

2002 LEGISLATIVE REVIEW

I. FEDERAL LEGISLATION	332
A. <i>The Farm Security Act</i>	332
1. <i>Animal Fighting Amendment</i>	333
2. <i>Humane Slaughter Resolution</i>	333
3. <i>Downed Animal Amendment</i>	334
4. <i>Puppy Mills</i>	334
5. <i>Bear Parts Trade</i>	335
6. <i>Baby Chicks by Mail</i>	336
7. <i>Concentrated Animal Feeding Operations</i>	336
8. <i>Migratory Bird Killing</i>	337
9. <i>Helms Amendment Excludes Birds, Rats, and Mice from the Animal Welfare Act</i>	338
B. <i>The Captive Exotic Animal Protection Act</i>	338
C. <i>The Captive Wildlife Safety Act</i>	340
D. <i>Antibiotics Use in Farm Animals May Be Curtailed</i>	341
E. <i>The American Horse Slaughter Prevention Act</i>	342
II. REPORT OF THE COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK REGARDING ITS RECOMMENDATION TO AMEND THE ANIMAL WELFARE ACT	345
A. <i>Introduction</i>	345
B. <i>The Animal Welfare Act</i>	346
C. <i>Failure in AWA Enforcement</i>	346
D. <i>Lack of Right of Action/ Standing</i>	349
E. <i>Creating a Cause of Action and Overcoming Prudential Standing Concerns</i>	351
F. <i>Overcoming Constitutional Standing Concerns</i>	353
G. <i>Recommendation</i>	355

REVIEW EDITOR'S NOTE

The fifth annual edition of *Animal Law's* Legislative Review addresses the passage and defeat of a broad spectrum of federal legislative action in 2002, as well as highlights several proposals that would afford animals greater legal protections in life, as well as in death. This volume does not address state legislation, opting instead to include the Report from the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act. This re-

port provides thoughtful insight into the history and the future of concerned individuals' efforts to obtain and enforce laws protecting animals from abuse.

In addition, Mr. Ryan Sudbury reports on major pieces of federal legislation, including an update and additions to the Farm Security Act addressed in Volume 8 and enacted in 2002; the Captive Exotic Animal Protection Act, which seeks to place limits on the canned hunt industry; the Captive Wildlife Safety Act, which would ban the interstate movement of exotic animals used as pets; the Preservation of Antibiotics for Human Treatment Act, which seeks to eliminate antibiotics use in healthy farm animals; and the American Horse Slaughter Prevention Act, which would prohibit the slaughter and trade of live horses intended for human consumption.

I congratulate promoters of animal welfare on the strides taken to recognize animals as sentient beings worthy of protection, and applaud their efforts to end the atrocities animals continue to face at the hands of medical researchers, slaughter houses, and individual citizens. I hope this section is useful in monitoring the legal relationship between humans and nonhumans. *Animal Law Review* welcomes all suggestions for the publication of future legislative reviews.

Emilie Keturakis
Legislative Review Editor

I. FEDERAL LEGISLATION

A. *The Farm Security Act*

On May 13, 2002, President George W. Bush signed into law the Farm Security and Rural Investment Act of 2002,¹ known as the Farm Bill. The Farm Bill provides long-term planning and almost two hundred billion dollars to various farming related programs. As originally introduced and voted on by the members of the House and Senate, the Farm Bill would have provided some major advances for animal protection efforts. Sadly, behind the closed doors of the House-Senate conference committee meetings, most of these provisions were stricken from the final version of the bill. Representatives Larry Combest (R-Tex.) and Charles Stenholm (D-Tex.) successfully advocated for gutting the animal protection provisions of the once animal-friendly Farm Bill.² Fortunately, the original sponsors are reintroducing many of the issues stripped from the Farm Bill. This section serves as an update to the Farm Security Act section found in Volume 8.

¹ Pub. L. No. 107-171 (May 13, 2002).

² Humane Socy. of the U.S., *Humane Scorecard for the 107th Congress* <<http://www.hsus.org/ace/14580>> (accessed Apr. 5, 2003).

1. *Animal Fighting Amendment*

One remaining bright spot in the final version of the Farm Bill is the inclusion of an animal fighting amendment. The amendment, proposed by Representatives Earl Blumenauer (D-Or.) and Tom Tancredo (R-Colo.), and Senators Wayne Allard (R-Colo.) and Tom Harkin (D-Iowa), amends the Animal Welfare Act by closing the loophole that allowed breeders to ship gamecocks and dogs used for fighting to states where fighting is allowed, or to export them to other countries.³ It also provides an increased fine of fifteen thousand dollars for offenders, up from the previous fine of five thousand dollars.⁴ The conferees did, however, remove a provision that would have included felony jail time for offenders.⁵ Proponents of the animal fighting amendment, including animal rights and welfare organizations and the American Veterinary Medical Association, hail the passage of the amendment as one they feel will place especially strong pressure on the nationwide cock-fighting industry.⁶

2. *Humane Slaughter Resolution*

The Humane Slaughter Resolution, backed by Representative Connie Morella (R-Md.) and Senator Peter Fitzgerald (R-Ill.), also remained in the Farm Bill as it was signed into law.⁷ This resolution was introduced after a Washington Post article identified numerous violations of the Humane Slaughter Act of 1958, where the responsible government agencies took no action.⁸ Despite the provisions of the Humane Slaughter Act that require animals to be rendered insensible to pain prior to slaughter, animals are frequently dismembered or scalded while still aware and conscious.⁹ The Washington Post article noted that there are repeated violations of the Humane Slaughter Act in several slaughterhouses around the United States, and that the United States Department of Agriculture (USDA) gives little support to inspectors wishing to enforce the law.¹⁰ The same article noted an example where “the government took no action against a Texas beef

³ The Humane Society of the United States, *The Humane Scorecard 2001* <http://files.hsus.org/web-files/PDF/Humane_Scorecard_2001.pdf> (accessed Apr. 13, 2003). [hereinafter HSUS, *Humane Scorecard*].

⁴ *Id.*

⁵ *Id.*

⁶ Laurie Fulkerson & Sarah Baker, *Legislative Review: The Anti-Cockfighting Amendment*, 8 *Animal L.* 259, 275 (2002).

⁷ HSUS, *Humane Scorecard*, *supra* n. 3.

