions are made—both under the Administrative Procedure Act (APA) and the U.S. Constitution—this Article concludes that due process considerations do not dictate that the USDA must automatically renew licenses. Further, this Article concludes that resources could, in fact, be much more effectively allocated to further the purposes of the AWA if the agency halted this practice.

Although this Article focuses on the AWA as a case study, its analysis has implications that go far beyond this specific context and apply to administrative licensing generally. As Eric Biber and J.B. Ruhl recently noted—echoing an observation made by Richard Epstein two decades ago as "no less true today"—"[a]dministrative permits are ubiquitous in modern society," yet "the permitting system 'has received scant attention in the academic literature.' "[30] Even scanter attention—indeed virtually none—has been brought to bear on the specific issue of permit or license renewal—despite the vast array of administrative regimes providing for such renewal, the significant government and private interests underlying renewal decisions, and the multitude of different procedures governing renewal decisions. This Article begins to fill that void.

This Article proceeds as follows: Part II provides a comprehensive overview of when and what procedural protections apply to renewal decisions under both the APA and the U.S. Constitution, and describes an increasing trend away from formalistic decisionmaking and toward informal processes in the context of administrative licensing. Part III then turns to licensing in the AWA context specifically, describing the statutory and regulatory provisions underlying the USDA's licensing decisions and the agency's somewhat inconsistent interpretation of those provisions. Part IV delves into the criticisms that the USDA's practice of automatically renewing AWA licenses has faced from the agency's own OIG and from Congress, and

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29. *See* Lisa Heinzerling, *Undue Process at the FDA: Antibiotics, Animal Feed, and Agency Intransigence*, 37 VT. L. REV. 1007, 1026 (2013) (coining the term "procedural maximalism" in discussing the Food and Drug Administration which, like the USDA, provides far more procedure than it is statutorily required to).

30. Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 137 (2014) (quoting Richard A. Epstein, *The Permit Power Meets the Constitution*, 81 IOWA L. REV. 407, 407 (1995)).

in litigation brought by animal protection groups—and the agency's defenses of the practice. Finally, Part V, building on recent jurisprudence as well as the case law discussed in Part II, argues that, contrary to the USDA's longstanding assertions, due process considerations do not mandate automatic renewal of AWA licenses, that the agency has the discretion to decline renewals, and that, moreover, doing so would best effectuate the purposes of the AWA.

II. LICENSING, RENEWAL, AND PROCEDURAL DUE PROCESS

As Eric Biber and J.B. Ruhl recently noted—echoing an observation made by Richard Epstein two decades ago as "no less true today"—"[a]dministrative permits are ubiquitous in modern society," yet "the permitting system 'has received scant attention in the academic literature.' "[31] Biber and Ruhl have made an important contribution to this void in the literature, "offering a deep account of the theory and practice of regulatory permits in the administrative state" and "proposing a set of default rules and exceptions for permit design."[32] But, as they note, this initial foray could not possibly cover all aspects in the vast world of permits and "[t]opics such as enforcement, public participation, permit terms, amendment and revocation procedures, inspections and monitoring, and judicial review deserve more attention."[33]

This Article seeks to build on the work begun by Ruhl and Biber by delving into a particular aspect of permitting that has received especially little attention and, as a result, has been a source of confusion—permit renewals. Permit renewals raise interesting and important questions about administrative law and procedural due process. Does one have a property interest in a permit after that permit expires by its terms? Is an agency's decision not to renew a license more akin to denying an initial license application or to suspending or revoking an active license?

Given the prevalence of permit regimes that rely on renewal,[34] there is a surprising level of confusion about the answers to these questions. This Part attempts to begin to allay that confusion by parsing existing law as it pertains to permit renewals. First, we establish our terms—what is a permit, and what is renewal. Next, we turn to the APA as it pertains to permit renewals and then, finally, to constitutional due process.

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31. *Id.*

32. *Id.* at 134.

33. *Id.* at 142.

34. *See id.* at 137.

A. What Is a License? What Is Renewal?

The APA defines the term "license" broadly to include "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission."[35] Although a permit is defined as one type of license, this Article uses the terms "permit" and "license" interchangeably for, as Biber and Ruhl explain, "a permit can be defined as: an administrative agency's statutorily authorized, discretionary, judicially reviewable granting of permission to do that which would otherwise be statutorily prohibited,"[36] and a license is, by definition, a granting of such permission.

The APA defines "licensing" to include "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."[37] Notably, "renewal" is distinguished in this definition from a host of other licensing actions, including actions impacting a license while it is active. As the D.C. Circuit has explained, and as is discussed further below, the APA distinguishes between a license "cut short by affirmative agency action" and a license that "naturally . . . lapse[s]"[38] or "expires on its own terms."[39] Accordingly, when discussing license renewal decisions, this Article refers to decisions about whether to reissue licenses that otherwise would expire or terminate by their own terms. Importantly, as discussed below, nonrenewal is fundamentally distinct from revocation in that the latter cuts short an existing license and, in addition, can permanently disqualify an entity from relicensure.[40] Accordingly, significantly more procedural protections are in place for revocation.

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35. 5 U.S.C. § 551(8) (2012); *see also id.* § 551(9) (" '[L]icensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.").

36. Biber & Ruhl, *supra* note 30, at 146.

37. 5 U.S.C. § 551(9).

38. Miami MDS Co. v. FCC, 14 F.3d 658, 659 (D.C. Cir. 1994).

39. Atl. Richfield, Co. v. United States, 774 F.2d 1193, 1200 (D.C. Cir. 1985); *see also* Great Lakes Airlines, Inc. v. Civil Aeronautics Bd., 294 F.2d 217, 222 (D.C. Cir. 1961) (distinguishing between a license that expires or terminates by its own terms and a license that is "withdrawn, suspended, revoked or annulled"); Bankers Life & Cas. Co. v. Callaway, 530 F.2d 625, 635 (5th Cir. 1976) (distinguishing "the 'withdrawal' of a permit or license" and "failure to renew an existing license").

40. *See* 9 C.F.R. § 2.11(a)(3) (2017) ("A license will not be issued to any applicant who . . . [h]as had a license revoked . . . .").

B. License Renewal and the APA

1. Formal Adjudication Under the APA

The APA categorizes licensing decisions as a type of administrative adjudication,[41] and it sets forth specific requirements for "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," with some narrow exceptions.[42] These formal adjudication requirements provide for a trial-like hearing, including a presiding administrative law judge, a right to counsel, a right to present evidence, a right to cross-examination, a written record, and written findings and conclusions.[43] As one chief administrative law judge has noted, these procedural requirements can result in "lengthy and complex extended trials lasting weeks or even months."[44]

However, not all adjudications—and, thus, not all licensing decisions—are subject to these formal requirements. Rather, by its terms, the APA only mandates adherence to these requirements where a separate statute requires determination "*on the record* after opportunity for an agency hearing."[45] Early on, agencies and courts interpreted the applicability of the APA's formal adjudication requirements broadly, but shifts in administrative law have, as Lisa Heinzerling explains, made "the agency that chooses formal over informal

41. *See* 5 U.S.C. § 551(7) (" '[A]djudication' means agency process for the formulation of an order."); *id.* § 551(6) (" '[O]rder' means the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing.").

42. *Id.* § 554(a). The exceptions are: "(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except a administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives." *Id.* § 554(a)(1)-(6) (footnote omitted).

43. *See id.* § 556.

44. Peter M. Davenport, *The Department of Agriculture's Rules of Practice: Do They Still Serve Both the Department's and the Public's Needs?*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 567, 568 (2013). Famously, a rulemaking proceeding adhering to similar formal requirements to determine what percentage of peanuts peanut butter should contain lasted eleven years. Robert W. Hamilton, *Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1142-43 (1972).

45. 5 U.S.C. § 554(a) (emphasis added); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 89 (Wm. W. Gaunt & Sons, Inc. 1973) (1947) [hereinafter ATTORNEY GENERAL'S MANUAL] ("Should the licensing proceedings be required by statute to be determined upon the record after opportunity for an agency hearing, an agency will be required to follow the provisions as to hearing and decision contained in sections 7 and 8 of the Act. As to other types of licensing proceedings, the Act does not formulate any fixed procedure . . . .").

processes the administrative equivalent of the dodo—exotic, ungainly, of a different era."[46]

These shifts began in the arena of rulemaking in 1972 when the Supreme Court in *United States v. Allegheny-Ludlum Steel Corp.* noted that the APA required formal rulemaking proceedings specifically when a statute called for a decision to be made "on the record after opportunity for an agency hearing" and ruled that a statute calling simply for "a hearing" was "insufficient to invoke" the formal requirements.[47] Building on this holding the following year in *United States v. Florida East Coast Railway*, the Supreme Court again distinguished between a statute requiring that a decision be made "after hearing" and a statute requiring that a decision be made "on the record after opportunity for an agency hearing."[48] As Professor Heinzerling has noted:

> Although the Court insisted that the words of the APA—"on the record" and "after . . . hearing"—were not "words of art" and that "statutory language having the same meaning" could trigger the APA's formal rulemaking requirements . . . no statute lacking the words "on the record" has been held to require formal rulemaking under the APA since *Florida East Coast Railway*.[49]
>
> . . . .
>
> Although the Supreme Court, in *Florida East Coast Railway*, distinguished rulemaking from adjudication and suggested that the procedural requirements for the latter could be greater than those for the former . . . [t]he lower courts have . . . embraced the implications of *Florida East Coast Railway* in the adjudicatory context.[50]

Thus, as Heinzerling succinctly summarizes:

> One early decision, holding that statutes requiring "hearings" for adjudicatory decisions must be presumed to require formal hearings, has been overruled. Another case has held that *Florida East Coast Railway* requires the opposite presumption—that, unless Congress clearly indicates otherwise, the bare requirement of a "hearing" in the adjudicatory context means that only informal, not formal, proceedings are required. Several courts, bowing to the dominance of *Chevron*[51] in modern administrative law, have held

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46. Heinzerling, *supra* note 29, at 1014.

47. 406 U.S. 742, 756-57 (1972) (quoting 5 U.S.C. § 553 (1970)).

48. 410 U.S. 224, 236-37 (1973) (internal quotations omitted).

49. Heinzerling, *supra* note 29, at 1015 (first alteration in original) (first citing *Fla. E. Coast Ry.*, 410 U.S. at 238; then citing GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 229 (5th ed. 2009)).

50. *Id.* at 1016.

51. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court held that if a "statute is silent or ambiguous with respect to the

> that an agency's views on whether formal procedures are required for adjudication are entitled to deference so long as they are reasonable.[52]

Most importantly, "[e]very case applying this framework has upheld the agency's choice to use informal processes rather than formal ones."[53]

> The prevailing methodology at this time is for courts to apply *Chevron* in interpreting section 554(a). Since a statute that calls for a "hearing" but fails to use the words "on the record" is ambiguous with respect to whether the APA applies, the court must defer to a reasonable agency interpretation of the statute.[54]

2. *Informal Adjudication Under the APA*

The vast majority of agency adjudications—"[p]erhaps 90 percent"[55]—are not subject to the APA's formal, on-the-record hearing requirements. For these informal adjudications, section 555 of the APA provides baseline procedures, including a right to counsel, a right to appear, a copy of a transcript if evidence is submitted, issuance of subpoenas, and "[p]rompt notice . . . of [a] . . . denial."[56]

Within this basic framework, agencies have wide leeway as to how they handle informal adjudications.[57] As Gary J. Edles has explained, this was intended to allow for "practical, evolutionary, situational

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specific issue" before a court reviewing an administrative agency's action, then "the question for the court is whether the agency's answer is based on a permissible construction of the statute," an extremely deferential standard. *Id.* at 843.

52. Heinzerling, *supra* note 29, at 1016 (footnotes omitted); *see also* Moore v. Madigan, 990 F.2d 375, 378 (8th Cir. 1993) ("[W]hen Congress mandates a formal hearing before an agency in a statute, it either employs the term of art 'on the record' or it indicates its intent to trigger the formal hearing procedures of the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq." (citing City of W. Chi. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 641 (7th Cir. 1983); Webster Groves Tr. Co. v. Saxon, 370 F.2d 381, 384-86 (8th Cir. 1966))); Gary J. Edles, *An APA-Default Presumption for Administrative Hearings: Some Thoughts on "Ossifying" the Adjudication Process*, 55 ADMIN. L. REV. 787, 793 (2003) ("[I]n light of *Florida East Coast Railway* and its progeny, and the Supreme Court's seminal decision in *Chevron*, a simple statutory 'hearing' provision no longer automatically mandates formal hearing procedures . . . ." (footnotes omitted)).

53. Heinzerling, *supra* note 29, at 1017; *see also* Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2037 (2015) ("Since 1984, no circuit court has held that an agency is required to conduct an oral evidentiary hearing when it is required to conduct a 'hearing' to resolve contested issues of fact of that type.").

54. A GUIDE TO FEDERAL AGENCY ADJUDICATION 176 (Jeffrey B. Litwak, ed., 2d ed. 2012) (citing Dominion Energy Brayton Point v. Johnson, 443 F.3d 12 (1st Cir. 2006)).

55. *Id.*

56. 5 U.S.C. § 555 (2012).

57. Edles, *supra* note 52, at 791.

resolution."[58] Thus, for example, they might be handled strictly based on written documents. Evidentiary standards can be lax, and the person who made the decision being challenged can be involved in the hearing.[59] Cross-examination and discovery are not necessarily provided for.[60]

3. APA Requirements Specific to License Applications

In addition to the baseline procedural protections that section 555 of the APA provides for all informal adjudications, section 558(c) sets forth requirements specific to licensing decisions.[61] Section 558(c) contains three sentences, each with its own body of interpretive case law and analysis. These sentences and the protections they afford are discussed in turn below.

a. First Sentence of Section 558(c)

The first sentence of section 558(c) states:

> When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision.[62]

Because this provision references sections 556 and 557—the formal adjudication requirements discussed above in Part II.B—some have argued that it independently triggers these requirements for individual license determinations. However, most courts that have considered the question have ruled "that Section 558(c) does not independently provide that formal adjudicatory hearings must be held. 'It merely requires any adjudicatory hearings mandated under other provision of law to be set and completed in an expeditious and judicious manner.' "[63] Of the two courts that went the other way, neither

58. *Id.*; *see also id.* at 796 ("Starting in the 1960s, agencies began experimenting with innovative procedures . . . .").

59. *See* Paul R. Verkuil, John F. Duffy & Michael Herz, Introduction, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 5, 30 (2002).

60. *Id.*

61. *See* 5 U.S.C. § 558(c) (2012).

