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July 23, 2021

Honorable Judge Jill Clifton
Hearing Clerk's Office
U.S. Department of Agriculture
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Re: Objection to Conditions Order, AWA Docket 19-0004

Dear Hon. Judge Clifton:

The Animal Welfare Institute (AWI) objects to the "Conditions Order, to Monitor the Hearing" dated July 22, 2021, because it unreasonably impinges on the First Amendment rights of the press and the public to observe and disseminate information about these proceedings.

AWI asked to attend the hearing by letter dated May 26, 2021. As stated in our request, the outcome of this case has significant ramifications regarding how the United States Department of Agriculture (USDA) enforces the Animal Welfare Act (AWA) and is of great interest to AWI. Since 2017, AWI has published over 20 articles in our *AWI Quarterly* magazine regarding USDA enforcement of the AWA, including multiple articles about this case. In addition, AWI has a history of attending such hearings (e.g., those involving allegations of AWA violations by Santa Cruz Biotechnology).

Our request to attend was granted on June 24, 2021, via email by this Court through Erin Hoagland, Attorney Advisor, Office of Administrative Law Judges.[1] Respondent Daniel Moulton then filed two objections to public participation on July 9, 2021, and July 15, 2021, neither of which raised credible grounds for placing limitations on AWI's and other observers' ability to monitor the hearing. The USDA itself argued in favor of a fully public hearing in its "Response to Request for a Closed Hearing" ("Response") dated July 16, 2021. As the Response notes, under the First Amendment, the public has a right to attend the hearing.[2] Applying the test in *New York C.L. Union v. New York City Transit Auth*.,[3] and noting that administrative hearings

[1] "Judge Clifton asked me to inform you that she has approved the Animal Welfare Institute's request to attend the virtual hearing in AWA Docket No. 19-0004."
[2] Response to Request for a Closed Hearing, page 2.
[3] *New York C.L. Union v. New York City Transit Auth*., 684 F.3d 286 at 291 (2d Cir. 2012)

governed by the Rules of Practice applicable to this proceeding are open and have historically been open to the public,[4] the Response concludes that "in order to obtain a fair hearing for APHIS and the Respondent, it is necessary that the public be permitted access to the hearing."[5]

Despite this, one business day before the start of the hearing observers were emailed a list of strict conditions that limit their ability to meaningfully monitor the hearing. The Court has provided no explanation for these eleventh-hour restrictions other than references to "good cause" and its discretion granted pursuant to The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151).[6]

The allegations in this case are truly horrific, and the USDA's delay in holding Moulton Chinchilla Ranch ("MCR") accountable is unconscionable. The current complaint alleges violations of the Animal Welfare Act from 2013 to 2017. However, based on inspection reports and pictures that AWI has obtained via FOIA or the online inspection database, MCR continued to rack up citations from 2017 through May 2021. Between December 2013 and May 2021, MCR was cited more than 100 times for AWA violations on USDA inspection reports. Other than recording these citations, the USDA appears to have done little to prevent continued suffering of MCR's chinchillas.

Many of the acts resulting in citations, such as failure to provide needed veterinary care, were repeated over and over, sometimes with the same animals whose condition had become even worse. Over 120 suffering chinchillas had to be identified *during inspections* as needing veterinary care. Inspectors observed eyes that were crusted, sealed, swollen shut, bleeding, and oozing fluid. They reported insufficient staff, green drinking water, collars becoming embedded in the animals' necks, an ammonia-like foul odor so pervasive it burned inspectors' eyes and throats and forced them to leave, waste so widespread the animals could not find a clean spot to stand or sit, fly infestations, long-dead animals left in cages, and lighting so poor that adequate welfare checks were not possible.

The USDA actually attempted to visit the facility over 40 times since 2013. Seventeen times—in what is by far the worst case AWI is aware of—the USDA inspector arrived and was told that an authorized individual was not available to accompany the inspector. This prevented the USDA from inspecting the animals.

Despite this history of citations and thwarted inspections, the USDA conducted an *announced* inspection in October 2018. (The standard compliance inspection is unannounced—the better to ensure that the inspector is able to see conditions as they truly are, without providing an opportunity for the licensee to quickly clean up or hide noncompliances.) This announced inspection was conducted as part of a troubling USDA pilot program, through which it was considering changing its procedures so as to provide advance warning for many inspections.

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[4] Response to Request for a Closed Hearing, page 3.
[5] *Id.* at page 4-5.
[6] Exclusion Order to Protect Hearing Integrity and to Prevent Witness Harassment, paragraphs 4. and 5.

Even at this scheduled inspection, in which MCR had at least 16 animals in the "sick bay" area, the inspector found an additional 22 animals in need of veterinary care and noted, "Health issues that are not identified in a timely manner can cause unnecessary pain and discomfort." MCR was also instructed to increase daily observation of the animals to include "looking at both eyes on each animal, and observations of their neck collars to check for tightness." Inspectors had noted in 2014 that eye problems at MCR were "ongoing." Despite the number of animals involved, MCR was given just one repeat citation for lack of veterinary care.