⁸ Fulkerson & Baker, *supra* n. 6, at 277.

⁹ Socy. for Animal Protective Legis., *Congress Calls on USDA to Enforce the Humane Slaughter Act* <<http://www.saplonline.org/Legislation/hsaresolution.htm>> (accessed Feb. 28, 2003).

¹⁰ Animal Welfare Inst. Q., *Humane Slaughter Act Resolution Introduced* <<http://www.awionline.org/pubs/Quarterly/summer2001/hsaintroduced.htm>> (accessed Apr. 5, 2003).

company that was cited 22 times in 1998 for violations that include chopping hooves off live cattle."¹¹

The resolution calls for the complete enforcement of the Humane Slaughter Act, the resumption of tracking of violations that occur, and a report of the USDA's findings to Congress annually.¹² While the resolution contains no substantive provisions, it expresses the will of Congress that "the Humane Methods of Slaughter Act of 1958 should be fully enforced so as to prevent the needless suffering of animals."¹³

3. *Downed Animal Amendment*

Despite being passed in the House and Senate, the conferees, primarily Congressmen Larry Combest (R-Tex.) and Charles Stenholm (D-Tex.), removed the downed animal provisions from the Farm Bill that was signed into law.¹⁴ This removal arguably violates House and Senate rules that restrict conferees to areas of conflict between the versions of a bill passed in the two houses of Congress, as the language in the two bills was virtually identical.¹⁵

These provisions would have prohibited the marketing and dragging of downed animals that are too sick or injured to walk and required these incapacitated animals to be humanely euthanized.¹⁶ Currently, no federal legislation prohibits stockyard employees from cruelly pushing these animals with bulldozers or forklifts, or dragging them with chains while they are still conscious.¹⁷

In both the House and Senate, backers of the bill spoke passionately to persuade fellow members to reject the conferees' changes to this provision. Despite these efforts, the Farm Security Act passed with the deletions. The final bill calls for the Secretary of Agriculture to investigate and submit to Congress a report on the downed animal issue.¹⁸ Due to the widespread support of the original bill, sponsors are looking to reintroduce provisions for downed animals as free-standing legislation.

4. *Puppy Mills*

Influenced by a fierce campaign led by the American Kennel Club (AKC), the conferees removed the Puppy Protection Amendment to the

¹¹ The Society for Animal Protective Legislation, *supra*. n. 9 (quoting Senator Peter G. Fitzgerald (R-Ill.) from a statement made on the floor of the Senate quoting an Apr. 10, 2001 Washington Post article).

¹² Animal Welfare Institute Quarterly, *supra* n. 10.

¹³ The Society for Animal Protective Legislation, *supra* n. 9 (quoting Senator Peter G. Fitzgerald).

¹⁴ NoDowners.Org, *Agribusiness Friendly Undermines Downed Animal Protection Provision of Farm Bill* <http://www.nodowners.org/dapa_hr.htm> (accessed Apr. 5, 2003).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ HSUS, *Humane Scorecard*, *supra* n. 3.

¹⁸ NoDowners.Org, *supra* n. 14.

Animal Welfare Act from the final version of the Farm Bill signed into law.¹⁹ The amendment sought protections for puppies bred in commercial breeding operations and would have required a female to be at least one year old before being bred; a limit on the number of times a female could be bred in order to allow her to recover between litters; that dogs be socialized with other dogs and people, increasing the dog's well-being and future behavior; and a three-strikes policy where the USDA could revoke licenses of repeat violators of the Act's provisions.²⁰

Puppy mills are breeding facilities that produce purebred puppies in large numbers and have long concerned animal welfare activists because of the likelihood that the dogs will "suffer from over-breeding, inbreeding, minimal veterinary care, poor quality of food and shelter, lack of socialization with humans, and overcrowded cages."²¹ Over three thousand puppy mills are active in the United States today despite frequent violations of the Animal Welfare Act.²²

The AKC receives significant amounts of money from licensing these facilities and lobbied strongly to remove this amendment from the final version of the Farm Bill.²³ They argued that "hobby breeders" would be severely affected by this legislation, despite the fact that the amendment did not apply to operations with less than four breeding females.²⁴ While the Senate added this amendment to its version of the Farm Bill, the House Bill contained no such provision, giving the conferees further ground for deleting the section. The Senate and House sponsors of the legislation are looking to reintroduce puppy protection as free-standing legislation.

5. *Bear Parts Trade*

Despite widespread bipartisan support, the Bear Protection Act amendment to the Farm Bill offered by Senator Mitch McConnell (R-Ky.), which would have banned the United States' involvement in the import, export, and interstate shipment of bear gallbladders and bile, was dropped by the conferees.²⁵ Bears are besieged as a result of the high price that illegally poached gall bladders and bile will fetch in the Asian traditional medicines market, in spite of synthetic and herbal

¹⁹ The Humane Society of the United States, *Puppy Mill Calls Needed Again* <<http://www.hsus.org/ace/13750>> (accessed Apr. 5, 2003) [hereinafter HSUS, *Puppy Mill*].

²⁰ The Humane Society of the United States, *U.S. Senate Adopts Puppy Protection Act* <<http://www.hsus.org/ace/13188>> (last accessed Apr. 5, 2003).

²¹ *Id.*

²² *Id.*

²³ HSUS, *Puppy Mill*, *supra* n. 19.

²⁴ *Id.*

²⁵ HSUS, *Humane Scorecard*, *supra* n. 3.

alternatives.²⁶ The provisions of this amendment will be reintroduced in the 108th Congress.²⁷

6. *Baby Chicks by Mail*

Without the explicit support of the House and Senate, the conference committee included an amendment in the Farm Bill that requires airlines to carry baby chicks as ordinary mail, instead of designating them as live animals, which would mandate certain minimal conditions for the birds.²⁸ The issue was brought before Congress as airlines began refusing to ship baby chicks by mail. They instead wanted to treat them as cargo, a designation that provides the chicks better conditions, but at an increased rate.²⁹ Airlines, such as Northwest, decided that too many birds were not surviving the flights and standard mail fees were "too low to cover the costs of the special care the birds require."³⁰ On one flight in June 2001, three hundred birds died as they were exposed to rain, despite the best efforts of the airline's employees.³¹

Hatchery owners brought the issue before Congress arguing that not being able to send chicks by mail would put them out of business.³² Under U.S. Post Office rules drafted in 1924, day-old chicks, among other birds, can be mailed if they are not more than twenty-four hours old and they are packaged properly in a ventilated box.³³ Many animal welfare groups oppose this because the chicks can be crushed, frozen, or overheated on long trips.³⁴ Additionally, they go without food and water for the duration of the mail delivery process. This amendment to the Farm Bill was enacted despite the fact that neither the Senate nor House version of the bill addressed the issue.³⁵

7. *Concentrated Animal Feeding Operations*

Despite growing opposition to Concentrated Animal Feeding Operations, known as CAFOs, the Farm Bill included subsidies as high as \$450,000 per operation. CAFOs are defined as facilities where large numbers of animals are "stabled or confined and fed or maintained for

²⁶ The Humane Society of the United States, *The Bear Protection Act* <<http://www.hsus.org/ace/14518>> (accessed Apr. 5, 2003).