62. *Id.*

63. City of W. Chi. v. U.S. Nuclear Regulatory Comm'n, 701 F.2d 632, 644 (7th Cir. 1983) (quoting Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260-61 n.25 (9th Cir. 1987)); *see also* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 n.11 (1st Cir. 1978); Taylor v. Dist. Eng'r, U.S. Army Corps of Eng'r's, 567 F.2d 1332, 1337 (5th Cir.1978). *But see* N.Y. Pathological & X-Ray Labs., Inc. v. Immigration & Naturalization Serv., 523 F.2d 79, 82 (2d Cir. 1975) ("[D]esignation of approved facilities constituted 'a license required by law,' within the reach of 5 U.S.C. § 558(c) (1970) . . . requires an agency to conduct proceedings in accordance with 5 U.S.C. §§ 556 and 557. Except in limited cases involving willful-

appears to have followed the decisions in subsequent cases,[64] and one has since designated its statement as "at best dicta" and "decline[d] to elevate it . . . to a holding."[65]

b. Second Sentence of Section 558(c)

The second sentence of section 558(c) provides:

> Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—(1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.[66]

As the Seventh Circuit has explained,

> Read literally, all that this sentence requires of an agency proposing the suspension of a license is that the licensee receive prior written notice of the facts warranting the suspension and an "opportunity to demonstrate or achieve compliance" with all legal requirements. It does not mandate any sort of hearing, let alone the trial-type hearing described in sections 556 and 557.[67]

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ness and jeopardy of public health, interest or safety, the Administrative Procedure Act, 5 U.S.C. §§ 556 and 557 (1970), mandates an agency, in withdrawing, suspending or revoking licenses, to proceed on notice and to provide the opportunity for interested parties to be heard. Accordingly, INS was required to afford notice and to conduct hearings as required by these provisions in order to lawfully determine which surgeons and clinics it would approve and certify." (footnote omitted)); Porter Cty. Chapter of the Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1368 n.12 (D.C. Cir. 1979) ("Section 558(c) provides, in truth, that an agency shall adhere to the procedures for adjudications specified in 5 U.S.C. §§ 556, 557 (1976) for any revocation proceeding . . . ."). As Gary Edles notes:

> One commentator has suggested that the argument supporting full APA hearings may well have stemmed from an ambiguity created when the APA was recodified in 1966, supposedly without substantive change, and the word "any" was dropped from the phrase "any proceedings" so that agencies were thereafter instructed to "set and complete proceedings required to be conducted in accordance with sections 556 and 557 . . . or other proceedings required by law."

Edles, *supra* note 52, at 801-02 (alteration in original) (quoting William H. Allen, *The Durability of the Administrative Procedure Act*, 72 VA. L. REV. 235, 235-36 n.5 (1986)).

64. Edles, *supra* note 52, at 802 ("Research has not revealed any case in which the Second or D.C. Circuits have followed their 1970s precedents, and the issue appears to have evaporated since those cases were decided.").

65. Empresa Cubana Exportadora de Alimentos y Productos Varios v. U.S. Dep't of Treasury, 638 F.3d 794, 802 (D.C. Cir. 2011).

66. 5 U.S.C. § 558(c).

67. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074 (7th Cir. 1982); *see also* Air N. Am. v. Dep't of Transp., 937 F.2d 1427, 1438 (9th Cir. 1991) ("[T]he purpose

The court went on to note that "[t]he legislative history of the section confirms this literal interpretation and demonstrates that the sole purpose of the second sentence was to provide a licensee threatened with the termination of its license an opportunity to correct its transgressions before actual suspension or revocation of its license resulted."[68]

This provision is often referred to as the "second-chance" requirement.[69] Such an opportunity need not be formal and might typically be a follow-up inspection.[70] Thus, absent separately statutorily mandated procedures, the APA does not require any hearing for "the withdrawal, suspension, revocation, or annulment"[71] of a license but does require an opportunity to demonstrate compliance.

Even these minimal procedures do not apply in the case of a license renewal decision,[72] as "[c]ourts have been sensitive to the fact" that the section does not include reference to "a decision not to renew a license."[73] As the D.C. Circuit has explained, this provision "contemplates a license cut short by affirmative agency action"[74] and does not protect "[a] license that expires on its own terms."[75] In other words, as the Fifth Circuit has explained, the failure to renew an existing license is not a "withdrawal."[76] However, as discussed in the next section, the APA does separately apply to license renewals.

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of section 558(c) is to provide individuals with an opportunity to correct their transgressions before the termination or suspension of their licenses.").

68. *Gallagher*, 687 F.2d at 1074 ("As noted in the Senate Judiciary Committee's report on this provision, '[t]he second sentence is designed to preclude with withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of conduct questioned by the agency.' It is also evident from the legislative history of section 558(c) that the special treatment accorded licensees was not intended to trigger a right to an adjudicatory hearing meeting the requirements of sections 556 and 557. The House Judiciary Committee, commenting on an earlier version of section 558(c), stated that '[t]his section operates in all cases whether or not hearing is required, but it does not provide for a hearing where other statutes do not do so.' " (alterations in original) (emphasis omitted) (footnote omitted) (citations omitted)).

69. *See, e.g.*, Moore v. Madigan, 990 F.2d 375, 379 (8th Cir. 1993); George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 993-94 (2d Cir. 1974).

70. *See, e.g.*, *Moore*, 990 F.2d at 380 (holding the USDA complied with section 558(c) when it found the same violation on two consecutive inspection reports).

71. 5 U.S.C. § 558(c).

72. *See* Atl. Richfield Co. v. United States, 774 F.2d 1193, 1200 (D.C. Cir. 1985) ("A license that expires on its own terms is not protected by section 9(b)."); ATTORNEY GENERAL'S MANUAL, *supra* note 45, at 91 ("[I]t is clear . . . that the provisions of this sentence do not apply to renewal of licenses.").

73. Tamura v. FAA, 675 F. Supp. 1221, 1228 (D. Haw. 1987).

74. *See supra* notes 38-39 and accompanying text.

75. *Atl. Richfield Co.*, 774 F.2d at 1200.

76. Bankers Life & Cas. Co. v. Callaway, 530 F.2d 625, 635 (5th Cir. 1976); *see also* Hamlin Testing Labs., Inc. v. U.S. Atomic Energy Comm'n, 357 F.2d 632, 637 (6th Cir. 1966) ("[T]he denial of an application for renewal of a license is not withdrawal, suspen-

c. Third Sentence of Section 558(c)

The third, and last, sentence of section 558(c) states: "When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency."[77]

The D.C. Circuit has noted this provision was intended "to protect licensees from harm associated with delays in agency action on requests for license renewals."[78] Additionally, the Supreme Court has explained that this provision can "protect a person with a license from the damage he would suffer by being compelled to discontinue a business of a continuing nature, only to start it anew after the administrative hearing is concluded."[79]

4. Right to Judicial Review

In addition to the procedural protections discussed above, the APA separately provides for judicial review of all administrative licensing decisions. Specifically, section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof"[80] if "there is no other adequate remedy in a court."[81] "Agency action" is defined to include "the whole or a part of an agency . . . license . . . or the equivalent or denial thereof."[82]

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sion, revocation or annulment of the license within the meaning of . . . the Administrative Procedure Act."); White v. Franklin, 637 F. Supp. 601, 608 n.2 (N.D. Miss. 1981) ("Termination during the period of designation is distinguishable from non-renewal of a designation after expiration of the period, and only the former is covered by 5 U.S.C. § 558(c)."); *see also Tamura*, 675 F. Supp. at 1228 (D. Haw. 1987) (holding the FAA's decision not to redesignate aviation medical examiner after expiration of one-year designation period did not violate APA requirement that licensee be given notice and opportunity to demonstrate or achieve compliance with all lawful requirements).

77. 5 U.S.C. § 558(c) (2012).

78. Comm. for Open Media v. FCC, 543 F.2d 861, 867 (D.C. Cir. 1976) (citing 92 CONG. REC. 5654 (1946) (statement of Rep. Walker)).

79. Pan-Atl. Steamship Corp. v. Atl. Coast Line R.R. Co., 353 U.S. 436, 439 (1958).

80. 5 U.S.C. § 702 (2012).

81. *Id.* § 704.

82. *Id.* §§ 701(b)(2), 501(13); *see also id.* § 551(9) (" '[L]icensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.").

C. Constitutional Due Process and Licensing

The Fifth Amendment to the U.S. Constitution provides that "[n]o person . . . shall . . . be deprived of life, liberty, or property, without due process of law,"[83] while the Fourteenth Amendment provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."[84] These clauses provide procedural protections for broadly defined property rights—including, in some instances, licenses and license renewals.

1. When Is There a Protected Interest in License Renewal?

To qualify as a property interest protected by procedural due process, there must be a claim of legal entitlement—not merely a discretionary decision to provide a benefit.[85] Thus, a threshold, fact-intensive question for any due process analysis is whether some source of law provides substantive protections for an asserted interest such that there are limits on the state's discretion as to that interest. In addition to laws that explicitly create a property right, laws can also "create a constitutionally protected interest by establishing statutory or regulatory measures that impose substantive limitations on the exercise of official discretion"[86] as well as through mutually implicit understandings.[87] Regardless of its source, "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[88]

Applying this analytical framework to license renewals, courts have found a protected interest in some instances but not in others. Cases that have found no protected interest in renewal have often distinguished revocation or suspension of an active license, on the one hand, and nonrenewal of an expired license, on the other. Thus, for example, in *Movers Warehouse, Inc. v. City of Little Canada*,[89] the Eighth Circuit found no protected interest in the renewal of a bingo hall license that had "expired by its terms."[90] The court noted that

83. U.S. CONST. amend. V.

84. *Id.* amend. XIV.

85. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577-78 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

86. Craft v. Wipf, 836 F.2d 412, 417 (8th Cir. 1987).

87. Perry v. Sinderman, 408 U.S. 593, 602-03 (1972).

88. *Roth*, 408 U.S. at 577.

89. 71 F.3d 716 (8th Cir. 1995).

90. *Id.* at 719.

the city "did not 'revoke' or 'suspend' [the] bingo hall license" and that the business had "operated its business for the full term of the license until it expired."[91] The court continued, "The terms 'revoke' and 'suspend' imply the withdrawal of an existing entitlement. It would be proper to characterize the city's action as a revocation if the city interfered with [the] bingo hall operations during the term of the license."[92] Crucial to the analysis was the fact that the city had "unfettered discretion to withhold approval of an application for renewal of a bingo hall license."[93] Under these circumstances, the court found that at most there was "a unilateral expectation of renewal."[94] Where there are "no substantive limitations on the discretion of the licensing authority to deny renewal, such an expectation is not a protected property interest."[95] Similarly, New York's highest court found no protected interest in the renewal of licenses to operate medical facilities—even though those facilities had previously been approved for years—where "law vests [the government] with considerable discretion in licensing medical sites."[96] The court explained: "[P]roperty interests do not arise in benefits that are wholly discretionary . . . . To be contrasted against these laws are instances where the administra-

91. *Id.*

92. *Id.*; *see also* Carpenter v. City of Charleston, No. 1:10-CV-17-RWS, 2011 WL 2669308, at *2 & n.1 (E.D. Mo. July 7, 2011) (finding no protected property interest in renewal of liquor license where ordinances provided for a hearing before revocation or suspension of a license but not before nonrenewal).

93. *Movers Warehouse, Inc.*, 71 F.3d at 719.

94. *Id.* at 720.

95. *Id.*; *see also* Clarke v. de Blasio, 604 F. App'x 31, 32-33 (2d Cir. 2015) (finding no protected interest in renewal of process server licenses where government has "great discretion in determining whether to renew a license and neither the Administrative Code nor the City Charter requires . . . grant[ing] a renewal on the condition that certain criteria are met"); Austell v. Sprenger, 690 F.3d 929, 936 (8th Cir. 2012) (finding no constitutionally protected property interest in the renewal of a license to operate a childcare facility where "the applicable statutes and regulations governing [the] licensing determination are broad, subjective, and give the department substantial discretion to determine violations"); Thornton v. City of St. Helens, 425 F.3d 1158, 1164-65 (9th Cir. 2005) (finding no property interest in renewal of wrecking license where reviewing body had the discretion to deny a renewal application); Fed. Lands Legal Consortium *ex rel.* Robart Estate v. United States, 195 F.3d 1190, 1199-1200 (10th Cir. 1999) (finding no protected interest in grazing permits even though federal agency had previously renewed permits because "in the absence of a statutory or contractual right to renewal, a person . . . can claim no property interest in the indefinite renewal of his or her contract" and "[a] constitutional entitlement cannot be created—as if by estoppel—merely because a wholly and *expressly* discretionary state privilege has been granted generously in the past" (alterations in original) (internal quotations omitted)); *see also* Zenco Dev. Corp. v. City of Overland, 843 F.2d 1117, 1119 (8th Cir. 1988) (finding no protected interest in the renewal of a liquor license because municipal ordinance did not require notice or a hearing prior to the denial of the application).

96. Daxor Corp. v. State Dep't of Health, 681 N.E.2d 356, 361 (N.Y. 1997).

tive body was without discretion to deny an application and thus the applicant had an entitlement to the license sought."[97]

On the other hand, in a case involving licenses to rent properties, the Eighth Circuit found a protected property interest in renewal because the city's discretion to deny renewal was cabined by a licensing scheme that provided that "[a]n applicant seeking renewal of a rental license . . . need only meet three objective criteria to qualify."[98] With "no indication in the Code that upon satisfaction with these criteria, the City may still use its discretion to deny renewal," the court found a protected property interest in renewal.[99] Similarly, in *Club Misty Inc. v. Laski*,[100] the Seventh Circuit found a protected property interest in the renewal of a liquor license where state law provided that such licenses were "renewable as a matter of right when the term expires unless the licensee is unqualified or his premises unsuitable."[101] In so holding, the court acknowledged, "[w]ere renewal a matter of administrative grace, the challenged statute would be vulnerable only in cases in which the license was voided before the expiration of its current term."[102] Along these lines, courts have distinguished between licenses that are automatically renewed and licenses that expire and must actively be renewed.[103]

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97. *Id.* at 360-62; *see also* Testwell, Inc. v. N.Y.C. Dep't of Bldgs., 913 N.Y.S.2d 53, 57-58 (N.Y. App. Div. 2010) (explaining, in finding no protected property interest in the renewal of a concrete testing laboratory license that had expired, "due process may prevent the revocation or suspension of a license without notice and a hearing. However, [this] license was not revoked or suspended. Rather, the license expired . . . . Because the issuance of a license is an exercise of discretion, there is no property interest in the renewal of an expired license and no constitutional due process right to a hearing").

