

Explanatory Notes

OP2000

A number of minor wording changes were suggested that did not significantly alter the content of the document. Only explanations of those suggested changes that were considered to be significant are discussed.

Purpose and Term, pg. 1

The phrase “or the Secretary of Agriculture’s interpretation of the Act and the Regulations” was not eliminated from this section. The HPA gives to the Secretary the authority to administer and enforce the Act. Interpretation of the Act and Regulations is a necessary function for that administration and enforcement, one that is given to all federal departments and agencies with similar authority. It was never the purpose or intent of this Operating Plan or the 1999 Operating Plan to limit the Secretary’s authority. It should be clearly understood that the Secretary has the ultimate administrative authority in the interpretation of the Act and Regulations. This authority can only be curtailed or removed by an act of Congress, and not by this Plan.

Section II, pg. 2

The term “APHIS personnel” was not replaced with “APHIS VMOs” in the opening paragraph because doing so would be too limiting to APHIS authority. Inspections for compliance with the HPA at events need not be limited to the physical inspection of horses and some aspects of inspections, e.g. inspection of records, can and have been accomplished by personnel other than VMOs. (See 9 CFR 11.6)

Section II A 7, pg. 3

This section was not removed as suggested. Though it was not found in the OP99, it was included in this section because of changes made to other sections of the Plan. The Animal Care Deputy Administrator has always had the authority as stated, and this Plan cannot remove it. A statement of that authority was included in this section for the purpose of informing both the HIOs and the general public of the nature of the Deputy Administrator’s position. Any enforcement responsibility being given to the HIOs by this Plan is clearly indicated in the relevant sections of the Plan, and should not be confused with the authority of the Deputy Administrator or APHIS.

Section II B 4, pg. 3

The word “determining” was not changed to “recommending” because such a change would not be in accordance with the revisions found in the new Examination Dispute section of the OP2000.

Section II C 2, pg. 4

The last sentence referring to joint training of VMOs and DQPs was removed. Reference to such training was not appropriate for this section, and will be addressed separately when the final training schedule for 2000 is established. Animal Care (AC) will make every attempt to train its VMOs with DQPs, but realizes that joint training with all of the DQPs from all nine certified HIOs is not feasible.

Section III B, pg. 4

This section was changed to say that standards of conduct for HIO officers involving conflicts of interest be developed and enforced. HIOs are free to develop any other standards of conduct for their officers at their discretion.

Section III C, pg.5

In the last sentence, it was suggested that the word “may” after “Letter of Warning” (LOW) be changed to “shall.” This was not done because it would remove the agency’s discretion in dealing with situations where a LOW was not issued. Such situations need to be dealt with individually. The wording of this section was not changed.

Section III G, pg.7

It was suggested that multiple suspensions not be required to be served consecutively, but should be allowed to be served concurrently at the discretion of the HIO. APHIS does not agree. Multiple suspensions are a result of multiple HPA violations. As such, each violation deserves its own penalty.

Section III G 1, pg.7

At the request of several HIOs, and in order to maintain uniformity, it was agreed that all suspensions would start 20 days after the date the notice of a suspension was mailed, rather than the date it was received. The return of Certified Mail receipts is subject to many uncontrollable variables. Receipts may not be returned for weeks after delivery of the actual suspension notice.

Section III G 2, pg.8

It was suggested that the start of suspensions after a hearing be changed from the tenth day to the first day after a hearing. AC agrees with the suggestion and believes that suspensions should begin as soon as possible. No viable reason for waiting until the tenth day could be found,

Section IV A 2, pg.9

This was removed because APHIS has no need to require financial statements from an HIO.

Section IV A 4, pg. 9

It was suggested that the goal of an HIO contained in its mission statement be “the disqualification of sore horses at shows, exhibitions, sales, and auctions,” rather than “the elimination of the practice of soring horses.” It was argued that the HIOs can only be responsible for “activities which occur at events sanctioned by such organizations.” It was also argued that the language was too broad, and implementation would prove impractical.