²⁷ The Society for Animal Protective Legislation, *Bear Protection Act* <<http://www.saplonline.org/bear.htm>> (accessed Apr. 5, 2003).

²⁸ HSUS, *Humane Scorecard*, *supra* n. 3.

²⁹ Devon Spurgeon & Stephan Power, *Lawmakers Pass Bill Forcing Airlines to Transport Chicks at Bargain Fairs* <<http://www.hm-e.net/press06.htm>> (last accessed Feb. 27, 2003).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Vegan Speak News, *Conference Committee Guts Animal Protections in Farm Bill* <<http://www.veganspeak.com/GuttedFarmBill.htm>> (last accessed Apr. 13, 2003).

³⁵ *Id.*

a total of forty-five days or more in any twelve-month period," with no vegetation or crops grown in the normal harvest season.³⁶ Many in the House and Senate supported amendments to the Farm Bill that would have increased conservation programs and limited taxpayer subsidies to CAFOs.³⁷ The late Senator Paul Wellstone long championed for limiting taxpayer subsidies of large-scale livestock facilities, and Representatives Boehlert (R-N.Y.), Kind (D-Wis.), Gilchrest (R-Md.), and Dingell (D-Mich.) offered amendments in the House that would have increased money for conservation programs.³⁸

Opponents of granting subsidies to large-scale livestock operations argue that the subsidies serve to put the small family farmer out of business.³⁹ Further, granting conservation subsidies to CAFOs, something previously reserved for small operations, places the bill for cleaning up the massive pollution created by large-scale operations at the taxpayers feet.⁴⁰ Carl Pope of the Sierra Club states, "these largest producers will continue to overproduce and destroy habitat and water quality, while farmers who want to participate in voluntary conservation programs are turned away because the money is not there."⁴¹

8. *Migratory Bird Killing*

Efforts to exempt the Animal and Plant Health Inspection Service (APHIS) of the USDA from the Migratory Bird Treaty Act and the National Environmental Policy Act were thwarted. APHIS, once known as Animal Damage Control, "harasses and kills birds and wildlife that are considered by some to be pests."⁴² This amendment, which would have undermined the Migratory Bird Treaty Act, was pushed by Senators Tim Hutchinson (R-Ark.) and Blanche Lincoln (D-Ark.), and would have allowed APHIS agents to kill migratory birds without following currently required procedures.⁴³ Senators Tom Harkin (D-Iowa) and James Jeffords (I-Vt.) led the fight against this amendment, which resulted in the Senate not considering it as an addition to the Farm Bill.⁴⁴

³⁶ 40 C.F.R. § 122.23(b) (2003) (see regulation for exact threshold numbers for each type of animal that mandates CAFO designation, i.e. 700 dairy cows).

³⁷ HSUS, *Humane Scorecard*, *supra* n. 3.

³⁸ *Id.*

³⁹ Conscious Choice, *The Farm Bill 2002: Corporate Welfare, or Farmers Friend?* <<http://www.consciouschoice.com/note/note1507.html>> (accessed Mar. 2, 2003).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The Tulsa Audubon Society, *Migratory Bird Killing Amendment Fails* <<http://www.tulsaaudubon.org/conservation.htm>> (accessed Mar. 2, 2003).

⁴³ *Id.*

⁴⁴ HSUS, *Humane Scorecard*, *supra* n. 3.

9. *Helms Amendment Excludes Birds, Rats, and Mice from the Animal Welfare Act*

Responding to pressure from the medical research industry, Senator Jesse Helms (R-N.C.) successfully attached an amendment to the Senate Farm Bill that permanently exempts birds, rats, and mice from the protections of the Animal Welfare Act (AWA). The Helms amendment was retained by the conference committee and signed into law, even though the House version of the Farm Bill contained no such provision.⁴⁵

Birds, rats, and mice comprise over ninety percent of the animals used in laboratory research.⁴⁶ The bill's passage means that these animals will remain unprotected under the AWA, the primary federal law governing the treatment of animals.⁴⁷ In 1970, drafters amended the AWA from its original 1966 version to include protections for all warm-blooded animals.⁴⁸ Despite this wording, birds, rats, and mice are explicitly excluded, thereby appeasing the wealthy research industry.

The medical research community has long argued against inclusion of these animals in the AWA because they say that it would create unnecessary and expensive regulation.⁴⁹ Their success is a great disappointment to the animal protection community.

B. *The Captive Exotic Animal Protection Act*

Senator Joseph Biden (D-Del.) and Representative Sam Farr (D-Cal.) introduced the Captive Exotic Animal Protection Act, which seeks to put limits on the canned hunt industry that exists in about half of the states. The Humane Society of the United States estimates that "more than 1,000 hunting ranches across more than 25 states offer opportunities to shoot confined exotic mammals."⁵⁰ These "canned hunt" operations vary in size from one acre to thousands of acres, and allow would be hunters to "shoot tame or habituated animals for a fee, in 'no kill, no pay' arrangements."⁵¹ The prices can be as high as five thousand dollars for animals ranging from gazelles and cape buffaloes, to African lions.⁵²

The hunts are particularly offensive because very little work or skill is required to kill a caged or fenced-in large animal. Frequently,

⁴⁵ The Humane Society of the United States, *Passage of Farm Bill Denies Protections to Birds, Rats and Mice* <<http://www.hsus.org/ace/14121>> (accessed Mar. 3, 2003).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ National Animal Interest Association, *Support the Helms Amendment to the Farm Bill and protect biomedical research involving rats, mice, and birds* <http://www.naiaonline.org/body/articles/archives/helms_alert.htm> (accessed Mar. 3, 2003).