98. Stauch v. City of Columbia Heights, 212 F.3d 425, 430 (8th Cir. 2000).

99. *Id.*; *see also id.* ("[T]he licensing scheme which limits the City's discretion to deny renewal, creates a protected property interest.").

100. 208 F.3d 615 (7th Cir. 2000).

101. *Id.* at 616.

102. *Id.* at 618.

103. *See, e.g.*, Lockhart v. Matthew, 83 F. App'x 498, 500 (3d Cir. 2003) ("Lockhart's due process claim consists of assertions that, as an EMT with nineteen years experience, he was a tenured public employee with a property interest in his license. Unlike cases where this Court has been willing to recognize a property interest in a license, Lockhart's EMT license expired every two years."); Germantown Cab Co. v. Phila. Parking Auth., No. 14-4686, 2015 WL 1954163, at *6-7 (E.D. Pa. Apr. 30, 2015) (finding taxi cab company had no protected property interest in certificate of public convenience given that certifications "expire annually; renewal is not automatic; and the [granting body] has the discretion to deny a renewal of rights"); Marin v. McClincy, 15 F. Supp. 3d 602, 612-13 (W.D. Pa. 2014) (finding no protected property interest in emergency medical service licenses that "are valid for a finite time and do not automatically renew"); *see also* Speck v. City of Philadelphia, No. 06-4976, 2007 WL 2221423, at *6 (E.D. Pa. July 31, 2007) (finding no property interest in municipal police officer certifications that "expire after a fixed term and the individual maintains responsibility for renewing before expiration").

Shelley Ross Saxer helpfully illuminates these distinctions in the context of liquor licenses:

> Some states allow the licensee to renew without a formal reapplication. These "perpetual" statutes give specific guidelines for renewal and allow rejection of renewal only upon "good cause." In these jurisdictions, the licensee comes to expect that the license will be renewed as a matter of course. The perpetual renewal procedures provide for abbreviated and expedited review processes, avoiding the rigid procedures required for initial license issuance. In these states, renewal is considered a continuation of the original liquor license and little, if any, investigation or examination of the licensee is required. A perpetual liquor license therefore may be characterized as property due to the licensee's entitlement to renewal. Where there is an expectation that a license will be renewed, the license acquires a greater property interest due to the reliance that the license will be renewed.
>
> Other states follow a "provisional" renewal procedure, instead of the "perpetual" renewal procedure. The provisional renewal scheme requires holders to reapply each year for renewal. Provisional statutes deny the licensee any expectation of automatic renewal. Therefore, the licensee is not granted the "legitimate claim of entitlement" necessary to raise the license to the level of constitutionally protected property. . . . License holders, in states that follow a provisional renewal scheme, do not have a reasonable expectation that their license will be protected as property.[104]

2. What Process Is Due?

If a protected property interest in renewal exists, the next question is, What type of process is required under the Constitution? While early cases took a monolithic approach and required fixed procedures akin to a formal hearing under the APA in all cases,[105] in *Mathews v. Eldridge*[106] the Supreme Court abandoned this approach for a context-specific one. Under this approach, the sufficiency of procedural protections:

> [R]equires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative

104. Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 453-55 (1995) (footnotes omitted).

105. *See* Goldberg v. Kelly, 397 U.S. 254, 264-69 (1970).

106. 424 U.S. 319 (1976).

> burdens that the additional or substitute procedural requirement would entail.[107]

Thus, while those who face "interference with a protected property interest must be given some kind of notice and afforded some kind of hearing,"[108] there are no strict rules governing the contours of that hearing, and the Supreme Court has made clear that "procedural due process in the administrative setting does not always require application of the judicial model."[109] As Kevin Culp Davis commented, "The great contribution of the *Eldridge* opinion is . . . the adoption of the essential idea that adequate informal procedure may make trial-type hearing[s] unnecessary and even undesirable."[110]

D. The Resultant Trend Away from Formal Processes

As discussed above, while the courts became more accepting of informal hearings under the APA, constitutional "Due Process hearing requirements evolving over the same period reflect a similar judicial acceptance of less formal procedures over any formulaic, across-the-board approach favoring formal hearings."[111] As a result, as noted by former D.C. Circuit Chief Judge Patricia Wald, "the occasions where an evidentiary hearing is required seem to be steadily diminishing."[112] Indeed, a 1992 survey of nonformal administrative hearing programs found "that there were more than twice as many 'administrative judges,' i.e., non-ALJ adjudicators . . . as there were administrative law judges."[113]

Thus, agencies have moved away from formal hearing processes—which Justice Stephen Breyer has described as "inordinately cumbersome and time-consuming and offered few advantages over more informal . . . procedures"[114]—in a variety of contexts. Such informal procedures have been upheld by the courts and have been found to

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107. *Id.* at 335.

108. Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis omitted).

109. Dixon v. Love, 431 U.S. 105, 115 (1977).

110. KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE EIGHTIES: 1989 SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE 342 (1989) (emphasis added).

111. Edles, *supra* note 52, at 804-05.

112. Patricia M. Wald, *Judicial Review in Midpassage: The Uneasy Partnership Between Courts and Agencies Plays On*, 32 TULSA L.J. 221, 232 n.70 (1996).

113. Edles, *supra* note 52, at 814 (citing John H. Frye III, *Survey of Non-ALJ Hearing Programs in the Federal Government*, 44 ADMIN. L. REV. 261, 349 (1992)).

114. STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 582 (4th ed. 1999). Professor Davis similarly lamented that "[t]he major malady that cuts deeply into efficiency is grossly excessive use of trial procedure." 3 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 3 (2d ed. 1978).

adequately ensure fairness, despite their relative informality.[115] The Environmental Protection Agency, for example, has eliminated formal evidentiary hearings from its National Pollutant Discharge Elimination System permitting system under the Clean Water Act.[116] The USDA has used informal proceedings in a variety of contexts, including revocation of approved stockyard status under the Cattle Contagious Diseases Act,[117] the denial or termination of Supplemental Nutrition Assistance Program benefits,[118] and the suspension or revocation of a sugar re-export permit.[119] The Nuclear Regulatory Committee provides for "simplified" hearings for the "grant, renewal, licensee-initiated amendment, or termination of licenses or permits."[120] When the U.S. Fish and Wildlife Service suspends or revokes a permit, there is not a full evidentiary hearing; rather, the permittee has the opportunity to file written objections with supporting documentation to the agency (not to a separate judge).[121] These are but a few examples of the many different informal administrative procedures in place.

While agencies in many contexts "have been quick to avoid adjudicatory requirements where courts have allowed it,"[122] in the context of the AWA, the USDA has steadfastly continued to afford maximal procedural protections even when case law indicates that it is not required to do so. Part III discusses these procedures and practices.

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115. *See, e.g.*, Dominion Energy Brayton Point, LLC v. Johnson, 443 F.3d 12, 15 (1st Cir. 2006). And as Gary Edles has noted, "[a] major empirical study of informal adjudication examining forty two separate agency programs concluded that informal adjudication did, in fact, typically provide the core elements required by Due Process and were conducted both fairly and efficiently." Edles, *supra* note 52, at 808 (citing Paul R. Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976)).

116. *Dominion Energy*, 443 F.3d at 15 (citing Remarks on Regulatory Reform, 31 WEEKLY COMP. PRES. DOC. 278 (Feb. 21, 1995); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,276 (Dec. 11, 1996) (codified at 40 C.F.R. pts. 122-23 (2017)); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886, 30,900 (May 15, 2000) (codified at 40 C.F.R. pt. 122 (2017))).

117. *See* Moore v. Madigan, 990 F.2d 375, 378 (8th Cir. 1993).

118. *See* 7 C.F.R. § 273.15 (2017).

119. *See id.* § 1530.112.

120. *See* 10 C.F.R. § 2.310; *id.* §§ 2.1200-.1213.

121. 50 C.F.R. §§ 13.27(b), 13.28(b). Subsequent requests for reconsideration are handled similarly. *See id.* § 13.29(b). Appeals thereof are also in writing, *id.* § 13.29(e), although the U.S. Fish and Wildlife Service official handling the appeal has discretion to authorize oral argument "if such official judges oral arguments are necessary to clarify issues raised in the written record," *id.* § 13.29(f)(1).

122. William Funk, *The Rise and Purported Demise of* Wong Yang Sung, 58 ADMIN. L. REV. 881, 892 (2006).

III. LICENSING UNDER THE AWA

The AWA[123] is the most comprehensive federal law governing the treatment of animals.[124] Under the AWA, the USDA's Animal and Plant Health Inspection Service (APHIS) regulates 11,000 locations,[125] which collectively hold more than 2.5 million animals.[126]

A. Statutory Licensing Provisions

Congress set forth three express purposes in the AWA:

> (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 the theft of their animals by preventing the sale or use of animals which have been stolen.[127]

To effectuate these purposes, the AWA provides that in order to engage in a covered activity with covered animals[128]—dealing,[129] ex-

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123. Animal Welfare Act, 7 U.S.C. §§ 2131-2159 (2012).

124. For a more detailed discussion of the AWA and its implementation, see Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 78 OHIO ST. L. J. (forthcoming 2018) (manuscript at Part III) (on file with author).

125. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., 2018 PRESIDENT'S BUDGET 20-139 (2018) [hereinafter 2018 PRESIDENT'S BUDGET], https://www.obpa.usda.gov/20aphisexnotes2018.pdf [https://perma.cc/EC4R-572Z].

126. *Id.* at 20-139. Eight hundred and twenty thousand eight hundred and twelve regulated animals were used for research alone in fiscal year 2016. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, FISCAL YEAR 2016 (June 27, 2017), https://www.aphis.usda.gov/animal_welfare/downloads/reports/Annual-Report-Animal-Usage-by-FY2016.pdf [https://perma.cc/4EN5-GKG2].

127. 7 U.S.C. § 2131.

128. Animals covered by the AWA include:

> [A]ny live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus Rattus, and mice of the genus Mus, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry, used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

Id. § 2132(g).

129. The AWA defines "dealer" as:

hibition,[130] research,[131] or commercial transport—one must first obtain a license or registration.[132] Animal exhibitors and dealers must be licensed, while research facilities and carriers must be registered.[133]

The AWA provides the USDA broad discretion to prescribe the "form and manner" for license applications with the limiting proviso "[t]hat no . . . license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary."[134] These standards "govern the humane handling, care, treatment, and transportation of animals," and include:

> [M]inimum requirements . . . for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and

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> [A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—(i) a retail pet store which sells any animals to a research facility, an exhibitor, or a dealer.

Id. § 2132(f).

130. The AWA defines "exhibitor" as:

> [A]ny person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

Id. § 2132(h).

131. The AWA defines "research facility" as:

> [A]ny school (except an elementary or secondary school), institution, organization, or person that uses or intends to use live animals in research, tests, or experiments, and that (1) purchases or transports live animals in commerce, or (2) receives funds under a grant, award, loan, or contract from a department, agency, or instrumentality of the United States for the purpose of carrying out research, tests, or experiments.

Id. § 2132(e).

132. *Id.* §§ 2133, 2136.

133. *Id.* §§ 2133, 2136.

134. *Id.* § 2133; *see also id.* § 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.").

> temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals; . . . for exercise of dogs, as determined by an attending veterinarian in accordance with general standards promulgated by the Secretary . . . for a physical environment adequate to promote the psychological well-being of primates.[135]

These standards also include the minimum requirements for "the handling, care, and treatment" of animals being transported in commerce.[136]

The AWA similarly affords the agency broad discretion to prescribe rules and regulations governing registration, but does not expressly condition registration on a demonstration of compliance.[137]

The AWA is silent as to license renewals. With regard to the withdrawal of an active license, it provides that if the agency has reason to believe that a licensee has violated any provision of the AWA or its regulations, it "may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as [it] may specify, or revoke such license, if such violation is determined to have occurred."[138] Unlike the nonrenewal or suspension of a license, after which an entity can become relicensed, revocation permanently disqualifies one from licensure.[139] The AWA separately provides for civil monetary penalties and cease and desist orders after "notice and opportunity for a hearing,"[140] as well as criminal penalties.[141]

B. Regulatory Provisions

1. Registration

The AWA regulations provide that research facilities "shall register with the Secretary by completing and filing a properly executed form."[142] Registration is strictly a matter of paperwork, with no pre-

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135. *Id.* § 2143(a)(1)-(2).

136. *Id.* § 2143(a)(4).

137. *Id.* § 2136 ("Every research facility, every intermediate handler, every carrier . . . shall register with the Secretary in accordance with such rules and regulations as he may prescribe."); *see also id.* § 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.").

138. *Id.* § 2149(a).

139. *See* 9 C.F.R. § 2.11(a)(3) (2017) ("A license will not be issued to any applicant who . . . [h]as had a license revoked . . . .").

140. 7 U.S.C. § 2149(b).

141. *Id.* § 2149(d).

142. 9 C.F.R. § 2.30(a)(1) (2017).

registration inspection conducted to assess compliance; although, registrants are required to "agree to comply with the regulations and standards by signing a form provided for this purpose."[143] Research facilities are required to update their registration forms every three years.[144]

2. *Licensing*

a. *Initial Licenses*

Consistent with the statutory mandate "[t]hat no . . . license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary,"[145] the AWA regulations require initial applicants for licenses (unlike registrants) to submit to an inspection and demonstrate compliance with all of the AWA standards before a license will be issued.[146] Applicants are afforded three opportunities within a ninety-day period to demonstrate compliance.[147] The USDA has noted that "few applicants require three prelicensing inspections to complete the process, but even those applicants that require three prelicensing inspections usually complete the process within 90 days."[148] If an applicant does not demonstrate compliance in accordance with these

143. *Id.* § 2.30(b). The purpose of this certification requirement is unclear. The agency routinely receives false certifications and renews licenses even when the record before the agency leaves no doubt as to the falsity of the certification.

144. *Id.* § 2.30(a)(1).

145. 7 U.S.C. § 2133; *see also id.* § 2151 ("The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.").

146. 9 C.F.R. § 2.3(b) (2017) ("Each applicant for an initial license must be inspected by APHIS and demonstrate compliance with the regulations and standards, as required in paragraph (a) of this section, before APHIS will issue a license. . . . Issuance of a license will be denied until the applicant demonstrates upon inspection that the animals, premises, facilities, vehicles, equipment, other premises, and records are in compliance with all regulations and standards in this subchapter."); *see also id.* § 2.11(a)(2) ("A license will not be issued to any applicant who . . . [i]s not in compliance . . ."). Apart from failure to demonstrate compliance, the regulations also provide for additional bases for denying an initial license application, including, inter alia, having previously had a license revoked, having made false or fraudulent statements, or having "pled *nolo contendere* (no contest) or . . . been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals . . . ." *Id.* § 2.11(a)(6). The regulation also includes a broad catchall provision authorizing the agency to deny an initial license application to an applicant who is "otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act." *Id.*

147. *Id.* § 2.3(b).

148. Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,091 (July 14, 2004).

procedures, then that applicant must wait six months to reapply for a license.[149]

In addition to requiring a demonstration of compliance, the AWA regulations provide the USDA broad discretion to deny initial license applications, including when it deems the applicant "unfit to be licensed" and "determines that the issuance of a license would be contrary to the purposes of the Act."[150]

The AWA regulations afford an initial license applicant who is denied a license the ability to "request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied."[151] As discussed further below, this hearing right is provided even though the statute does not expressly provide for a hearing in the context of initial license decisions and, indeed, neither the APA nor constitutional due process mandate such a hearing.[152] Moreover, although the statute makes no reference to any hearings needing to be "on the record," the rules of practice provide for a formal on-the-record hearing in all AWA matters.[153]

b. License Renewals

The regulatory provisions pertaining to AWA licensing renewals are, as the Eleventh Circuit has commented, "poorly drafted."[154] On the one hand, the regulations appear to require renewal applicants to demonstrate compliance in the same manner initial license applicants must. Thus, section 2.3 of the regulations, a provision that on its face applies to both initial and renewal license applications, is titled "Demonstration of compliance with standards and regulations" and provides:

> Each applicant must demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply with the regulations and standards set forth in parts 2 and 3 of this subchapter. Each applicant for an initial license *or license renewal* must make his or her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection during business hours and at other times mutually agreeable to the applicant and APHIS, to as-

149. 9 C.F.R. § 2.3(b). Under the APA they could also challenge the denial in federal district court, *see* 5 U.S.C. § 702, but this appears to be uncommon.

150. 9 C.F.R. § 2.11(a)(6) (2017). Part V discuss the implications of this for due process.

151. *Id.* § 2.11(b).

152. *See supra* Part II.

153. 9 C.F.R. § 2.11(b).

154. Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1222 (11th Cir. 2015); *see also id.* at 1223 ("USDA deserves no plaudits for its regulatory draftsmanship . . . .").

> certain the applicant's compliance with the standards and regulations.[155]

The history of this provision seems to indicate that the demonstration of compliance was clearly intended to apply equally to both initial and renewal applicants. In promulgating this provision, the USDA stated that it had revised previously proposed (but not adopted) language in order

> [T]o require that each applicant for a license *or renewal of a license* must demonstrate compliance with the regulations and standards in Parts 2 and 3 of Subchapter A. We have removed the words, "before a license will be issued" from the requirement *because it applies to both initial licenses and license renewals.*[156]

Later, as part of another rulemaking, the agency also stated unequivocally that "[section] 2.3 of the regulations . . . requires applicants for licenses and renewal of licenses to demonstrate compliance with the regulations and standards."[157] The form for applying for re-

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155. 9 C.F.R. § 2.3(a) (2017) (emphasis added).

156. Animal Welfare Regulations, 54 Fed. Reg. 10,835, 10,840 (Mar. 15, 1989) (emphases added). The originally proposed wording was:

> Each applicant must demonstrate that his/her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in the business comply with the regulations and standards set forth in Parts 2 and 3 of this subchapter before a license will be issued. The applicant must make his/her animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection, during business hours and/or at other times mutually agreeable to the applicant and Veterinary Services, to ascertain the applicant's compliance with the standards and regulations.

Animal Welfare Regulations, 52 Fed. Reg. 10,298, 10,309 (Mar. 31, 1987).

157. Animal Welfare; Inspection, Licensing, and Procurement of Animals, 65 Fed. Reg. 47,908, 47,910 (proposed Aug. 4, 2000). However, as part of this same rulemaking, the agency also rejected the notion that renewals should be contingent on compliance:

> Several commenters suggested adding criteria for renewal of licenses in § 2.12. One commenter suggested that licenses should not be renewed if there were any AWA violations within the last 3 years and the facility had not been inspected within the last year. Another commenter suggested that no license should be renewed unless the facility was inspected and found compliant just prior to the renewal date.
>
> Enforcement of the AWA is based on random, unannounced inspections to determine compliance. In addition, APHIS uses a risk-based assessment to determine minimum inspection frequency. After inspection, all licensees are given an appropriate amount of time to correct any problems and become compliant. This cooperative system has been more effective than enforcement actions for each citation. Furthermore, a significant number of citations are for conditions that do not directly or immediately impact the health and well-being of the animals. It is unrealistic and counterproductive to make license renewal contingent on not having any citations. Accordingly, we are making no changes based on these comments.

newal (which is different from the initial license application form) also states "[n]o license may be issued unless . . . the applicant is in compliance with the standards and regulations [citing] Section 2133."[158] The compliance requirement is also incorporated into another provision that on its face also applies to both initial and renewal applications. That provision states:

> A license will be issued to any applicant, except as provided in §§ 2.10 and 2.11, when: (1) The applicant has met the requirements of this section and §§ 2.2 *and 2.3*; and (2) The applicant has paid the application fee of $10 and the annual license fee indicated in § 2.6 to the appropriate Animal Care regional office for an initial license, and, in the case of a license renewal, the annual license fee has been received by the appropriate Animal Care regional office on or before the expiration date of the license.[159]

Despite the plain language and regulatory history, the USDA currently takes the position "that § 2.3(a) does not condition license renewal on demonstrated compliance with AWA standards. Rather, [according to today's USDA,] § 2.3(a) affirms that initial and renewal applicants have an ongoing legal duty to maintain compliance and submit to random inspections."[160] As discussed further in Part IV, the Fourth and Eleventh Circuits have upheld this interpretation as reasonable.[161]

In defending its automatic renewal policy, the USDA has relied heavily on a regulatory provision that states, "APHIS will renew a license after the applicant certifies by signing the application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards."[162] Citing this provision, the USDA has argued that it has no choice but to renew a license if the applicant has made the requisite certification,[163] even

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Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,094 (July 14, 2004) (codified at 9 C.F.R. § 2.3 (2017)).

158. APHIS FORM 7003, *supra* note 19.

159. 9 C.F.R. § 2.1(c) (2017) (emphasis added).

160. Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1223 (11th Cir. 2015).

161. *See infra* Part IV.

162. 9 C.F.R. § 2.2(b) (2017).

163. *See, e.g.*, Motion to Dismiss at 9, Ray v. Vilsack, No. 5:12-CV-212-BO (E.D.N.C. July 25, 2012) ("Thus, if an applicant certifies current and future compliance with the AWA regulations and standards, the agency *will* renew the license. Such language essentially commits the agency to issue a renewal under these circumstances."); *id.* at 9 ("§ 2.2(b) required the agency to renew the permit." (footnote omitted)); Memorandum of Law in Support of Motion For Judgment on the Pleadings at 15, People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't of Agric., 194 F. Supp. 3d 404 (No. 5:15-CV-00429-D) (2016) ("[T]he license renewal procedures created by the Agency do not require—or even allow

though the immediately preceding regulatory provision makes clear that certification is one of a number of requirements to be met before the agency can renew a license.[164]

In tension with the USDA's argument is the fact that in adopting the certification requirement, it stated:

> The certification requirement will have no effect on the provisions of §2.3, which requires applicants for an initial license or license renewal to make their animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection so that an APHIS inspector may ascertain the applicant's compliance with the standards and regulations.[165]

Moreover, the literal reading that the USDA has urged of this provision would mean that the agency would have no choice but to renew a license even if the applicant had failed to pay the required fees—a position that the agency eschews.[166]

Regardless of the regulatory language, the USDA's practice, as previously noted, is to renew licenses pursuant to a "purely administrative"[167] or "rubberstamping"[168] process. As the Eleventh Circuit explained:

> [The] USDA's administrative renewal process requires a licensee to submit an application fulfilling three requirements: (1) a certification "that, to the best of applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards;"

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for—consideration of the licensee's compliance or noncompliance with the AWA as part of the administrative renewal process.").

164. *See* 9 C.F.R. § 2.1(c) (requiring compliance with § 2.2 (certification), § 2.3 (demonstration of compliance), and payment of a fee).

165. Animal Welfare; Licensing and Records, 60 Fed. Reg. 13,893, 13,894 (Mar. 15, 1995).

166. Notably, the agency previously took the position that it lacked the authority to deny a renewal application even if the applicant had refused to sign a certification, *see Review of the U.S. Department of Agriculture's Enforcement of the Animal Welfare Act, Specifically of Animals Used in Exhibitions: Hearing Before the Subcomm. on Dep't Operations, Research, & Foreign Agric. of the H. Comm. on Agric.*, 104th Cong. 664 (1992) [hereinafter *Hearing on Animals Used in Exhibitions*] ("[I]f a facility does not sign the certification, we do not believe we can remove the license or fail to renew it unless due process is afforded. It is APHIS' position that a license to engage in a business of an ongoing nature, such as dealers, may be denied only after an opportunity before an ALJ is provided.")—a position it has since quietly retreated from.

167. Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1209-10 (11th Cir. 2015).

168. Ray v. Vilsack, No. 5:12-CV-212-BO, 2013 WL 5561255, at *1 (E.D.N.C. Oct. 8, 2013).

> (2) payment of an annual fee; and (3) submission of an annual report.[169]

Thus, the agency renews a license without a demonstration of compliance but does require the remaining three conditions set forth in section 2.1 to be met. If a licensee fails to comply with any one of the three administrative requirements prior to the expiration of his license, the license will expire or, as the USDA puts it, "automatically terminate," and the licensee will need to seek a new initial license.[170] According to the USDA, "many licensees" have had their licenses automatically terminated because they had not provided updated contact information to the agency and could not be contacted at renewal time.[171] Although not required by statute, the regulations allow a licensee whose license expires (or is "automatically terminated") to request a hearing in accordance with the applicable rules of practice.[172] The expiration or termination remains in effect pending a final decision.[173]

Notably, the USDA previously treated licensees who failed to comply with the "purely administrative" renewal requirements the same as licensees facing suspension or revocation.[174] Thus, licensees who did not comply with the renewal requirements were afforded an opportunity for a hearing before, not after, losing the privilege of their license.[175] Finding this approach "burdensome" and costly,[176] the agency did away with it with little fanfare and virtually no explana-

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169. *Animal Legal Def. Fund*, 789 F.3d at 1223 (citing 9 C.F.R. §§ 2.2(b), 2.6(c), 2.7(d)). The "annual report" is part of the application form.

170. 9 C.F.R. § 2.5(b) (2017) ("Any person who is licensed must file an application for a license renewal and an annual report form (APHIS Form 7003), as required by § 2.7 of this part, and pay the required annual license fee. The required annual license fee must be received in the appropriate Animal Care regional office on or before the expiration date of the license or the license will expire and automatically terminate. Failure to comply with the annual reporting requirements or pay the required annual license fee on or before the expiration date of the license will result in automatic termination of the license.").

171. Animal Welfare Regulations, 52 Fed. Reg. 10,298, 10,298 (Mar. 31, 1987). The USDA proactively mails renewal packets to licensees rather than putting the burden on them.

172. 9 C.F.R. § 2.5(c) ("Any person who seeks the reinstatement of a license that has been automatically terminated must follow the procedure applicable to new applicants for a license set forth in § 2.1.").

173. *Id.*

174. *See* Proposed Revisions of Definitions, Regulations, and Standards for the Humane Handling, Care, Treatment, and Transportation of Dogs, Cats, and Certain Other Warmblooded Animals, 44 Fed. Reg. 45,912, 45,912 (Aug. 3, 1979).

175. *See id.*

176. *See id.* ("The cost of the administrative process of serving complaints on delinquent licensees in an attempt to obtain compliance with the law or to revoke or suspend licenses is high.").

tion—cursorily citing the licensing practices of "most State, county, and municipal governments."[177]

3. Rules of Practice

As noted above, the AWA provides for "notice and opportunity for hearing" if a license is to be suspended for more than twenty-one days or revoked.[178] It does not call for a hearing "on the record" and contains no other indication that would trigger the APA's formal adjudication requirements.[179] Despite having discretion to develop informal procedures to govern these decisions—and despite providing for informal adjudications in other contexts[180]—the USDA has opted to provide for full trial-like, on-the-record formal hearings in the AWA context[181] and in a wide array of other contexts in which it is not required to do so.[182] And, although the AWA does not reference any hearing requirements for the denial of an initial or renewal license application, the regulations provide for a full, on-the-record hearing for those decisions.[183]

Thus, all AWA administrative proceedings, and most other USDA proceedings, are governed by uniform rules of practice. The rules provide for a trial-like process, including: the filing of a complaint or petition for review;[184] the filing of an answer;[185] the right to file mo-

177. *See id.* ("Most State, county, and municipal governments utilize licensing procedures whereby licenses are issued for a period of 1 year and renewal of such licenses is dependent upon the payment of an annual license fee and the submission of a completed form of one sort or another. Failure to pay the annual license fee or to submit the form on or before a specified date results in expiration or lapse of the license (usually after notice and opportunity to comply). In keeping with this efficient and effective method for administering licensing systems, the Department proposed to amend the regulations to state that if the required annual dealer's or exhibitor's fees are not paid *or* if the required report is not filed on or before the date required by the regulations, the license of such dealer or exhibitor shall automatically terminate. Prior to such termination, the licensee shall be notified by the Department and given an opportunity to comply." (emphasis added)).

178. 7 U.S.C. § 2149(a) (2012).

179. *See supra* Part II; *see also In re* Caudill, No. 13-0186, 2015 WL 1776430, at *2 (U.S.D.A. Feb. 23, 2015) ("While Animal Welfare Act license termination proceedings have been determined on the record after an agency hearing, 7 U.S.C. § 2133 does not require that Animal Welfare Act license termination proceedings be determined on the record after opportunity for an agency hearing." (footnote omitted)).

180. *See supra* notes 112-114 and accompanying text.

181. *See* 9 C.F.R. § 4.1 (2017); *see also* 7 C.F.R. §§ 1.131-.151 (2017).

182. U.S. DEP'T OF AGRIC., RULES OF PRACTICE GOVERNING FORMAL ADJUDICATORY ADMINISTRATIVE PROCEEDINGS INSTITUTED BY THE SECRETARY § 1.131 (2005).

183. 7 C.F.R. § 1.131(b)(4).