The phrasing suggested for the HIO mission statement in this section reflects the purpose of the Act and Animal Care’s own mission statement on Horse Protection, as found in the Strategic Plan. As such, it is more a statement of principle for a goal worth achieving, rather than a requirement to be implemented. The elimination of this abusive practice was the stated intent of Congress when it enacted the HPA. While this agency has no intention of making the HIOs solely responsible for achieving the elimination of soring, we recognize that the HIOs were given a very significant role in the realization of that goal in the 1976 amendment to the HPA. The inclusion

of such a statement in the rule book of each HIO would not only give a clear indication of the organization's true and intended purpose, it would also send a clear message to those who continue to engage in soring that the HIOs have joined with the USDA in working to achieve that goal.

Section V A 1 & 2, pg. 11

The original language of the OP2000 appeared to indicate that HIO representatives such as the DQP Coordinator and show management would be excluded from the inspection area and warm-up area. This was unintentional and the language has been corrected.

Section V C , pg. 12

In the second sentence of the first paragraph, it was suggested that the phrase, "at shows, exhibitions, sales, and auctions" be inserted between the phrase "all things." This was not done because it would limit the authority conferred to the USDA by the HPA. Inspections for the purpose of enforcing the Act, especially of records, can be and are done at locations other than at these events. One such type of inspection is the annual audits of HIO records that APHIS conducts.

Section V C, pg.12

As suggested, language was included to indicate that DQPs and VMOs have authority to have shoes and pads removed from a horse's feet for inspection purposes. Though DQPs and VMOs have always had this authority, it is felt that stating this in the OP2000 was important in order to encourage the detection of pressure shoeing and similar abusive practices by inspectors at shows.

Section V C, pg. 13

It was suggested that a sentence be added to the end of this section stating that authorized HIO and APHIS representatives may also inspect horses for the purpose of evaluating the performance of the DQPs and VMOs respectively. The language was not added because both APHIS and the HIOs already have the authority and responsibility to evaluate their respective employees. There is no language in the OP2000 that removes that authority.

Section V E, pg. 13

It was suggested that additional language be added to the end of the opening paragraph stating that no single diagnostic procedure or any one factor would be used to reach a conclusion as to whether a horse was in violation of the Act. The added statement also calls for the inspector to evaluate the overall horse and conduct the inspection in a thorough manner.

This language as suggested was not included. It is well settled that, for example, digital palpation alone is a highly reliable method of determining whether a horse is sore as defined in the Act and Regulations. It is also APHIS' stated policy that an inspection for compliance with the Act should include the three components: movement, appearance, and physical exam. APHIS' position has always been, and continues to be, that the results of any one of these three evaluation criteria alone can provide sufficient evidence of a violation of the Act. The language suggested for inclusion in this section would limit the determination of a violation to positive findings in some unspecified combination of these three factors. This position has been repeatedly rejected by

APHIS because it is contrary to the Act. It is once more rejected, and the suggested language has not been included in the Plan.

It is unclear as to what was meant by the suggested phrase, “examination of the overall horse.” The three stated evaluation criteria already allow for a thorough examination of the horse for the discrete purpose of determining compliance with the Act. Additionally, DQPs and VMOs already have the authority to conduct any other examination procedure when warranted for the purpose of determining compliance with the Act. Because conducting complete physical examinations on horses at events adds no more useful information for this purpose and would only serve to delay the event, that language was not included. We did include additional language, however, calling for the inspector to conduct an examination of the horse that allows the inspector to determine if there is compliance with the Act.

Section VI, pg. 14

The first two sentences in the introduction were removed because they served no real purpose. The HIOs were mentioned along with APHIS as intending to enforce the Scar Rule, because the principal burden of such enforcement under the OP2000 rests with the HIOs.

Section VI A, pgs. 15 - 18

The term “approximately” was added to all definitions of anatomical locations. The anatomical literature does not describe exact boundaries for any of these anatomical demarcations, and the device used to describe them, the circle divided into quarters, can only be considered to approximate the boundaries.

Section VI A - “Bilateral granuloma”, pg. 15

The definition was replaced with that in the OP99 because it more closely follows that in the authoritative medical reference, Dorland’s Illustrated Medical Dictionary.

Section VI A - “Other bilateral pathological evidence of inflammation”, pg. 16

A sentence describing inflammation, as found in the OP99 definition, was reinserted into the OP2000 version because it is also part of the definition of inflammation found in Dorland’s Illustrated Medical Dictionary.