⁵⁰ Humane Society of the United States, *Why We Need the Captive Exotic Animal Protection Act* <<http://www.hsus.org/ace/11570>> (accessed Feb. 20, 2003).

⁵¹ *Id.*

⁵² *Id.*

these animals are obtained from zoos or are the offspring of zoo animals, and thus they are less wary of humans, making them easier targets than their wild counterparts.⁵³ Often the animals are fed from the same vehicle used to transport the hunter to the animal; as a result the animals frequently approach the vehicle expecting food, making them even easier targets.⁵⁴

The bill, S. 1655 and H.R. 3464, would make it illegal to “knowingly transfer, transport or possess in interstate or foreign commerce a confined exotic mammal for the purpose of allowing the killing or injuring of that animal for entertainment or the collection of a trophy.”⁵⁵ This includes animals such as African lions, antelope, gazelles, giraffes, and water buffalo. However, the Act does not protect exotic animals that have spent their lives in the wild, nor does it provide any protection for native wildlife hunted in such a manner.⁵⁶

The Act would penalize violators, including zoo officials, animal dealers, auctioneers, and operators of canned hunts. However, the hunters themselves would not be held liable. Violators would be fined up to \$100,000 or imprisoned for not more than one year, and the law allows any federal law enforcement officer to enforce the provisions of the Act.⁵⁷

Many hunting groups, such as the Boone and Crockett Club, oppose canned hunts because they violate what they believe to be most hunters’ concepts of a “fair chase” and “sportsmanship.”⁵⁸ Further, there is concern that these exotic animals are highly susceptible to disease due to their confinement with other animals and stress from transport, and could pose a threat to the native wildlife population by spreading various communicable diseases.⁵⁹

The bill is not without opposition, however, as some hunting and ranching groups argue that this represents an unconstitutional infringement on states’ rights, and that state fish and game agencies generally have jurisdiction in this area.⁶⁰ According to the Animal Rights Foundation of Florida, “California, Indiana, Maryland, Nevada, New Jersey, North Carolina, Oregon, Rhode Island, Wisconsin, and Wyoming currently have laws that specifically prohibit the hunting of exotic mammals in enclosures.”⁶¹ The bill has seventy-eight co-sponsors in the house and thirteen in the Senate, illustrating its widespread support. While many animal rights groups acknowledge that

⁵³ Animal Rights Foundation of Florida, *Canned Hunts* <http://www.animalrightsflorida.org/campaigns_hunts.htm> (accessed Jan. 24, 2003).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ HSUS, *Humane Scorecard*, *supra* n. 3.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Exotic Wildlife Association, *News and Events* <<http://www.exoticwildlifeassociation.com/0502newsevents.htm>> (accessed Jan. 24, 2003).

⁶¹ Animal Rights Foundation of Florida, *supra* n. 53.

the Act is not an "ideal" animal rights bill, they stand firmly behind it, supporting this initial effort to address the problem of these hunts. Senate Bill 1655 is currently on the Senate Legislative Calendar to be sent to the floor; House Resolution 3464 has been referred to the House Committee on the Judiciary.⁶²

C. *The Captive Wildlife Safety Act*

On July 25, 2002, Representative George Miller (D-Cal.) introduced H.R. 5226 and in October, Senator James Jeffords (D-Vt.) introduced S. 3038, collectively known as the Captive Wildlife Safety Act.⁶³ The Act would ban the interstate movement of lions, tigers, leopards, cheetahs, jaguars, and cougars bound for use as "pets" by private individuals.⁶⁴ According to the Animal Protection Institute, "the bill does not affect the interstate movement of these animals for use in zoos, circuses, accredited sanctuaries, incorporated humane societies, and other facilities licensed and inspected by the USDA under the provisions of the Animal Welfare Act."⁶⁵

The animals that the Act would protect are mostly kept at unlicensed roadside zoos, in basements, backyards, cages of private homes, and even as guardians of drug stashes.⁶⁶ The number of tigers estimated to be held as pets in the United States is about five thousand; a number that likely equals, if not exceeds, their numbers in the wild.⁶⁷

The drafters of the bill note that it serves two important purposes. First, keeping exotic animals as pets is inherently dangerous since these animals can never be fully domesticated. There have been numerous instances of relatives, especially children, who have been injured by captive exotics. Two attacks, one in Florida and the other in Texas, respectively left a fifty-eight-year-old woman severely injured and a three-year-old boy dead.⁶⁸

Second, the animals are rarely given the proper care and attention that they require. It is easy for people to obtain a tiger cub for as little as \$350.⁶⁹ However, once fully grown, the cost of providing food and care can come to thousands of dollars per month. Animal shelters around the country are being forced to deal with the problem of these unwanted "pets." Most notably, the Houston Society for the Prevention

⁶² Humane Society of the United States, *Captive Exotic Animal Protection Act* <<http://www.hsus.org/ace/12599>> (accessed Jan. 24, 2003).

⁶³ Animal Protection Institute, *Help Ban the Interstate Transport of Big Cats as "Pets"* <<http://www.api4animals.org/doc.asp?ID=1292>> (accessed Jan. 31, 2003) [hereinafter API, *Interstate Transport of Big Cats as "Pets"*].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ The Washington Post, *A Cat-Fight Brews over Backyard Wildlife* <<http://www.washingtonpost.com/ac2/wp-dyn/A27571-2002Sep2?language=printer>> (accessed Apr. 5, 2003).

⁶⁷ *Id.*

⁶⁸ API, *Interstate Transport of Big Cats as "Pets," supra* n. 63.