184. *Id.* § 1.133(b); *see also id.* § 1.135 (setting forth requirements for "content of complaint or petition for review").

185. *Id.* § 1.136.

tions;[186] an oral hearing[187] at which testimony is presented and subject to cross-examination;[188] transcription of the hearing;[189] an opportunity to submit proposed findings of fact and conclusions of law and supporting briefs;[190] and the right to appeal to a judicial officer.[191]

Under these rules, the USDA's Office of Administrative Law Judges—which currently appears to have only two administrative law judges (ALJs)[192]—is responsible for "presid[ing] over cases arising under approximately forty-five statutes."[193] As the agency's former chief ALJ has explained, "[t]he types of cases heard by the Department's administrative law judges involve a full spectrum of complexity, from presiding over rule-making hearings, certifying the record, and simple reviews of administrative records, to lengthy and complex extended trials lasting weeks or even months."[194] "A significant percentage of the[se judges'] time is spent presiding over rulemaking hearings, as ALJs are required by statute to preside in a number of instances, particularly involving marketing agreements for milk, fruits and, vegetables."[195]

The uniform rules of practice, unlike the Federal Rules of Civil Procedure upon which they were modeled, have not been significantly revised in nearly four decades,[196] and a former chief ALJ has suggested that they suffer "multiple shortcomings" and "urgently need significant revision."[197] In particular, he has flagged the fact that the rules do not contain "a mention of their purpose being the just,

186. *Id.* § 1.143(d).

187. *Id.* § 1.141(a)-(b).

188. *Id.* § 1.141(h).

189. *Id.* § 1.141(i).

190. *Id.* § 1.142(b).

191. *Id.* § 1.145.

192. *About OALJ*, USDA OFF. ADMIN. L. JUDGES, http://www.oaljdecisions.dm.usda.gov/about [https://perma.cc/8W4A-ZG63].

193. Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 475, 520 (2011); *see also* Davenport, *supra* note 44, at 569-70 ("Despite the fact that a number of Acts have since been repealed and other provisions added, the current rules indicate that they are applicable to nearly fifty statutes that require a formal adjudicatory hearing under the APA before an administrative law judge. They are also applicable to '[o]ther adjudicatory proceedings in which the complaint instituting the proceeding so provides with the concurrence of the [Department's] Assistant Secretary for Administration.' " (alterations in original) (footnotes omitted)).

194. Davenport, *supra* note 44, at 568.

195. Solomon, *supra* note 193, at 520-21.

196. Davenport, *supra* note 44, at 569 (USDA rules of practice "have remained largely unchanged since their last major revision in 1977" (citing Rules of Practice Governing Formal Adjudicatory Administrative Proceedings instituted by the Secretary, 42 Fed. Reg. 743 (Jan. 4, 1977) (codified at 7 C.F.R. pt. 1 (2017)))).

197. *Id.* at 567.

speedy, and inexpensive determination of every proceeding"—an omission he deems "truly . . . significant" and in need of correction.[198]

IV. CRITICISMS OF AUTOMATIC RENEWAL UNDER THE AWA AND RESPONSES THERETO

A. USDA Office of Inspector General Criticism of Automatic Renewal and Recommendations

1. 1992 USDA Office of the Inspector General Audit Report

The first known major criticism of the USDA's AWA renewal policies was articulated in a 1992 audit report from the agency's own OIG.[199] This report "concluded that APHIS cannot ensure the humane care and treatment of animals at all dealer facilities as required by the act"[200] and attributed this failing in large part to the agency's practice of renewing licenses to facilities known to be in violation.[201] The OIG "noted that for 284 facility inspection reports reviewed, 49 facility licenses were renewed by APHIS when the facilities were known to be in violation of the act,"[202] and that "license renewals had been granted to 49 of 156 facilities in violation of the act."[203] The audit concluded that APHIS's decision to "not require that facilities be in compliance with the act to obtain license renewals" resulted in "reduced assurance that animal care facilities will make required corrections to comply with the provisions of the act to ensure the humane care and treatment of animals."[204]

The OIG advised APHIS to change its license renewal practices, urging the agency to ensure that "facilities are in compliance with the intent of the Animal Welfare Act through the use of compliance inspections prior to the renewal of licenses"[205] and to not renew licenses of facilities not in compliance.[206]

In response, APHIS purported to "agree[] with the intent of the recommendation that license renewal should not be granted if the facility is not in compliance," but indicated that it believed it lacked the authority "to deny a renewal without requiring the same notice

198. *Id.* at 570.

199. 1992 OIG AUDIT REPORT, *supra* note 13.

200. *Id.* at 1.

201. *Id.* at 2, 11, 13.

202. *Id.* at 2.

203. *Id.* at 13.

204. *Id.* at 11.

205. *Id.* at 14.

206. *Id.* at 15.

and opportunity for a hearing on the record as provided when we revoke a license."[207] A USDA Office of General Counsel (OGC) opinion reportedly was provided in support of this position,[208] but despite numerous Freedom of Information Act requests, no documentation of this opinion has been made available.

In light of the reported OGC opinion, the OIG advised APHIS to "seek legislation to obtain the authority to withhold license renewals when facilities are known to be in violation of the act"[209] and requested that the agency "provide a time-phased action plan to seek legislation to obtain authority to withhold license renewals when deemed necessary by the Secretary."[210] It is unclear whether this action plan was ever provided, but it appears that no action was taken before the OIG performed its next audit.

In addition to articulating serious concerns about the agency's renewal practices, the OIG also took aim at its adherence to formal procedures, which the OIG believed resulted in "an excessive period of time to assess civil penalties."[211] The OIG urged APHIS to "implement procedures which would allow for hearing cases outside the [ALJ] system" in order "[t]o decrease the time necessary to adjudicate cases."[212] APHIS "responded that the present system of [ALJs] presiding over cases is dictated by the Department Rules of Practice," and "they have no control over the manner in which the ALJ system is administered."[213] In fact, APHIS has the authority to promulgate alternate rules of practice and, indeed, has done so in other contexts.[214]

2. 1995 USDA OIG Audit Report

The OIG's 1995 audit report references "28 instances . . . in which APHIS had renewed licenses or registrations to facilities which were in direct violation of the Act, thereby potentially jeopardizing the

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207. *Hearing on Animals Used in Exhibitions*, *supra* note 166 (statement of James R. Ebbitt, Assistant Inspector General for Audit); *see also* 1992 OIG AUDIT REPORT, *supra* note 13, at 15 ("APHIS stated that the Animal Welfare Act does not include a provision for withholding renewal of a license due to lack of facility compliance."). As discussed *supra*, the USDA is in fact *never* required to provide full, on the record hearings under the AWA and, moreover, has the discretion to treat nonrenewals and revocations differently.

208. *See* 1992 OIG AUDIT REPORT, *supra* note 13, at 15 ("This issue was also addressed by OGC, who advised that APHIS lacks authority to withhold renewals.").

209. 1992 OIG Audit Report, *supra* note 13, at 15.

210. *Id.* at 16.

211. *Id.* at 13. Notably it appears that the USDA had five ALJs at the time, *id.* at 15, compared to the two it now apparently has, *see supra* note 192 and accompanying text.

212. 1992 OIG AUDIT REPORT, *supra* note 13, at 15.

213. *Id.* at 14.

214. *See, e.g.*, Moore v. Madigan, 990 F.2d 375 (8th Cir. 1993).

health and well-being of the animals under their care."[215] Noting APHIS's position that it lacks the authority to "refuse to renew licenses or registrations for any cause except failure to apply for renewal or for nonpayment of the required license fee,"[216] and the fact that "secur[ing] the termination of an operator's license or registration through the administrative hearing process . . . can take over 3 years,"[217] the OIG again found a "need for APHIS to be able to refuse renewals to serious violators of the Animal Welfare Act."[218] Accordingly, the OIG again recommended that APHIS "[i]nitiate legislation to amend the Animal Welfare Act to provide APHIS with the authority to . . . withhold renewals of licenses and registrations for facilities which are seriously out of compliance with the Animal Welfare Act or which refuse to cooperate with APHIS."[219]

The audit details visits to three facilities "whose licenses or registrations were renewed even though APHIS was aware of direct, ongoing violations."[220] One of the facilities, Michigan State University,[221] had its registration renewed after an inspection revealed six violations and a follow-up inspection that revealed that four of the violations had not been corrected and resulted in a monetary penalty.[222] "The university's registration was renewed with no determination having been made as to whether the violations had been corrected."[223] Two additional inspections after the registration renewed found that some violations still remained uncorrected.[224]

The identifying details of the other two facilities are redacted, but one was a research facility that had had its registration renewed "two months after an inspection report revealed persistent violations for which the facility had received a warning letter more than a year prior."[225] The OIG accompanied APHIS on an inspection of the facility more than a month after the renewal and found "30 instances of non-

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215. 1995 OIG AUDIT REPORT, *supra* note 14, at 5.

216. *Id.*

217. *Id.*

218. *Id.* at 7.

219. *Id.* at 8.

220. *Id.* at 6.

221. The audit refers to a "State university" with registration number 34-R-017. *Id.* Michigan State University's registration number is 34-R-0017. *See, e.g.*, USDA, APHIS, Michigan Inspection Reports 30, https://www.aphis.usda.gov/animal_welfare/downloads/awa/Inspection_Reports/RF/AWA_IR_R-MI_secure.pdf [https://perma.cc/746G-EGVA] (inspection report for MSU noting AWA certificate number "34-R-0017").

222. *Id.* at 6-7.

223. *Id.* at 7.

224. *Id.*

225. *Id.* at 6. Warning letters are the USDA's primary means of enforcing the AWA, a practice that is scrutinized in Winders, *supra* note 124.

compliance with the regulations, of which 4 had been identified as repeated violations during the prior inspection."[226] The third facility was a dog dealer whose license had been renewed at least two times after "the operator of the facility had been referred to OGC . . . for an administrative hearing because he was suspected" of operating an unreported animal handling site and of maintaining inaccurate record of dogs purchased from individuals and pounds.[227] The dealer had also refused to allow APHIS inspectors access to his facility on fourteen separate occasions, in violation of the regulations.[228]

These examples, the OIG found, "demonstrate the need for APHIS to be able to refuse renewals to serious violators of the Animal Welfare Act, or to revoke them when necessary, without having to initiate an administrative hearing process, which may take over 3 years to complete."[229] Accordingly, the OIG again recommended that APHIS "[i]nitiate legislation to amend the Animal Welfare Act to provide APHIS with the authority to immediately revoke, or to withhold renewals of licenses and registrations for facilities which are seriously out of compliance with the Animal Welfare Act or which refuse to cooperate with APHIS."[230] APHIS indicated that it "agreed that such legislation would enhance its enforcement efforts" and that it was "cooperating with Congressional offices to expand enforcement authorities" and "anticipated that such legislation would be proposed during 1995."[231]

B. Congressional Concern Regarding Automatic Renewal

Following the 1992 OIG audit report, members of Congress questioned the USDA about its renewal practices at a House committee hearing on AWA enforcement.[232] Asked by Representative Charlie Rose of North Carolina if the USDA had "taken the position that it may not consider previous violations of the Animal Welfare Act by an applicant who is applying for a reapplication or a renewal," Joan Arnoldi, Deputy Administrator for Regulatory Enforcement and Animal

226. 1995 OIG AUDIT REPORT, *supra* note 14, at 6.

227. *Id.* at 7.

228. *Id.*

229. *Id.*

230. *Id.* at 8. Although the OIG did not specifically address the rules of practice as it had in 1992, the rules were implicated in its finding that "APHIS lacks the regulatory authority to enforce the Animal Welfare Act" in part because of its inability to "revoke registrations or suspend operators to deal with serious or repeat violations without a lengthy administrative hearing process" during which "the operator can continue to commit the violations for which the facility was originally cited." *Id.* at 4.

231. *Id.* at 8.

232. *Hearing on Animals Used in Exhibitions*, *supra* note 166, at 1.

Care, responded "[i]t is our belief that a person who obtains a license has an expectation that that license will be renewed."[233] When asked point blank by another representative about the OIG's recommendation that the USDA seek additional authority, Arnoldi stated, "What we have done . . . is to seek a legal opinion as to how we are currently handling that situation and when we have that legal opinion, we will know whether to go forward or not and propose a different regulation."[234] The representative followed up: "So it is your testimony then that you would like to have the authority, you are questioning whether you have the authority, and if you don't have the authority, you will seek remedial legislation?"[235] Arnoldi rejected this framing of the issue: "I am not saying that I want the authority or need the authority. I think the current system is working quite well."[236]

The issue of automatic AWA license renewals came up in Congress again following the 1995 OIG audit report. Representative George Brown, Jr. of California, who had been previously involved in amendments to the AWA, expressed serious concern about the findings of the report:

> [T]he inspector general's report indicates that APHIS has been neglecting its statutory obligations and has renewed facility licenses even when cited violations—past and present—had not yet been corrected. Additionally, APHIS is not inspecting research facilities before issuing the initial registrations, therefore noncompliance with the act may go unnoticed until APHIS' first inspection up to a year later.
>
> It was clearly the intent of Congress that facilities should come into compliance before being issued the initial registrations, and that license renewals should be withheld . . . in instances where facilities are not in compliance with the provisions of the act.
>
> . . . .
>
> . . . I am hopeful that this misunderstanding within the agency can be corrected. If APHIS does not have the authority, under current legislation, to enforce the requirements of the act, then it

233. *Id.* at 96-97 (statements of Rep. Charlie Rose of N.C. & Joan Arnoldi, Deputy Adm'r for Regulatory Enf't & Animal Care).

234. *Id.* at 106 (statement of Joan Arnoldi, Deputy Adm'r for Regulatory Enf't & Animal Care).

235. *Id.* (statement of Rep. Charlie Rose of N.C.).

236. *Id.* (statement of Joan Arnoldi, Deputy Adm'r for Regulatory Enf't & Animal Care); *see also id.* at 96 ("We believe we have sufficient authority under the Animal Welfare Act to protect exhibition animals and are not seeking additional authority at this time."); *id.* at 98 (statements of Rep. Michael J. Kopetski & Joan Arnoldi, Deputy Adm'r for Regulatory Enf't & Animal Care) (Rep. Kopetski: "Your office has not asked for any additional authority or legislation, you feel you have all the authority you need?" Arnoldi: "Yes, sir, that is our position.").