Section VI A - “Other evidence of inflammation”, pg. 16

The term “ulceration and/or hair loss” was replaced with “or loss of function” because this more accurately reflected the definition of inflammation found in Dorland’s Illustrated Medical Dictionary and other medical and veterinary texts.

Section VI A, “Proliferating granuloma tissue”, pg. 17

It was suggested that the phrase “and/or abnormal thickening” be deleted from the second sentence. This phrase was contained in the definition found in the OP99, and had not been changed. Because it accurately describes a possible sequela to a proliferating granuloma, it remains in the definition.

Section VI A - “Uniformly thickened epithelial tissue”, pg. 17

Several changes were made to the definition, most at the suggestion of one HIO, in order to more clearly define the term. The two examples used in the OP99, callous and corn, were reinserted in the OP2000.

Section VI B 1, pg.17

The language was changed in order to more accurately reflect the language found in the HP Regulations.

Section VII A, pg. 21

It was suggested that the entire section be replaced with a paragraph that deletes some of the language limiting the activities that a person may engage in while on suspension. The language in the OP2000 was written to be consistent with that found in decisions issued by the Department in its administrative proceedings. The proposed language is too limiting, and would allow a person on suspension to engage in prohibited activities.

Some concern was expressed that the section might prohibit “innocent people” from participating in some horse events because of family or corporate relationships with the person on suspension. This section in no way prohibits such family members or corporate relations of a person on suspension, or other innocent persons, from legitimately participating in any horse event. It has been the experience of this agency, however, that some individuals in the past have taken advantage of family and corporate relationships, using them to effectively violate the terms of their suspensions and disqualifications. When a person attempts to evade the terms of a suspension through such relationships, such action would constitute a violation of the suspension. The language proposed for change in this section does not clearly convey that important message. The language was, therefore, not changed.

Section VII B, pg. 21

Several proposals were received requesting the penalties for a violation of suspension be changed. It was argued that any additional penalty for a suspension violation should be tied somehow to the original penalty or the original violation.

We have decided to retain the six month suspension as the penalty for a suspension violation. A suspension violation is, in fact, a separate violation, apart from the original violation and not tied to the length of the original suspension. As such, imposing a separate penalty for this violation is justified. A suspension violation is a serious one and should not be treated lightly, because it demonstrates a lack of remorse on the part of the violator for the original violation, and an unwillingness by the violator to acknowledge the authority of the Act and to comply with its requirements.

Section VII C, pg. 21

Some concern was expressed over the wording of this section regarding the events at which a violation was committed. The wording was changed to clarify which events were being referred to.

Section VII D 2, pg. 21 - 22

It was suggested that the language of this section be changed to indicate that an owner only consider “litigated enforcement proceedings” against a trainer for HPA violations. This language is too limiting. For an owner to be found not to have “allowed” his or her horse to be entered, exhibited, sold or auctioned while sore, the owner must consider all HPA violations that the trainer had committed, not just those that may have been litigated in a federal proceeding. Because the date from which the owner must consider such violations goes back only to March 1, 1999, it is even more important that an owner’s consideration of a trainer’s history not be so limited. That date marks the start of the implementation of the OP99. Almost all enforcement of HPA violations from that time has been by the HIOs, and there have been very few federal cases to date. Merely considering “litigated enforcement proceedings,” therefore, would not provide an owner with enough information to give meaningful consideration to a trainer’s history.

Section VII E, pg. 23

At the suggestion of the majority of the HIOs, first and second penalties for Scar Rule and Unilateral Sore violations were reduced. It was also suggested by some HIOs that third and subsequent penalties for these violations be reduced. It has been argued that both of these violations can be committed inadvertently by persons at horse shows or sales, especially if those persons are new to the breed and unfamiliar with HPA rules. Because it is not the intent of APHIS to unjustly punish persons unfamiliar with the law, the penalty for a first violation was reduced. The second penalty was also reduced for similar reasons. That the same argument, however, does not extend to subsequent violations, and those remain in place. APHIS still considers these two violations to be severe.

Although several HIOs requested it, the “Disqualified from Show” penalty found in the OP99 as first offense penalties for these two violations was not reinstated. This penalty does not afford due process to a person accused of a violation at a show. There was also considerable confusion evident over the meaning of this penalty, as well as non-uniformity in the application of the penalty during the 1999 show season.