⁶⁹ Humane Society of the United States, *Exotic Pets Bill Will Resurface in January* <<http://www.hsus.org/ace/15963>> (accessed Apr. 5, 2003).

of Cruelty to Animals opened a special wing to house big cats in response to their increasing numbers.⁷⁰

Opponents of the bill are quick to point out that this is America, and no one should interfere with those who can afford to feed and house these animals. Further, they argue that the bill unfairly exempts private sanctuaries that do not belong to one of the associations that is exempted from coverage under the bill.⁷¹

However, most organizations that are knowledgeable about the needs of captive exotic animals support this bill. Supporters include the American Veterinary Medical Association, the American Zoo and Aquarium Association, the Animal Protection Institute, the USDA, and the Humane Society of the United States.⁷² Nineteen states currently restrict or ban private possession of big cats—Alaska, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Massachusetts, Maryland, Michigan, Nebraska, New Hampshire, New Mexico, Tennessee, Utah, Vermont, Virginia, and Wyoming.⁷³

The Senate Bill, with only one co-sponsor, was referred to the Senate Committee on Environment and Public Works. The House version of the bill, with twenty-six co-sponsors, was referred to the House Subcommittee on Fisheries Conservation, Wildlife and Oceans.

D. Use of Antibiotics in Farm Animals May be Curtailed

House Resolution 3804 and Senate Bill 2508, known as the Preservation of Antibiotics for Human Treatment Act, are concurrently sponsored by Representative Sherrod Brown (D-Ohio) and Senator Edward Kennedy (D-Mass.). This bill seeks to phase out the nontherapeutic use of antibiotics commonly fed to healthy farm animals, and it is currently in committee in both the House and the Senate. The American Medical Association, the American Public Health Association, and the American College of Preventive Medicine are among many organizations that have endorsed this bill.⁷⁴

The widespread use of antibiotics in farm animals has allowed the farm industry to create factory-type conditions for the animals. If the animals are constantly fed antibiotics, they can be held in unsanitary conditions in large numbers and kept in small spaces with no natural light, little air circulation, and no exercise. Supporters claim that if nontherapeutic antibiotics use vanishes, farmers will be forced to improve the living conditions of the animals they raise.

Further, increasing scientific evidence indicates that the routine feeding of antibiotics to healthy farm animals “promotes development

⁷⁰ The Washington Post, *supra* n. 66.

⁷¹ Phoenix Exotics, *Newsletter* <<http://www.phoenixexotics.org/newsletters/newsletter-2-15.pdf>> (accessed Apr. 5, 2003).

⁷² API, *Interstate Transport of Big Cats as “Pets,” supra* n. 63.

⁷³ *Id.*

⁷⁴ H.R. 3804, The Preservation of Antibiotics for Human Treatment Act of 2002, Summary <http://www.iatp.org/antibiotics/library/uploadedfiles/HR_3804_The_Preservation_of_Antibiotics_for_Hu.htm> (accessed Apr. 5, 2003).

of antibiotic-resistant bacteria that can be transferred to humans, making it harder to treat certain infections.⁷⁵ The Union of Concerned Scientists estimates that seventy percent of all antibiotics used in the U.S. are administered to pigs, poultry, and cattle to promote growth and compensate for unsanitary living conditions.⁷⁶ Because many of the antibiotics used in agriculture are the same, or closely related to medications used to treat human infections and diseases, antibiotic resistance poses a serious threat to the well-being of everyone. Another concern is that the antibiotics used in farm animals will seep into the groundwater and the resulting resistant bacteria will migrate into municipal drinking water supplies. Recently, the United States Geological Service, the only agency currently monitoring the presence of antibiotics in streams and rivers, found that forty-eight percent of streams surveyed contained antibiotics.⁷⁷ Furthermore, the Bush administration is planning to cut funding to this agency in its budget proposal, forcing the nation's only such monitoring program to be shut down.

The effects of widespread agricultural use of antibiotics are already being felt. For example, one out of six cases of *Campylobacter* infection, the most common cause of food poisoning, is resistant to fluoroquinolones, the drugs most often used to treat severe food-borne illness. Just six years ago, before fluoroquinolones were approved for use in poultry, such resistance was negligible.⁷⁸ *Campylobacter* accounts for 2.4 million illnesses and over 120 deaths each year in the United States.⁷⁹ In Denmark, a country that has banned the administration of antibiotics to healthy farm animals, a recent study shows that animals free from regular antibiotic treatment have dramatically reduced levels of resistant bacteria.⁸⁰

E. *The American Horse Slaughter Prevention Act*

February of 2002 saw the introduction of The American Horse Slaughter Protection Act (H.R. 3781) by Representative Connie

⁷⁵ *Id.*

⁷⁶ The Humane Society of the United States, *The Emerging Threat of Antibiotic Resistance: A Hidden Cost of Factory Farming* <<http://www.hsus.org/ace/14018>> (accessed Apr. 5, 2003).

⁷⁷ *Pharmaceuticals, Hormones, and Other Organic Wastewater Contaminants in U.S. Streams, 1999–2000: A National Reconnaissance*, 36 *Env'tl. Sci. & Tech.* 1202, 1202–11 (2002).

⁷⁸ U.S. Centers for Disease Control and Prevention, *1999 Annual Report: National Antimicrobial Resistance Monitoring System: Enteric Bacteria* <http://www.cdc.gov/ncidod/dbmnd/narms/annual/1999/html/narms_1999_annual.htm> (accessed Apr. 5, 2003).

⁷⁹ P.S. Mead et al., *Food-Related Illness and Death in the United States*, 5 *Emerging Infectious Diseases* 607, 607–25 (1999).

⁸⁰ Keep Antibiotics Working, *Antibiotic Resistance—An Emerging Public Health Crisis* <http://www.keepantibioticsworking.com/library/uploadedfiles/Antibiotic_Resistance_-_An_Emerging_Public_Hea.pdf> (accessed Apr. 5, 2003).

Morella (R-Md.).⁸¹ On February 13, 2003, Representatives John Sweeney (R-N.Y.) and John Spratt (D-S.C.) reintroduced the bill to the House as H.R. 857. If signed into law, this bill would prohibit the slaughter as well as the trade and transport of live horses intended for human consumption.⁸² While there is no real market for horsemeat in the United States, Europeans and Japanese both consume horsemeat slaughtered in the United States. Currently three foreign-owned slaughterhouses are based in the U.S., and thousands of horses are shipped live to Canada and Mexico for slaughter.⁸³ In introducing the bill, Representative Morella noted that "more than 55,000 horses were slaughtered in America last year to satisfy consumer demand overseas."⁸⁴

The horse stands as a symbol of the pioneering spirit of the American West, and our society has repeatedly pushed for stronger horse protection measures. In 1971, Congress passed the Wild Horses and Burros Act (Public Law 92-195), which protected horses on public lands from being rounded up and sold by "mustangers" to be used for commercial products.⁸⁵ Since the enactment of this act, wild horses, once considered endangered, are thriving.