> should seek the authority from Congress or initiate legislation, as the inspector general has recommended . . . .[237]

Later in 1996, as part of a House committee hearing on legislation that would amend the AWA (pertaining to things other than renewal), members of Congress again questioned the USDA about renewal.[238] The agency's responses to questions from the committee indicate that it had provided draft legislation to the subcommittee, but that it had done so reluctantly.[239]

The following month this legislation was introduced by Representative Steve Gunderson of Wisconsin.[240] The bill, which had no cosponsors, would have amended section 2133 of the AWA to provide: "No license shall be issued or renewed under this Act . . . until the dealer or exhibitor has demonstrated compliance with the regulations and standards promulgated by the Secretary pursuant to this Act . . . ."[241] The bill also proposed amending section 2149 of the AWA to authorize withholding renewal "for a period of up to 120 days" where the Secretary has reason to believe that the applicant had been or was in violation of the AWA.[242] If passed, the bill would have provided notice and an opportunity for a hearing within thirty days of nonrenewal, and allowed for the nonrenewal period to be extended following a hearing.[243] The bill was referred to the Committee on Agriculture but never had a hearing.

The next year another bill was introduced by Representative Jon D. Fox of Pennsylvania.[244] This bill, which had eleven cosponsors, did not expressly condition renewal on a demonstration of compliance but did include a provision that would have authorized the agency to refuse to renew a license for up to 120 days if it had reason to believe the applicant had violated or was violating the AWA.[245] As before, the bill provided for notice and a right to a hearing within thirty days, and for the

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237. 141 CONG. REC. 15,886 (1995) (statement of Hon. George E. Brown, Jr.).

238. *The Family Pet Protection Act and the Pet Safety and Protection Act: Hearing on H.R. 3393 and H.R. 3398 Before the Subcomm. on Livestock, Dairy, & Poultry of the H. Comm. on Agric.*, 104th Cong. 68 (1996).

239. *Id.* at 70 (noting that draft legislation was provided "as a service to the subcommittee" and "does not necessarily reflect the Administration's position"); *see also id.* at 71 ("We are enclosing bill language as the Committee requested, but we wish to emphasize that this language is provided in response to the Committee's request and does not necessarily reflect the Administration's position.").

240. H.R. 4249, 104th Cong. (1996).

241. *Id.* § 3(2)(a).

242. *Id.* § 6(a)(1).

243. *Id.* § 6(2)(a)-(d).

244. H.R. 635, 105th Cong. (1997).

245. *Id.* § 6(a)(1).

nonrenewal period to be extended following the hearing.[246] This bill, like the prior one, was referred to the Committee on Agriculture but never had a hearing.

It appears that no similar legislation was subsequently introduced, and the issue of automatic license renewal received little attention for fifteen years, until animal advocacy groups began challenging it.

C. Litigation Challenging Automatic License Renewal

Animal advocacy groups have brought a series of lawsuits against the USDA contending that the USDA's automatic license renewal practices are unlawful. Relying on the provision of the AWA that states "no . . . license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards,"[247] the groups have argued that, like initial licenses, the agency is precluded from renewing licenses for facilities that it knows are not in compliance with the Act.

As discussed in the context of each specific case below, these suits have been unsuccessful, with most of the courts that have reached the merits of the argument concluding that the term "issue" is ambiguous in the Act and does not unequivocally include both initial and renewal licenses, and that the USDA, therefore, has discretion not to condition renewal on compliance. However, as discussed in Part V, an important implication of these decisions is that the USDA equally has discretion to condition renewal on compliance.

1. Ray v. Vilsack*—Jambbas Ranch*

The first lawsuit challenge to the USDA's renewal practices, *Ray v. Vilsack*, involved the agency's renewal of the license of Jambbas Ranch, a now-shuttered, unaccredited roadside zoo.[248] Two individual visitors to the zoo, along with the Animal Legal Defense Fund (ALDF) and People for the Ethical Treatment of Animals (PETA), brought suit under the APA against the USDA for renewing Jambbas's license despite the facility's ongoing AWA violations.[249]

Over a five-year period, the USDA cited Jambbas for failing to provide adequate veterinary care to animals approximately twelve times and cited the facility for an additional twenty-one animal wel-

246. *Id.*

247. 7 U.S.C. § 2133 (2012).

248. Ray v. Vilsack, No. 5:12-CV-212-BO, 2014 WL 3721357, at *1 (E.D.N.C. July 24, 2014).

249. *See* Complaint for Declaratory and Injunctive Relief, *Ray*, No. 5:12-CV-212-BO, 2012 WL 4850768 (Apr. 19, 2012).

fare violations.[250] Violations documented during one of these inspections included: bison who licked their skin raw as result of being irritated by swarms of flies ("leaving raw patches of up to four inches"); goats suffering from overgrown hooves and confined in an enclosure "covered with a layer of feces"; and various animals who were exposed to "protruding nails and rusty, broken fencing with protruding wiring."[251] Despite documenting these and other violations, each year the USDA renewed Jambbas's license.

The USDA moved to dismiss the lawsuit on the ground that issuance of a renewal license is an enforcement action immune from judicial review.[252] As the court explained, the APA provides a narrow exception to its presumption in favor of judicial review for actions "committed to agency discretion by law. . . . [T]his exception applies in limited circumstances where the agency's statute has been written in such a way as to give the agency 'no law to apply' in carrying out a specific act—leaving it to the agency's discretion to fill in the gaps."[253] Agency enforcement decisions fall within this exception and are presumptively immune from judicial review.[254] The USDA contended that "issuance of renewal licenses is an exercise in 'rubberstamping,' any departure from which would be punitive"—i.e., "would effectively be an enforcement action."[255] The court rejected this argument, noting:

> [T]he agency's decision to automatically grant renewal licenses is not in accord with the express language of the statutory mandate, which requires a demonstration of compliance before such issuance is proper. . . . Therefore . . . the decision to deny a renewal license is not a discretionary enforcement action, but rather an agency action carried out according to statutory mandates issued by Congress and subject to judicial review.[256]

The USDA also moved to dismiss for failure to state a claim, contending that "the agency has broad discretion to interpret the AWA, it has not exceeded that discretion, and, as such, the plaintiffs' statement of the case [wa]s legally insufficient."[257] In making this argument, the USDA did *not* contend that section 2133's proviso that "no . . . license shall be issued under the dealer or exhibitor shall have demonstrated that his facilities comply with the standards"

250. Order at 2, *Ray*, No. 5:12-CV-212-BO, 2013 U.S. Dist. LEXIS 200539 (E.D.N.C. Jan. 18, 2013) [hereinafter Order Denying Motion to Dismiss].

251. *Id.* at 2 (citing Jambbas's Exhibit No. 16, at 20-21).

252. *Id.* at 4-6.

253. *Id.* at 6 (citations omitted).

254. *See* Heckler v. Chaney, 470 U.S. 821 (1985).

255. Order Denying Motion to Dismiss, *supra* note 250, at 5.

256. *Id.* at 5-6.

257. *Id.* at 6.

does not apply to license renewals. Instead, the agency conceded its applicability but argued that it had the discretion to decide *how* an applicant demonstrates renewals and that demonstrating compliance through certification was permissible.[258] This argument ran counter to statements made by the agency at the time it adopted the certification requirement that certification was *not* intended "as an alternative means of ascertaining compliance or as a substitute for inspections."[259] Indeed, when certification was put in place the agency stated that

> The certification requirement will have no effect on the provisions of § 2.3, which requires applicants for an initial license or license renewal to make their animals, premises, facilities, vehicles, equipment, other premises, and records available for inspection so that an APHIS inspector may ascertain the applicant's compliance with the standards and regulations.[260]

Without "ventur[ing] into the intricacies of *Chevron* and its progeny" at the motion to dismiss stage, the court rejected this argument as well, concluding that plaintiffs "sufficiently pleaded their claim by setting forth the provisions of the AWA at issue and noting the defendants' conduct that violates those provisions."[261]

After its motion to dismiss was denied, the USDA filed an administrative record in the case comprised solely of records pertinent to the USDA's automatic renewal process—Jambbas's one-page renewal applications, the renewed licenses, and records related to payment of licensing fees.[262] Plaintiffs moved to compel the full administrative

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258. Reply at 3-4, *Ray*, No. 5:12-CV-212-BO ("Plaintiffs primarily claim that the way Defendants determine compliance with the AWA for renewal applications violates the text of the AWA. Specifically, Plaintiffs object to 9 C.F.R. § 2.2(b), which provides that the Department of Agriculture '*will* renew a license after the applicant certifies by signing an application form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards.' . . . [A]lthough the Secretary has substantial discretion to create a licensing regime, no license may be issued 'until the [applicant] shall have demonstrated that his facilities comply' with the applicable AWA standards. Critically, this statutory language does not specifically state *how* an applicant must show that his facilities comply with the AWA. For example, an applicant could . . . certify that it is in compliance with all regulations . . . . '[T]he statutory language is ambiguous' . . . as to the precise question of how an applicant for renewal may demonstrate compliance with the AWA." (citations omitted)); *see also* Memorandum in Support of Motion to Dismiss at 7, *Ray*, No. 5:12-CV-212-BO (noting that section 2133 does not include "specific restrictions on the Secretary's authority regarding how to establish compliance"); *id.* at 7-8 ("[T]he AWA does not provide judicially reviewable standards with respect to . . . developing the means by which license applicants may demonstrate that they are incompliance with the AWA.").

259. Animal Welfare; Licensing and Records, 60 Fed. Reg. 13,893, 13,894 (Mar. 5, 1995).

260. *Id.*

261. Order Denying Motion to Dismiss, *supra* note 250, at 6.

262. Notice of Filing of Administrative Record, *Ray*, No. 5:12-CV-212-BO.

record, including the USDA's inspection reports for Jambbas and other materials, noting that "[j]udicial review under the APA is to be based on 'the full administrative record that was before the Secretary at the time he made his decision' " and that "[a]n agency may not exclude information on the ground that it did not 'rely' on that information in its final decision."[263] The court ordered the USDA to supplement the record but underscored that it had "not yet ruled on the *Chevron* question nor any other merits of the case" and that "[t]he expansion of the [administrative record] does not indicate one way or another as to how this Court will rule on the merits of the case."[264]

Before the merits of the case could be reached, the USDA took enforcement action against Jambbas, causing the facility to close down.[265] Based on this action, the court ruled the case was moot and granted the USDA's motion for summary judgment, noting "[t]he consent order effectively provides the same relief plaintiffs would obtain by the non-renewal of Jambbas's license."[266] Jambbas has not reopened.

2. ALDF v. USDA—*Miami Seaquarium*

A few months after *Ray v. Vilsack* was filed, another suit challenging the USDA's AWA renewal practices was filed. Originally filed in the Northern District of California, *ALDF v. USDA* challenged the renewal of the Miami Seaquarium's exhibitor license.[267] Plaintiffs—four individuals, ALDF, the Orca Network, and PETA—argued that the renewal was unlawful because "[f]or years, Seaquarium has housed an orca named Lolita under conditions that violate the agency's standards" including requirements pertaining to tank size, socialization, and shelter.[268]

Miami Seaquarium intervened in the case, and the government moved to dismiss for improper venue or, in the alternative, to trans-

263. Order at 1, *Ray*, No. 5:12-CV-212-BO, 2013 WL 5561255 (E.D.N.C. Oct. 8, 2013) (quoting another source).

264. *Id.*

265. Order at 1, *Ray*, No. 5:12-CV-212-BO, 2014 WL 3721357 (E.D.N.C. July 24, 2014) [hereinafter Order Granting Motion to Dismiss]. More than a year after plaintiffs filed suit, the USDA filed a formal complaint against Jambbas. *See id.* at 2. The agency then entered into a consent decision with Jambbas pursuant to which, inter alia, Jambbas's license was suspended for four months and Jambbas would need to demonstrate compliance with the AWA before USDA would move to lift the suspension. *Id.*

266. *Id.* at 4.

267. *See* Animal Legal Def. Fund v. U.S. Dep't of Agric., No. CV 12-4407-SC, 2013 WL 120185, at *7 (N.D. Cal. Jan. 8, 2013).

268. Complaint for Declaratory Relief and Injunctive Relief at 2, *Animal Legal Def. Fund*, No. 3:12-CV-04407-SC.

fer venue.[269] The court denied the motion to dismiss but transferred the case to the Southern District of Florida.[270]

The government then moved to dismiss or, in the alternative, for summary judgment, and Miami Seaquarium moved for summary judgment.[271] Taking a different track than it had taken in *Ray v. Vilsack*, the USDA now argued that initial issuance of a license is fundamentally distinct from the renewal of a previously issued license and that section 2133's conditioning of issuance on a demonstration of compliance applies only to the former. The court accepted this argument and granted the motion.[272]

Plaintiffs appealed, and in 2015 the Eleventh Circuit upheld the USDA's automatic license renewal practice.[273] Applying the two-step *Chevron* framework, the court concluded that the USDA's decision to "conduct[] license renewal through a purely administrative procedure" constituted a "reasonable policy choice balancing the conflicting congressional aims of due process and animal welfare."[274]

First, the court concluded that the AWA's provision that "no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards" does not unambiguously apply to license renewals because "the plain meaning of 'issue' does not necessarily include 'renew.' "[275] In reaching this conclusion, the court focused in on the fact that the AWA contains an enforcement provision that "spells out the adjudicative process for punishing a licensee, i.e., one who already holds a license."[276] Eliding fundamental distinctions between withholding an active license and allowing a license to expire,[277] and conflating revocation—which permanently disqualifies one from licensure—and nonrenewal, the court concluded, "[i]f § 2133 mandated the revocation of a license whenever USDA thinks the exhibitor has failed to demonstrate compliance on an anniversary date, the due process protections afford to licensees in § 2149 would be mere surplusage."[278] In fact, as discussed in Part

269. *See Animal Legal Def. Fund*, 2013 WL 120185, at *1.

270. *Id.*

271. *See* Animal Legal Def. Fund v. U.S. Dep't of Agric., No. 13-20076-CIV, 2014 WL 11444100, at *1 (S.D. Fla. Mar. 25, 2014), *aff'd sub nom.*, 789 F.3d 1206 (11th Cir. 2015).

272. *Id.* at *8.

273. *Animal Legal Def. Fund*, 789 F.3d at 1225.

274. *Id.* at 1209-10. "Due process" is not referenced in the AWA's statement of policy, which focuses entirely on animal protection, nor is due process referenced elsewhere as an "aim" of the statute. *See* 7 U.S.C. § 2133 (2012).

275. *Animal Legal Def. Fund*, 789 F.3d at 1216.

276. *Id.* at 1217 (emphasis omitted).

277. *See supra* Part II.

278. *Animal Legal Def. Fund*, 789 F.3d at 1217 (citations omitted).

II, treating the withdrawal of an active license differently from nonrenewal is consistent with the APA and due process jurisprudence.