The USDA finally filed an 18-page complaint in November 2018. The complaint listed 81 separate instances of failure to provide adequate veterinary care, including multiple animals whose condition deteriorated over time. The complaint referenced countless eye issues and animals who were lame (in some cases, even missing part of a leg), who had tumor-like masses, and whose head listed to one side. One female had "an open wound around the neck with a pale liquid discharge mixed with a pale granular-type discharge in it and a putrid odor." MCR was also cited for unsafe housing and more than 10 instances of failure to remove an excessive accumulation of waste—including excrement, soiled bedding, and even dead animals. The USDA inexplicably failed, however, to include 60 additional instances of chinchillas in need of veterinary care, or seven additional times when inspections of animals were thwarted.

Despite this record, AWI was optimistic that MCR would finally be held accountable when an in-person public hearing was scheduled for April 6, 2020. Then the COVID-19 pandemic hit and the hearing was delayed and forced to be held virtually. If not for the pandemic, this would have been a public hearing and AWI representatives would have attended physically. Yet, because the hearing is virtual and requires affirmative access to a dial-in number, the Court is able to condition access in a way that unreasonably impinges on the First Amendment rights of the press and the public to observe and disseminate information about these proceedings.

The constitutional right of access to information about governmental activities is rooted in First Amendment principles fundamental to our system of government. For example, "[t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment." *U.S. v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978). Moreover, the Supreme Court has found a "common understanding that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." *Globe Newspaper*, 457 U.S. at 604. "Without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

To protect this important First Amendment right, "the Supreme Court articulated a two-part test for right of access claims." *Leigh v. Salazar*, 677 F.3d 892, 898 (9th Cir. 2012). "First, the court must determine whether a right of access attaches to the government proceeding or activity by considering: (1) whether the place and process have historically been open to the press and general public; and (2) whether public access plays a significant positive role in the functioning of the particular process in question. Second, if the court determines that a qualified right applies, the government may overcome that right only by demonstrating 'an overriding interest based on

findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest'" *Id.* (citing *Press-Enterprise II*, 478 U.S. at 8–9).[7]

Since the Supreme Court adopted the two-part *Press-Enterprise II* test, courts have applied it to strike down limits on public access to information about governmental proceedings in a wide variety of contexts, including the USDA's own prior limitations on access. *See Cal-Almond, Inc. v. U.S. Dept. of Agric.*, 960 F.2d 105 (9th Cir. 1992) (finding that USDA limitations on access to a list of almond growers eligible to vote in a marketing order referendum raised serious constitutional questions); *Cal. First Am. Coalition v. Woodford*, 299 F.3d 868 (9th Cir. 2002) (finding that the First Amendment guaranteed a right of the press and public to observe executions); *Leigh v. Salazar*, 677 F.3d at 900–01 (considering the application of these First Amendment principles to roundups of wild horses); *Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020) (finding that "the press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed").

Here, the first prong of the *Press-Enterprise II* test is indisputably satisfied, such that a qualified First Amendment right of observation applies. To begin with, the fact that the regulations governing these proceedings provide that "[r]ecordings or transcripts of hearings shall be made available to any person" strongly indicates that these proceedings have historically been open to the press and public. *See* 7 C.F.R. § 1.141(i)(3). Likewise, the fact that this proceeding is actually open to some degree of observation confirms that a First Amendment right of observation applies here. Moreover, public access has indisputably played a significant positive role in the existence and functioning of the Animal Welfare Act. The last research-related USDA enforcement hearing was in 2015 and followed a substantial public interest campaign including media coverage in *Nature* and other periodicals. Because the AWA lacks a private right of action, educating the public and utilizing all available information to apply pressure on the agency to undertake meaningful enforcement actions is the only recourse available for concerned members of the public to ensure that Congress's objectives underlying the AWA are met. More specifically, public observation of this case is particularly likely to play a significantly positive role, given the fact that (as discussed above) this case reflects especially long-running and egregious AWA violations. Under these circumstances, it is particularly critical that the public be free from restrictions in observing and documenting the rigor (or lack of rigor) with which the

[7] In *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside* ("*Press-Enterprise II*"), 478 U.S. 1 (1986), the Supreme Court held that a court-imposed restriction—similar to this Court's conditions on observing this hearing—on gathering and disseminating information about a criminal trial was an unconstitutional violation of the First Amendment. That case concerned the efforts of the press and public to obtain and disseminate information regarding a murder trial, about which California state courts had concluded that information could not be publicized in order to protect the accused's right to a fair trial. *Id.* at 5–6. The Supreme Court reversed those restrictions on public access to information about the trial, holding that the lower courts failed to ensure that restrictions on access were narrowly tailored to serve an overriding governmental interest. *Id.* at 15; *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (finding the closure of a murder trial to public observation unconstitutional because "the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public"); *Globe Newspaper Co. v. Superior Ct. for the County of Norfolk*, 457 U.S. 596, 604 (1982) (finding unconstitutional a law excluding the public from testimony in certain rape trials).