Historically, the horses used for slaughter may be older and in poor health, suffering from a number of ailments. More frequently, however, they are healthy young horses bought at auction and shipped to slaughterhouses. These horses are frequently shipped on two-storied trucks intended for smaller animals such as pigs and sheep, which force the horses to "travel in a bent position."⁸⁶ The horses are frequently mistreated during shipment and often not properly rendered unconscious before being slaughtered.⁸⁷

Recent documentation has shown that horses sent to these slaughterhouses suffer in immeasurable ways. Due to the conditions at the abattoirs, the horses "exhibit fear typical of 'flight' behavior, pacing in prance-like movements with their ears pinned against their heads and eyes wide open."⁸⁸ The fear is well placed, as repeated blows with captive bolt pistols are often necessary to render them unconscious, which

⁸¹ The American Horse Council, *Federal Ban on Slaughtering Horses for Human Consumption* <<http://www.horsecouncil.org/issues/Animal%20Welfare/Slaughter.htm>> (accessed Apr. 5, 2003).

⁸² *Id.*

⁸³ The Animal Protection Institute, *Ban the Slaughter of Horses for Human Consumption* <<http://www.api4animals.org/doc.asp?ID=1236>> (accessed Apr. 5, 2003). [hereinafter API, *Ban the Slaughter of Horses for Human Consumption*].

⁸⁴ The Animal Welfare Institute, *News - US Horse Slaughter Legislation* <http://www.animalprotect.most.org.pl/news/US_Horse_Slaughter_Legislation.html> (accessed Apr. 5, 2003).

⁸⁵ United States Department of the Interior, *Wild Horses and Burros on Public Lands* <<http://biology.usgs.gov/s™/noframe/x182.htm>> (accessed Apr. 5, 2003).

⁸⁶ API, *Ban the Slaughter of Horses for Human Consumption*, *supra* n. 83.

⁸⁷ *Id.*

⁸⁸ Society for Animal Protection Legislation, *American Horse Slaughter Prevention Act* <<http://www.saplonline.org/Legislation/ahpa.htm>> (accessed Apr. 6, 2003).

frequently does not happen before having their throats slit.⁸⁹ "Death is not swift for these terrified and noble animals."⁹⁰

While most horse groups support the proposed bill, some wonder about its future consequences. They point to the fact that most horse shelters and retirement farms are full and have waiting lists, and donations to these sanctuaries are down.⁹¹ These groups argue that the inability to slaughter the animals will only lead to abuse in other ways, such as lack of food or poor living conditions. They urge that people push for stricter laws on proper housing for horses and better enforcement funding for humane slaughter practices, rather than more legislation that will be underfunded.⁹²

Most groups, however, are rallying in support of the bill, including the Humane Society of the United States, the Fund for Animals, the Animal Welfare Institute, and many other animal welfare and equine protection groups. The bill has been referred to the House Committees on Agriculture, International Relations, and Ways and Means. There are currently twenty-five co-sponsors of this bill.⁹³ No hearings have been scheduled at the time of this writing.⁹⁴

Representative Thomas Reynolds (R-N.Y.) has introduced a similar, but less far-reaching bill, H.R. 2622. This bill would not prohibit the export of horses intended for human consumption, despite the fact that the market for U.S.-produced horsemeat is almost entirely foreign.⁹⁵

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Horse and Farm Magazine, *Unwanted Horses: What's Next?* <<http://www.horseandfarmmagazine.com/unwanted-horses-editorial2.html>> (accessed Apr. 6, 2003).

⁹² *Id.*

⁹³ The American Horse Council, *supra* n. 81.

⁹⁴ The Humane Society of the United States, *American Horse Slaughter Prevention Act* <<http://www.hsus.org/ace/13421>> (accessed Apr. 6, 2003).

⁹⁵ HSUS, *Humane Scorecard*, *supra* n. 3.

II. REPORT OF THE COMMITTEE ON LEGAL ISSUES
PERTAINING TO ANIMALS OF THE ASSOCIATION OF THE
BAR OF THE CITY OF NEW YORK REGARDING ITS
RECOMMENDATION TO AMEND THE ANIMAL WELFARE ACT*

A. *Introduction*

The history of the efforts of concerned individuals to obtain enforcement of laws protecting animals from abuse is a clear demonstration of the absolute necessity of adequate access to justice in a functioning system of law. Indeed, there are few undertakings more fraught with potential frustration than the effort to apply laws protecting animals. While many statutes exist protecting animals and setting certain standards for their care, they are frequently not enforced. Normally, this is a situation in which the potential beneficiaries of a statute turn to the courts, either by way of a citizen's suit provision, or by way of a proceeding against the government to improve the way the statute is enforced. However, when a lawyer is approached by someone who is concerned about the illegal mistreatment of animals, there is generally little to offer in the way of possible legal recourse. Even where there is substantial evidence of clear violations of a regulatory statute, the people who wish to bring actions to enforce it almost never have standing to do so because they do not own the animals. Indeed, it is generally the animals' owners who are accused of having violated the law.

The fact is that animals living in captivity live almost completely under the control of their human owners. Experience has shown that, without being compelled, certain of these owners will not properly care for the physical and psychological needs of these animals. This situation is particularly problematic for the enormous number of animals held in institutional settings. State laws prohibiting cruelty to animals, which have traditionally been animals' primary means of protection, do not always apply to animals in particular institutional settings, including research facilities, and, in any case, are often inadequately enforced against all types of institutional animal users. Recent history is replete with shocking examples of neglect and indifference, or worse, to animals who are unlucky enough to fall into the hands of bad actors within certain industries. Examples include so-called "roadside" zoos, which are unaccredited, often seedy facilities that exhibit exotic animals for whom they are ill prepared to care; "puppy mills," i.e., breeding facilities for pure-bred puppies destined for the retail pet trade where both mothers and offspring are caged in substandard, and, at times, horrifying, conditions; and some research facilities, where budget-minded administrators sometimes forget that the subjects of experiments are not simply another sort of inventory, but, at

* Printed with permission of the Association of the Bar of the City of New York.

the very least, deserve appropriate care and respect in exchange for the enormous sacrifices they endure for humankind.