Continuing to conflate nonrenewal and revocation, the court added: "To revoke a license, USDA would not need to bring an enforcement proceeding against a licensee; the agency could patiently bide its time until the license anniversary rolled around, then immediately revoke the license for failure to demonstrate compliance."[279] Further misstating the law, the court added: "The exhibitor would have no right to a hearing, nor would she have a right to appeal the denial of her renewal application."[280] In fact, as discussed above, the exhibitor would have the right to seek judicial review of the renewal decision under the APA (just as the plaintiffs in this case sought such review).[281] Unlike someone whose license had been revoked, the exhibitor would also have the ability to seek relicensure. Nothing more is required by the APA.

Having found the AWA ambiguous as to whether renewal is allowed absent a demonstration of compliance, the court proceeded to *Chevron* step two.[282] Here the court also heavily relied on a manufactured due process policy aim, concluding that "USDA's administrative renewal scheme furthers the AWA's competing goals of promoting animal welfare and affording due process to licensees."[283] Even though "due process" is not mentioned or even alluded to in the congressionally stated purposes, and in fact is never once mentioned in the AWA,[284] the Eleventh Circuit repeatedly refers to it as one of the goals of the Act.[285]

In response to the plaintiffs' argument that automatic renewal is unreasonable because it facilitates inhumane care and treatment of animals in contravention of the stated purposes of the AWA, the court emphasized that even after renewing "USDA retains the au-

279. *Id.*

280. *Id.*

281. 5 U.S.C. § 702 (2012) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."); *id.* §§ 702(b)(2), 551(13), 551(9) (defining "agency action" to include "the whole or a part of an agency . . . license . . . or the equivalent or denial thereof," and defining "licensing" to include "agency process respecting the . . . renewal . . . of a license").

282. *Animal Legal Def. Fund*, 789 F.3d at 1220.

283. *Id.* at 1224.

284. *See* 7 U.S.C. §§ 2131-2159 (2012).

285. *See Animal Legal Def. Fund*, 789 F.3d at 1225 (asserting that Congress "[t]asked" the USDA "to perform the difficult job of reconciling the inherently conflicting interests of due process and animal welfare").

thority under its regulations to suspend or revoke[286] a license for noncompliance."[287] Further, the court emphasized that "the threat of USDA enforcement and the imposition of sanctions less severe than revocation" incentivize licensees "to rectify violations within a short time window."[288]

This idyllic characterization runs counter to all of the evidence. Indeed, it was the fact that licensees are not incentivized to correct violations that prompted the OIG to urge the agency to halt automatic renewals.[289] As the OIG explained more than a quarter of a century ago, automatic renewal in fact results in "reduced assurance that animal care facilities will make required corrections to comply with the provisions of the act to ensure the humane care and treatment of animals."[290] In the intervening years, numerous OIG audits have reiterated that contrary to the Eleventh Circuit's conclusion, the USDA is doing very little to incentivize compliance or further the goals of the AWA and, in fact, is allowing facilities to treat violations as a cost of doing business.

A recent OIG audit, which set out to, inter alia, "determine the effectiveness of [Investigative Enforcement Services (IES)'] role in imposing enforcement actions,"[291] noted that numerous prior audits had concluded "that IES' enforcement of AWA was ineffective and the penalty worksheet calculated minimal penalties that did not deter violators."[292] Thus, according to the OIG, the agency has routinely discounted penalties so steeply that they are treated as a "cost of doing business" by the regulated community.[293]

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286. Again, the court conflates revocation—which is permanent—and nonrenewal or termination, which do not bar an entity from becoming relicensed.

287. *Animal Legal Def. Fund*, 789 F.3d at 1224.

288. *Id.* (citing Animal Welfare; Inspection, Licensing, and Procurement of Animals, 69 Fed. Reg. 42,089, 42,094 (July 14, 2004) (codified at 9 C.F.R. pts. 1-2 (2017))).

289. *See supra* Section IV.A.

290. 1992 OIG AUDIT REPORT, *supra* note 13, at 11; *see also* 1995 OIG AUDIT REPORT, *supra* note 14, at 5 (noting numerous renewals of facilities that "were in direct violation of the Act, thereby potentially jeopardizing the health and well-being of the animals under their care").

291. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 33601-0001-41, ANIMAL AND PLANT HEALTH INSPECTION SERVICE OVERSIGHT OF RESEARCH FACILITIES 2 (2014) [hereinafter 2014 OIG AUDIT REPORT].

292. *Id.* at 18 (citing 1995 OIG AUDIT REPORT, *supra* note 14; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 33002-3-SF, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES (2005) [hereinafter 2005 OIG AUDIT REPORT]; OFFICE OF INSPECTOR GEN., U.S. DEP'T OF AGRIC., AUDIT REP. NO. 33002-4-SF, ANIMAL AND PLANT HEALTH INSPECTION SERVICE ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS (2010) [hereinafter 2010 OIG AUDIT REPORT]).

293. *Id.* at 3; *see id.* at 16 ("In 2012, IES issued penalties to violators that were reduced by an average of 86 percent from AWA's authorized maximum penalty, even though these

Despite having repeatedly pointed out this fundamental failing previously, and having urged reforms to address it, this recent audit found that the agency persisted in offering steep penalty discounts—in cases involving "animal deaths and other egregious violations," penalties were "reduced by an average of 86 percent from AWA's authorized maximum penalty."[294] Review of USDA enforcement actions since the last audit indicates that extreme discounting continues.[295]

Thus, the Eleventh Circuit had no basis for taking the USDA at its word that its "brand of cooperative enforcement" has been effective.[296] As the OIG has made clear, the agency's "belie[f] that compliance achieved through education and cooperation would result in long-term . . . compliance" has proven "ineffective in achieving . . . compliance with [the] . . . AWA."[297] This "cooperative" approach, the OIG has determined, has in fact "weakened the agency's ability to protect the animals."[298] Under this approach, rather than "prevent[ing] . . . situation[s] from worsening," APHIS has failed to take action while violations "escalated to the serious or grave levels, which directly affected the animals' health."[299]

3. PETA v. USDA

In August 2015, PETA filed another suit against the USDA, this time challenging the renewal of five chronic violators' licenses, as well as the agency's overall pattern and practice of automatic license renewal.[300] The USDA moved for judgment on the pleadings arguing,

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cases involved animal deaths and other egregious violations."); *id.* at 18 ("In three prior OIG audits, we reported that IES' enforcement of AWA was ineffective and the penalty worksheet calculated minimal penalties that did not deter violators."); *see also* 2005 OIG AUDIT REPORT, *supra* note 292, at 10; 1995 OIG AUDIT REPORT, *supra* note 14, at 16 (noting that an APHIS policy memorandum suggested that stipulations range from four to ten percent of statutorily available penalties and finding an average discount rate of 88% and noting, "APHIS personnel stated that many facility operators consider the stipulations as a normal cost of doing business," because of the small dollar amounts).

294. 2014 OIG AUDIT REPORT, *supra* note 291, at 16.

295. *See, e.g.*, AWA Enforcement Actions for January-July 2015 (on file with author). The USDA no longer makes its Animal Welfare Act enforcement actions publicly available. *See Animal Care Information System Website Review Chart*, USDA, ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA/acis-table [https://perma.cc/WM5L-3PAS] (last modified Aug. 18, 2017). *See generally* Delcianna J. Winders, *Fulfilling the Promise of E-FOIA's Proactive Disclosure Mandate*, 95 DENVER L. REV. (forthcoming 2018) (discussing the USDA's deletion of thousands of AWA-related records from its website).

296. Animal Legal Def. Fund v. U.S. Dep't of Agric., 789 F.3d 1206, 1224 (11th Cir. 2015).

297. 2010 OIG AUDIT REPORT, *supra* note 292, at 8 (footnote omitted).

298. *Id.* at 1.

299. *Id.* at 10.

300. Complaint at 1-2, People for the Ethical Treatment of Animals, Inc., v. U.S. Dep't of Agric., 194 F. Supp. 3d 404 (2016) (No. 5:15-CV-429-D).

as before, that a renewal license is not "issued" and thus is not statutorily conditioned on compliance, but also contending that due process precludes nonrenewal without a pre-deprivation enforcement proceeding.[301] According to the USDA:

> [A]utomatic denial of a license renewal application on the basis of past failed inspections or other evidence of non-compliance—without the requisite due process afforded by a separate enforcement proceeding—would actually run afoul of § 2149. Thus, the Agency's renewal regulations must be deemed reasonable because the alternative position would violate the clear intent of Congress as expressed in the AWA by permitting the effective termination of a license without pre-deprivation due process.[302]

The district court ruled in favor of the USDA, uncritically citing to the Eleventh Circuit decision and, essentially, adopting its reasoning.[303]

On appeal, the Fourth Circuit affirmed on the grounds that "the AWA does not directly address license renewal but does expressly authorize the USDA to promulgate and implement its own renewal standards."[304] Like the Eleventh Circuit, the Fourth Circuit concluded that the AWA is ambiguous as to whether the statutory term "issue" encompasses renewal, and thus the agency was entitled to deference on this point and the agency's interpretation would stand unless "arbitrary, capricious, or manifestly contrary to the statute."[305] Although the Fourth Circuit did not discuss due process as a consideration at any length, it did note that the Eleventh Circuit had "concluded that the USDA's interpretation of the renewal process was reasonable because it soundly balanced the competing goals of animal welfare and due process for licensees."[306] The Fourth Circuit concluded by signaling its agreement with the Eleventh Circuit's holding that " 'AWA licensing regulations embody a reasonable accommoda-

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301. Memorandum of Law in Support of Motion for Judgment on the Pleadings, *supra* note 163, at 10-11, 17.

302. *Id.* at 17 (citation omitted); *see also id.* at 10-11 ("Since Congress specifically required due process in the form of notice and hearing prior to the invalidation of a previously issued license, *see* 7 U.S.C. § 2149(a), the Agency would act ultra vires by denying a renewal application that complies with the administrative requirements (i.e., completed application and fee) unless it also brings a successful enforcement action as contemplated by that statutory provision.").

303. *See People for the Ethical Treatment of Animals, Inc.*, 194 F. Supp. 3d at 415.

304. People for the Ethical Treatment of Animals, Inc. v. U.S. Dep't Agric., 861 F.3d 502, 505 (4th Cir. 2017).

305. *Id.* at 509-10 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44).

306. *Id.* at 512.

tion of the conflicting policy interests Congress has delegated to the USDA' and 'are entitled to *Chevron* deference.' "[307]

4. ALDF v. Vilsack—*Cricket Hollow Zoo*

In *ALDF v. Vilsack*, two individuals and the ALDF brought suit in federal district court in Washington, D.C., challenging the USDA's renewal of an exhibitor license for Cricket Hollow Zoo, an unaccredited private zoo in Iowa.[308] As discussed in the Introduction of this Article, the USDA renewed Cricket Hollow's license on the very same day that it inspected the facility and documented violations of eleven different animal welfare standards affecting at least seventy-seven animals, including a direct violation and five repeat violations.[309]

Relying heavily on the Eleventh Circuit's decision in *ALDF v. USDA*, the district court granted the defendants' motion to dismiss, holding that "the statutory language does not compel the conclusion that 'issue' necessarily includes 'renew.' "[310] Like the Eleventh Circuit, the district court found the separate enforcement provision of the AWA to be important, concluding that it would be inconsistent with the enforcement provision to condition license renewal on compliance.[311] Based on this, the district court, like the Eleventh Circuit, concluded that "the structure of the Animal Welfare Act does not *unambiguously* require existing licensees to demonstrate compliance with the Act's substantive provisions in order for their license to be renewed."[312]

At Chevron step two, quoting at length from the Eleventh Circuit opinion, the district court found the USDA's renewal practice to be "permissible."[313] Like the Eleventh Circuit, the district court took the position that one of the AWA's goals is "to afford due process to licensees" and, based on this, concluded "that the agency chose to accommodate the multiple goals of the statute, including the promotion of animal welfare and the protection of procedural rights afforded to applicants and licensees, is well within the agency's zone of policy-

307. *Id.* at 512 (quoting Animal Legal Def. Fund v. U.S. Dep't Agric., 789 F.3d 1206, 1224 (11th Cir. 2015)).

308. *See* Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602, 606 (D.C. Cir. 2017).

309. *See* INSPECTION REPORT FOR CRICKET HOLLOW ZOO, *supra* note 1, at 1.

310. Animal Legal Def. Fund v. Vilsack, 169 F. Supp. 3d 6, 13 (D.D.C. 2016).

311. *Id.* at 14-15 (citing *Animal Legal Def. Fund*, 789 F.3d at 1216).

312. *Id.*

313. *Id.* at 17.

making discretion."[314] Also like the Eleventh Circuit, the district court conflated revocation and nonrenewal, stating that:

> [O]nce an applicant has initially demonstrated compliance with the requirements of the statute, as required by the text of the statute, a license is not automatically revoked for noncompliance. That is, a license is not revoked absent an enforcement proceeding initiated by the agency pursuant to the strictures of the statutory provisions enacted by Congress.[315]

On appeal, the D.C. Circuit affirmed in part and vacated and remanded in part.[316] First, the court held that the USDA's renewal of Cricket Hollow's license was not contrary to section 2133 of the AWA. In so holding, the court expressly declined to rely on the Eleventh Circuit's reasoning, noting that the USDA's contention that the term "issue" in section 2133 does not encompass renewal was not supported by the agency's regulations and, indeed, appeared to be a post hoc litigation position.[317] The court explained: "Nothing in the agency's regulations suggests that USDA interprets § 2133 as not applying to renewals, or even that it believes renewal applicants need not demonstrate compliance with the regulations and standards in order to qualify for a renewal license."[318]

While interpreting the demonstration of compliance requirement to apply to both initial and renewal applications, the D.C. Circuit nevertheless held that, as the USDA had argued in the Jambbas case,[319] the means of demonstrating compliance for the two could differ.[320] More specifically, the court held—not withstanding USDA's prior statements to the contrary[321]—that a license renewal applicant could "demonstrate" compliance through self-certifying compliance and making itself available for inspections.[322] Noting "the enforcement authority provided for elsewhere in the statute, and the attendant procedural protections afforded to license-holders in revoca-

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314. *Id.* at 18 (citing *Animal Legal Def. Fund*, 789 F.3d at 1224; 7 U.S.C. § 2149(a) (2012)); *see also id.* at 19 ("Tasked by Congress to perform the difficult job of reconciling the inherently conflicting interests of due process and animal welfare, USDA has exercised its expertise to craft a reasonable license renewal scheme based on a permissible construction of the [Animal Welfare Act]." (alteration in original) (internal quotation marks omitted) (quoting *Animal Legal Def. Fund*, 789 F.3d at 1225)).