Section VII E, pg. 24

It was suggested that the phrase “sell, auction, or offer for sale or auction” be replaced with “or participate in a public sale or auction.” To clarify that suspensions do not preclude private treaty sales, language was added to the OP2000.

Section VII E, pg. 24

At the request of several HIOs, wording was included in this section to clarify APHIS’ expectations with regard to the imposition of penalties by the HIOs to horse transporters. APHIS does not expect any HIO to engage in extraordinary investigation procedures in order to determine whether a person had transported or arranged for the transport of horses in violation of the HPA. APHIS does expect, however, that the HIO would take reasonable steps to investigate such incidents, and to impose penalties accordingly.

Section VII E, pg. 25

It was suggested that a paragraph be added to this section adding another responsibility to those for the Deputy Administrator. The suggested additional responsibility reads as follows:

“Reviewing violations upon the recommendation of the HP Coordinator, whether detected by DQPs or VMOs, as to whether such violations might be reasonably believed to be willful. If the Deputy Administrator for Animal Care, after review believes the violation(s) were willful, he shall recommend to the Secretary that the matter be referred to the United States Attorney General.” Language was included in this section to indicate that the Department retains its right to pursue criminal enforcement actions where such actions are indicated.

Language was also included in this section to indicate that the Department reserves the right to pursue federal cases in those instances where it has been determined that a violation has been committed, and no penalty or an inappropriate penalty has been imposed. In such instances, the purpose of the HPA is not served if a violation is allowed to have occurred without consequence to the violator.

Section VIII, pg. 26

Several HIOs suggested that the Conflict Resolution process outlined in the OP99 replace the new section in the OP2000 on Examination Disputes. This change was not made, mainly for the reasons discussed at the November 19 meeting with the HIOs. The process in the OP99 proved to be too cumbersome, resulting in very delayed actions on a number of cases presented for Conflict Resolution. Some cases presented from shows in May 1999, have still not been resolved, and many others are still awaiting some resolution. The 60 day limit for resolving disputes as required by the OP99 was met in very few instances. It has also become apparent that the Conflict Resolution process was not always being used as intended, i.e., to resolve legitimate disagreements over findings on horses between VMOs and DQPs.

The new Examination Dispute process in the OP2000 is an attempt to rectify some of these problems. In addition, removal of one layer from the process relieves the Animal Care Deputy Administrator from a very time-consuming process that is inappropriate to his role as head of this agency. Such day-to-day proceedings of the HP Program are more appropriately dealt with by the Horse Protection Coordinator as part of his normal duties. Despite his removal from the routine Examination Dispute process, the Deputy Administrator continues to be the final authority in any case being considered for administrative action by this agency.

Section VIII, pg. 28

Because a number of HIOs had expressed concern over the exclusion of the AAEP as a consultant from the Examination Dispute section, it was decided to include in that section a statement regarding consultation by the HP Coordinator with veterinary medical organizations on questions regarding veterinary medical and technical findings. It should be clearly understood, however, that such consultation would only be sought with regard to veterinary matters. Consultations regarding legal issues or legal interpretations of the HPA arising from a dispute are not within the legal purview of such organizations.

Miscellaneous

1. Several HIOs have asked that the Scar Rule be changed to prohibit any scarring or changes indicative of soring anywhere on the pasterns of horses. Several have also suggested that horses currently showing that might be in violation of the Scar Rule be “grandfathered” into a new Scar Rule, allowing them to continue their show careers. Because none of these suggestions is allowed under the current regulation, any such changes would have to go through a rulemaking process before they could become effective. APHIS is currently considering proposing such rulemaking.
2. A process was suggested where “Voluntary Consent Decrees” could be entered into by alleged violators, in lieu of a hearing process. It is unclear how such a voluntary agreement was any different from the alleged violator merely agreeing to accept the ticket issued by the DQP at the show, and simply not asking for a hearing on the ticket. The suggestion was not included in the Plan.
3. It was suggested that the term for the OP2000 be extended to two years instead of one. Because the process encompassed by the OP2000 is still new, APHIS does not think it is wise to enter into an agreement for a two year period of time until we can be reasonably certain that the various elements of the Plan actually work as anticipated. If some component of the Plan was found to be ineffective or to work contrary to the requirements of the Act, two years would be too long to wait to make the needed corrections.