B. The Animal Welfare Act

In recognition of these problems, in 1966 Congress enacted, and, in 1970, 1976, and 1985, amended, the Animal Welfare Act¹ ["AWA" or "the Act"] with the goal of providing some protection for animals, such as by setting "minimum standards" for food, water, shelter, ventilation and veterinary care. The Act does not apply to all animals in captivity and is limited to certain animals in certain industries, i.e., in the pet trade, in research, and on exhibition, such as in zoos and circuses, and to certain animals during transportation in interstate and foreign commerce.² Most notably, it does not cover the billions of animals intended for use as "food or fiber."³ Recently, federal legislation has been enacted excluding rats, mice and birds, who constitute over ninety-five percent of the animals used in research, from the provisions of the Act that cover animals in research.⁴ Moreover, the animal care provisions governing research institutions are meant to govern the care of the animals when they are not being experimented upon and do not govern the "design, outlines, guidelines, or performance of actual research or experimentation by a research facility as determined by such research facility."⁵

The United States Department of Agriculture ["USDA"] is charged with promulgating and enforcing regulations to carry out the purposes of the AWA and is authorized and, in some cases required, to conduct inspections. If violations are found, potential consequences include the scheduling of follow-up inspections until the problem is resolved, injunctive relief, civil penalties such as license suspension and fines of up to \$2500, and criminal penalties, i.e., a fine of up to \$2500 and/or a prison term of up to one year. The most severe penalties of fines of up to ten thousand dollars and ten years in prison are reserved for interference with the official duties of inspectors rather than for animal abuse.⁶

C. Failure in AWA Enforcement

Although enactment of the Act was commendable, a law is only as useful as its enforcement. Experience has shown that the enforcement of the AWA has been poor at best, and the USDA has developed a long

¹ 7 U.S.C. §§ 2131 et seq. (2000).

² 7 U.S.C. §§ 2131-2132 (2000).

³ 7 U.S.C. § 2132(g) (2000).

⁴ 7 U.S.C. § 2132(g)(1) (2000).

⁵ 7 U.S.C. § 2143(a)(6)(A) (2000). While the Secretary of Agriculture is thus not authorized to promulgate regulations that dictate research protocols, certain provisions of the Act, including those that require consideration of pain management and alternatives (*see* 7 U.S.C. § 2143(a)(3)) could be considered to affect the nature of the research that is covered by the Act.

⁶ 7 U.S.C. §§ 2146(b), 2149, 2159 (2000).

and notorious reputation for ineffective enforcement. Although this failure has often been attributed to underfunding, and there are obviously benefits to increasing funding for enforcement, increased funding will not cure what appears to be a fundamental lack of interest on the part of the USDA.

While documented complaints by private parties and animal protection organizations regarding the USDA's failure to enforce the Act are legion,⁷ some of the most credible and pointed criticism of the enforcement of the Act comes from government studies, including reports from the USDA itself.

For example, a January 1995 audit report by the USDA's Office of the Inspector General ["OIG"] focused on various research facilities and licensed dealers and found that the division within the USDA that is entrusted with enforcement of the Act, the Animal and Plant Health Inspection System ["APHIS"] did not effectively use its enforcement authority. For example, the report noted that APHIS penalties, which were often so low that violators regarded them as a cost of doing business, were not aggressively collected and were often arbitrarily reduced. Moreover, APHIS accommodated facilities that repeatedly refused access to inspectors, rather than suspending their licenses. "As a result, facilities had little incentive to comply with the requirements of the Act." The report also noted that certain problems that had been set forth in a 1992 report had not been resolved, including that APHIS still did not reinspect all facilities where serious violations had been found, did not effectively prioritize upcoming inspections, and did not always properly classify violations that threatened animals' health and safety.⁸

At times, poor enforcement of the AWA has actually limited the ability of states to enforce their own laws to protect certain animals and to protect the public. A 1996 OIG audit regarding licensing practices in regard to animal exhibitors warned that individuals were able

⁷ See generally Cass Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (with Notes on Animal Rights)*, 47 U.C.L.A. L. Rev. 1333 (2000); Katherine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J.L. Reform 937 (2002); Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 Seton Hall Legis. J. 443 (1999); Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 Pace Env'tl. L. Rev. 103 (1998); see also *Animal Legal Defense Fund v. Glickman*, 943 F. Supp 44 (D.D.C. 1996) (Charles Richey, J.), *aff'd*, 154 F.3d 426, *cert. denied*, 526 U.S. 1064 ("[W]hile Congress set forth a clear mandate of humane treatment of animals, it then took away from that mandate by granting unbridled discretion to the agency which, as past experience indicates, will do little or nothing. The agency's conduct in this and other cases that have come before this member of the Court not only is egregious because of its delayed nature, but represents, in the eyes of at least more than 50,000 members of the plaintiff organization, one of the basic reasons why the American people have lost faith in much of their government. The inaction and eventual failure to act in accordance with law remind the Court of the sage and accurate statement of the late Judge J. Skelly Wright of the Court of Appeals for this Circuit when, in essence, he noted that the regulators in Washington are regulated by the regulated (citations omitted).").

⁸ USDA, OIG Audit Report No. 33600-1-CH (Jan. 1995).

to keep wild or exotic animals as pets in circumvention of state law by obtaining federal exhibitors' licenses through APHIS in spite of little, if any, experience in handling and caring for the animals, amongst whom were bears and tigers. The report noted that APHIS inspections of these facilities, resulting in the issuance of licenses, sometimes took place before the facilities were even in possession of the exotic or wild animal and when they had only common domestic animals, such as rabbits.⁹

A 1998 OIG study that focused on inspections of airlines found that, for the more than two year period of review, only 32% of 221 sample sites had been inspected; APHIS could not readily determine whether particular airports were inspected; and APHIS inspections were unsuccessful because inspectors could not predetermine when a registered carrier was actually transporting animals. Indeed, of 297 inspections, only 43 (14.5%) were performed with animals present. Where animals were present, over thirty-seven percent of the inspections revealed violations. The report also noted that the primary way APHIS is informed of violations is through a consumer complaints and that, by the time it can investigate, it is difficult to obtain evidence.¹⁰

While recent efforts have been made to increase funding for APHIS for the purpose of enforcing the Act, there is good reason to suppose that these efforts, on their own, will never result in the fulfillment of the goals of the Act. The agency's ninety-nine inspectors are responsible for inspecting over ten thousand facilities nationwide, each of which possesses numerous animals, often of many different species, with vastly different needs. The task of adequately inspecting these facilities is a massive one, for which much greater increases in government funding than has heretofore been forthcoming would be needed. Given the enormity of the task, it is unlikely that there will ever be truly adequate funding. Moreover, a review of the USDA's funding requests reveals a distinct lack of interest in improving the situation.