315. *Id.* at 18.

316. Animal Legal Def. Fund, Inc. v. Perdue, 872 F.3d 602, 621 (D.C. Cir. 2017).

317. *Id.* at 612-13, 615.

318. *Id.* at 613.

319. *See supra* note 258 and accompanying text.

320. *Perdue*, 872 F.3d at 614.

321. *See supra* notes 259-60 and accompanying text.

322. *Perdue*, 872 F.3d at 615, 617. In so holding, the court drew a distinction between demonstrating, or showing, compliance and actually being in compliance. *Id.* at 616-17.

tion and suspension proceedings under § 2149," the court found this procedure for "demonstrating" compliance to be reasonable.[323]

The D.C. Circuit then went on to consider whether, even assuming the reasonableness of the USDA's renewal scheme generally, reliance on a self-certification of compliance that the agency knows to be false would be arbitrary and capricious.[324] Noting that an agency's decision is arbitrary and capricious when its "explanation for its decision . . . runs counter to the evidence before the agency," and that "[r]eliance on facts that an agency knows are false at the time it relies on them is the essence of arbitrary and capricious decisionmaking," the appellate court remanded for the USDA to, "at a minimum, explain how its reliance on the self-certification scheme in this allegedly 'smoking gun' case did not constitute arbitrary and capricious action."[325] The court also left open the option for the USDA to "revisit its decision to renew the disputed license" or to "take appropriate action to amend its regulatory scheme."[326]

These cases and the issues they raise suggest important areas and opportunities for revisions to the USDA's implementation of the AWA. Drawing on the developments of the law detailed in this Article, and the problems that have plagued the implementation of the USDA, Part V makes concrete policy proposals for addressing the automatic renewal problem while also ensuring fairness.

V. IMPROVING LICENSING UNDER THE AWA

It is imperative that the USDA revise its regulations pertaining to renewal. As detailed above and even noted by the Eleventh Circuit, the existing regulations are very poorly drafted and seemingly inconsistent—thereby failing to provide notice to the regulated community of the USDA's practices. For example, they appear to require a demonstration of compliance prior to license renewal, yet simultaneously appear to deprive the agency of discretion to deny a license renewal based on noncompliance. The regulations are in desperate

323. *Id.* at 618.

324. *Id.*

325. *Id.* at 620 (first quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); then quoting Mo. Pub. Serv. Comm'n v. FERC, 337 F.3d 1066, 1075 (D.C. Cir. 2003)).

326. *Id.* Shortly after the D.C. Circuit's decision, the USDA permanently revoked Cricket Hollow's AWA license, *see In re* Cricket Hollow Zoo, No. 15-0152-0155 (USDA Nov. 30, 2017), likely mooting the remand, *see Perdue*, 872 F.3d at 620 (licensing challenge not moot so long as Cricket Hollow continued to maintain a USDA license).

need of updating to facilitate clarity and, indeed, such updating should have been done long ago.[327]

Moreover, the regulations should be updated to make clear that license renewal will indeed be conditioned on compliance going forward and will no longer be "automatic."[328] As discussed above, the USDA historically insisted that it lacked the authority to condition license renewal on compliance. However, this position is inconsistent with the decisions of the courts that have considered the issue. Specifically, as discussed above, numerous courts have concluded that the AWA is ambiguous as to whether "issuance" includes renewal licenses and that the agency, therefore, has the discretion to treat renewal applications differently from initial license applications. The D.C. Circuit, while not basing its ruling on the term "issuance," similarly held that the USDA has discretion in determining the procedures for demonstrating compliance that authorize a demonstration through self-certification. A key implication of these holdings is that the agency *could exercise its discretion differently*. In other words, the USDA does have discretion under *Chevron* to treat renewal applications the same way that it treats initial license applications and to condition renewal on a demonstration of compliance, and to provide for such demonstration through actual inspections.

This implication is worth underscoring because it runs counter to the assertions the USDA made to the OIG when that office urged the agency to stop automatically renewing licenses. The *sole* basis for the USDA's decision to not adopt the OIG's recommendation that it condition renewals on compliance was the contention that "the Animal Welfare Act does not include a provision for withholding renewal of a license due to lack of facility compliance."[329] Because courts have ruled that the USDA has discretion to read "issuance" of a license—which is expressly conditioned on compliance—as including or not including license renewal, and, especially, because the D.C. Circuit

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327. *See, e.g.*, Exec. Order No. 13,563, 3 C.F.R. § 6(a) (2011) ("To facilitate the periodic review of existing significant regulations, agencies shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned. Such retrospective analyses, including supporting data, should be released online whenever possible.").

328. Conditioning renewal on compliance does not necessarily mean that the USDA must conduct an inspection at the time of every renewal. Rather, it simply means that where the record before the agency—comprised of reports for inspections conducted over the course of the year, the agency's investigative files, and the like—indicates that a facility is not in compliance, the agency must decline to renew until compliance is shown. In the case of consistent compliers—the vast majority of facilities—the most recent routine inspection report will suffice to show the requisite compliance.

329. 1992 OIG AUDIT REPORT, *supra* note 13, at 15; *see also id.* ("OGC . . . advised that APHIS lacks authority to withhold renewals.").

has indicated that license renewal *is* in fact conditioned on a demonstration of compliance, that argument no longer holds water.

Thus, contrary to longstanding assertions, the USDA does, in fact, have the authority to condition license renewal on a demonstration of compliance if it wants to, and to provide for this demonstration through inspections. Indeed, the USDA has admitted as much.[330] With the asserted reasons for clinging to automatic renewal no longer in play, the practice has become indefensible. As the USDA's own OIG has found, the practice is undermining the AWA's purpose of ensuring the humane care and treatment of animals.

In addition to incentivizing and increasing compliance with the AWA by conditioning the ability to continue engaging in regulated activity on a demonstration of compliance, halting automatic license renewal will also allow for much more effective use of the limited resources available to implement and enforce the AWA. Under current practices, as a direct result of automatic renewal, the USDA loses considerable resources at every step of the way—from licensing to inspections to investigations to enforcement.

First, because the USDA has not adjusted its licensing fees—even for inflation—in more than a quarter of a century,[331] the agency now spends more on the mere act of issuing a license than it recoups in license fees, and licensing chronic violators costs the agency money that could instead be directed toward furthering the purposes of the AWA.[332] According to the USDA, the average cost of issuing a license is $665.[333] License renewal fees are based on the number of animals held and range from a minimum of $40 for those exhibiting five or fewer animals, to a maximum of $310 for those exhibiting more than five hundred regulated animals.[334] Thus, even those who pay the highest relicensing fees do not cover even half of what it costs the USDA just to license them.

By automatically renewing the licenses of chronic violators, the USDA also unduly increases its inspection burdens. The agency has

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330. *E.g.*, Memorandum of Law in Support of Motion for Judgment on the Pleadings, *supra* note 163, at 14 (arguing that agency has "discretion to determine what the requirements for renewal will be and whether (or not) a demonstration of compliance is among them").

331. *Compare* 9 C.F.R. § 2.6 (2017) (current fee structure), *with* Animal Welfare, 54 Fed. Reg. 36,123, 36,150 (Aug. 31, 1989) (codified at 9 C.F.R. pt. 2 (2017)) (setting the fees that remain in effect today).

332. *See* 2018 PRESIDENT'S BUDGET, *supra* note 125, at 20-54 ("Regulated entities already pay minimal fees for licenses, but they do not cover the full cost of the activity or the cost of the inspections.").

333. U.S. Dep't of Agric. Response to FOIA Request 11-152 (Mar. 8, 2011).

334. 9 C.F.R. § 2.6(b)(5)-(c).

about 125 inspectors,[335] who are responsible for inspecting more than 2.5 million animals at nearly 11,000 locations.[336] According to the USDA, the average cost of an AWA inspection is $1363.[337] Under the agency's risk-based inspection system, chronic violators are inspected far more frequently than other licenses. Specifically, facilities that are "consistently in compliance" are inspected once every one to three years, while "problem facilities" are inspected as frequently as every three months, and "[t]hose in the middle are inspected about once per year."[338] Thus, chronic violators whose licenses are automatically renewed may be inspected eight to twelve times more frequently than consistent compliers, and four times more frequently than other licensees. This differential can become even greater in the case of violations "that have, or are likely to have, a serious impact on the well-being of the animals," as inspectors are required to re-inspect within forty-five days of such violations.[339] Cricket Hollow, the facility discussed in the Introduction of this Article, exemplifies just how many resources the USDA is directing toward inspections of chronic violators after renewing their licenses. In 2015, for example, the USDA inspected Cricket Hollow at least eight times.[340]

In addition to directing disproportionate resources on frequent inspections of chronic violators, the USDA also directs considerable investigation resources toward these licensees. "[S]erious cases" of violations, such as "animal deaths due to negligence and lack of veterinary care," can be referred to the agency's IES staff, who then "conduct[s] comprehensive investigations."[341] By relicensing chronic violators who cannot demonstrate compliance, the agency is causing

335. 2014 OIG AUDIT REPORT, *supra* note 262, at 5.

336. *See supra* notes 125-26 and accompanying text.

337. U S. Dep't of Agric. Response to FOIA Request 11-152 (Mar. 8, 2011).

338. *Risk Based Inspection System*, USDA, ANIMAL & PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_risk_based_inspection_system [https://perma.cc/S39H-WY2G] (last updated Aug. 15, 2016); *see also* 2015 EXPLANATORY NOTES, *supra* note 336, at 20-50 (calling for facilities that have been flagged as high-risk and cited for repeat violations to be re-inspected within ninety days).

339. *Risk Based Inspection System*, *supra* note 338.

340. *See* ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION REPORTS FOR CRICKET HOLLOW ZOO (Feb. 19, 2015; Mar. 4, 2015; May 27, 2015; June 15, 2015; June 24, 2015; July 7, 2015; Sept. 22, 2015; Dec. 10, 2015). Similarly, one of the facilities at issue in the lawsuit challenging automatic license renewal brought by PETA was inspected at least eight times over just twelve months, *see* ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION REPORTS FOR SUMMER WIND FARMS (Jan. 19, 2016; Feb. 23, 2016; May 17, 2016; May 31, 2016; July 26, 2016; Sept. 6, 2016; Sept. 28, 2016; Nov. 9, 2016), while another was inspected at least six times over the same time period (and three times in less than a single month), *see* ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION REPORTS FOR HENRY HAMPTON (Feb. 2, 2016; Apr. 25, 2016; May 18, 2016; May 19, 2016; Aug. 3, 2016; Nov. 4, 2016).

341. 2005 OIG AUDIT REPORT, *supra* note 292, at 2.

itself to have to direct resources toward investigating these licensees. Again, Cricket Hollow exemplifies this intensive resource expenditure, having been the subject of numerous USDA investigations.[342]

Not surprisingly, the agency also expends a disproportionate amount of its enforcement resources on these same licensees—in many cases, trying to revoke the very licenses they have renewed through formal administrative hearings that can take years to resolve. For example, in July 2015, just two months after having renewed Cricket Hollow's license on the very same day that it inspected and documented violations of eleven different AWA standards impacting at least seventy-seven animals, the USDA filed an administrative complaint seeking, inter alia, suspension or revocation of the license.[343] Well over two years passed before an initial decision was rendered in that matter.[344]

As discussed above, hearings like the one brought against Cricket Hollow notoriously cause delay, during which animals continue to suffer. Although Cricket Hollow's license was ultimately revoked, countless animals languished in contravention of the AWA's core purposes during the years in which the roadside zoo's license was automatically renewed despite chronic violations. As detailed in Part II, the USDA is not statutorily required to provide such extensive procedures, and the agency could handle AWA enforcement actions much more efficiently. Agencies of all stripes have moved toward informal hearing procedures, and, as Lisa Heinzerling has explained, "the agency that chooses formal over informal processes [is] the administrative equivalent of the dodo—exotic, ungainly, of a different era."[345] Indeed, the USDA itself uses informal proceedings in a variety of contexts outside of the AWA, and both the OIG and the agency's former chief ALJ have urged it to do so more generally, including in the AWA context. Thus, in addition and apart from updating the AWA's license renewal regulations, it is also imperative that the agency revise its Rules of Practice—following in the footsteps of many agencies that have adopted rules that allow for informal adjudications that ensure fairness while allowing for matters to be resolved without extensive delays to allow—as former Chief ALJ Davenport has urged,

342. Similarly, all of the facilities at issue in PETA's lawsuit have been the subject of at least one formal USDA investigation in the preceding five years, while one of them has been the subject of at least three separate investigations during this time period.

343. Complaint, Cricket Hollow Zoo, No. 15-0152, 15-0153, 15-0154, 15-0155 (U.S.D.A. July 30, 2015). Similarly, the USDA sought to revoke one of the licenses at issue in PETA's lawsuit just nine days after renewing it. Summer Wind, No. 16-0036 (U.S.D.A. Jan. 8, 2013), and sought to revoke another of the licenses at issue in that lawsuit just eleven days after renewing it, Tri-State Zoo, No. 11-0222, Decision and Order (U.S.D.A. Mar. 22, 2013).

344. *In re* Cricket Hollow Zoo, No. 15-0152-0155 (USDA Nov. 30, 2017).

345. Heinzerling, *supra* note 29, at 1014.

"the just, speedy, and inexpensive determination of every proceeding"[346] Doing so is in the interest not only of the animals who are supposed to be protected by the AWA but also the regulated community and the agency itself, which have found themselves mired in years long proceedings that involve extensive legal costs, largely underwritten by taxpayers.

VI. CONCLUSION

In the more than seventy years since the APA was enacted, judicial decisionmaking has evolved considerably, making clear what constitutional due process and the APA do and do not require. While many agencies have updated their practices to keep pace with these evolving understandings and to ensure that their licensing decisions are made fairly, efficiently, and in ways that further statutory mandates, others lag woefully behind. The USDA's practice of automatically renewing AWA licenses based on what can most generously be described as an outdated and inaccurate understanding of the Constitution and the APA is one such example. As detailed in this Article, the USDA is operating under a misapprehension of what the Constitution and the APA require and, as a result, is undermining the very purposes of the AWA. While litigation seeking to change the agency's practice of automatically renewing AWA licenses even in the face of egregious violations has so far failed, it has nevertheless opened an important door to revising the USDA's practice. It is in the interests of the animals Congress intended the AWA to protect, the regulated community, taxpayers, and the USDA itself to pursue such revisions.

346. Davenport, *supra* note 45, at 570.