USDA handles the case, so that it will be possible for the public to engage in educated advocacy for more stringent laws or regulations that may better achieve Congress's goals under the AWA.

Because a First Amendment right of observation applies here, any restrictions on that right must be narrowly tailored to serve an overriding government interest. *Press-Enterprise II*, 468 U.S. at 9. To be "narrowly tailored," a restriction of a First Amendment right in this context "must be no greater than necessary to protect the interest justifying it." *U.S. v. Brooklier*, 685 F.2d 1162, 1172 (9th Cir. 1982). Any overriding interest purportedly justifying a restriction on a First Amendment right must "be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise II*, 478 U.S. at 9–10.

Here, the Court's restrictions on public observation fail the standards the Supreme Court established in *Press-Enterprise II*. To begin with, although the Court identified the prevention of witness harassment and the need to ensure that testimony is based on witnesses' own recollection as purportedly "good cause" justifying its conditions on attending hearings in this matter, the Court has not made any "findings specific enough that a reviewing court can determine whether the closure order was properly entered." For example, the Court has identified no evidence (nor does any evidence exist) suggesting that any of the potential observers at the hearing have engaged in or would engage in any form of witness intimidation. Likewise, the Court has failed to make any findings indicating that the particular restrictions imposed are necessary to prevent witness intimidation, particularly in light of the indisputable fact that some information about the issues in this trial is already public. Without any explanation of how the information under restriction would actually contribute to witness intimidation, the Court cannot satisfy the requirement that the restriction is "no greater than necessary to protect the interest" at issue. *Brooklier*, 685 F.2d at 1172. Furthermore, no apparent consideration has been given to whether any less restrictive means exist to protect this ostensible interest, such as limitations on *particular pieces* of evidence, rather than the currently imposed blanket restriction on disseminating *any* evidence that is not already publicly available.

Similarly, as to the Court's expressed concern that testimony must be based on personal recollection, the Court has failed both to make findings specific enough to ensure that a reviewing court can determine whether its order is proper, and has failed to consider the clear availability of less restrictive means of achieving this goal. Less restrictive means indisputably exist. For example, limitations on the admission of hearsay evidence may be sufficient to ensure that witnesses testify solely based on their personal recollection; likewise, witnesses may be required to affirm in an oath that their testimony is based on personal recollection. Because the Court's current restrictions are not the least restrictive means of protecting the interest of ensuring that witnesses testify based on personal recollection, these restrictions are not narrowly tailored.

Furthermore, several of the particular conditions that the Court has imposed on observation of the hearings in this matter are certainly not narrowly tailored to preserve any important interest. For example, condition 2(b), which requires that hearing access is "personal . . . and not to be shared with others, even if the others are in [the same] organization" lacks any apparent

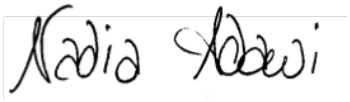
connection to any of the interests the Court has identified and thus is not justifiable within the context of this First Amendment right. Moreover, there are certainly less restrictive means than limiting observations to single individuals at organizations; for example, individuals from the same organization could be required to sign an agreement to honor constitutionally valid conditions on observation.

Finally, condition 2(d) and 2(f) are not narrowly tailored. These conditions cast sweeping restrictions on communication of any information not already publicly available—regardless of how inconsequential that information may be to the interests the Court has identified as putatively overriding the public's First Amendment rights—rather than protecting particular information that may actually be germane to those interest. Thus, these conditions are not narrowly tailored. Condition 2(f) fares particularly poorly under this constitutional inquiry. This condition recognizes that recording *is permitted* and that members of the public may obtain transcripts of the recordings, but must do so later and at their own expense. The delay of access to this information, and the imposition of a cost, are wholly unmoored from any purportedly overriding interest and thus are not narrowly tailored to serve any overriding interest.

AWI reiterates its request that the hearing be open to the public to preserve the First Amendment rights of the press and the public to observe and disseminate information about these proceedings.

Thank you for your consideration.

Sincerely,



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CERTIFICATE OF SERVICE

Daniel J. Moulton, a/k/a Dan Moulton, d/b/a Moulton Chinchilla Ranch, Respondent
Docket: 19-0004

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct, and this is to certify that a copy of the NADIA S. ADAWI'S OBJECTION TO PARAGRAPH 2 OF CONDITIONS ORDER, TO MONITOR THE HEARING has been furnished and was served upon the following parties on July 23, 2021 by the following:

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