For example, for Fiscal Years 1996 through 1998, the USDA consistently requested, and was granted, approximately \$9.2 million per year for enforcement of the Act by Animal Care—the program under APHIS responsible for conducting inspections to ensure compliance with the Act.¹¹ However, in Fiscal Year 1999, the USDA inexplicably cut its request to only \$6.4 million for enforcement of the Act, while Congress, in the unusual position of having to foist money upon an undemanding agency, nevertheless appropriated \$9.2 million.¹² In Fiscal Year 2000, the USDA requested \$9.7 million, but Congress, again recognizing that the agency's needs were greater than it stated, appropriated \$10.2 million.¹³

⁹ USDA, OIG Audit Report No. 33601-1-CH (June 1996).

¹⁰ USDA, OIG Audit Report No. 33099-0002-CH (Aug. 1998).

¹¹ Sen. Rpt. No. 105-51, at 43 (1997); Sen. Rpt. No. 104-317, at 46 (Jul. 16, 1996); H.R. Rpt. No. 104-172, at 32 (1995).

¹² Sen. Rpt. No. 105-212, at 35 (1998); Sen. Rpt. No. 106-80, at 50 (1999).

¹³ Sen. Rpt. No. 106-288, at 56 (2000); Sen. Rpt. No. 106-80, at 50 (1999).

In Fiscal Year 2001, USDA did request increases in its funding for enforcement, and Congress appropriated \$12.1 million.¹⁴ However, while, in the context of the history of enforcement of the AWA, this was a substantial increase, it still fell woefully short of what is necessary to adequately enforce the Act, allowing the addition of only eleven more inspectors, bringing the total number, at that point, to eighty-five.¹⁵ For Fiscal Year 2002, the USDA requested a less than \$700,000 increase for enforcement of the Act, while Congress actually ultimately appropriated \$15,167,000. Not surprisingly, for 2003, USDA again requested less than Congress had given it the year before, i.e., \$14,381,000, but Congress appropriated \$16,408,000. Thus, Congress appears to be more concerned with adequately funding the agency than the agency itself. Indeed, the Senate Appropriations Committee specifically stated, in recommending the 2002 increase:

The Committee remains concerned about press accounts of inhumane treatment of animals and reports that the inadequate enforcement of animal welfare regulations has led to repeat violations and continuing mistreatment of animals.¹⁶

D. *Lack of Right of Action / Standing*

When citizens for whose benefit a statute has been passed discover that it is not being adequately enforced, their traditional recourse is to turn to the courts. A fundamental problem for those who would like to see the AWA better enforced is that it was not passed for the purpose of protecting humans, but for the purpose of protecting animals, and there are, therefore, no obvious plaintiffs who may bring actions when the agency charged with its enforcement is unable, or unwilling, to do the job. Thus, despite many attempts to bring such suits, human plaintiffs have had difficulty in bringing the merits of their arguments before the courts because of the lack of any citizen suit provision within the Act.

First, under current case law, an enforcement action brought directly under the AWA is likely to be dismissed for failure to state a claim upon which relief can be granted, as the courts have held that the AWA provides no implied private cause of action.¹⁷

AWA plaintiffs, seeking to avoid this result, have sued instead under the Administrative Procedure Act ["APA"] which provides a right to bring suit against a government agency to any person "suffering legal wrong because of agency action, or adversely affected or ag-

¹⁴ Sen. Rpt. No. 107-41, at 56 (2001); Sen. Rpt. No. 106-288, at 56 (2000).

¹⁵ Marian Dozier, *U.S. Raps Animal Welfare Agency*, *The Sun Sentinel* (Feb. 25, 2001).

¹⁶ Sen. Rpt. No. 107-41, at 58.

¹⁷ See e.g. *Intl. Primate Protection League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986), *cert. denied*, 481 U.S. 104; *In Defense of Animals v. Cleveland Metroparks Zoo*, 785 F. Supp. 100 (N.D. Ohio 1991).

grieved by agency action within the meaning of a relevant statute,"¹⁸ and permits a reviewing court to, *inter alia*, "compel agency action unlawfully withheld or unreasonably delayed."¹⁹ One of the necessary limitations in this approach is that the action must be brought against the government for failing to enforce the Act and cannot be brought directly against the party who allegedly violated the Act.

Moreover, while these suits have not been dismissed for failure to state a claim, they have in many instances been dismissed for lack of standing, both constitutional and prudential. Briefly, the standard set forth to satisfy constitutional standing requirements in federal courts under Article III's "cases or controversies" requirement include (1) that the plaintiff itself has suffered an "injury in fact," (2) that the defendant caused the injury, and (3) that the injury is redressable by a favorable decision.²⁰ In addition, while not constitutionally required, federal courts require a plaintiff to show "prudential standing," which requires that the interest the plaintiff seeks to protect must be "arguably within the zone of interests to be protected or regulated by the statute."²¹ This requirement has posed substantial problems for many plaintiffs seeking redress under the APA for injuries arising from alleged violations of the AWA.²²

Recently, the courts have begun to recognize certain instances in which human plaintiffs have demonstrated both constitutional and prudential standing to bring an action against the government for its failure to enforce the AWA. In *Animal Legal Defense Fund v. Glickman*,²³ a plaintiff who claimed to have suffered aesthetic injury by having repeatedly observed a chimpanzee confined by himself in extremely poor conditions at a "game farm" was found to have standing to challenge USDA regulations that allegedly did not comply with the AWA mandate that the Secretary set minimum requirements for an environment that will "promote the psychological well-being of primates." In *Alternatives Research & Development Foundation v. Glickman*,²⁴ the court held that one of the plaintiffs, a student in a college research laboratory who claimed to have repeatedly viewed laboratory rats being treated inhumanely, had suffered an aesthetic injury which entitled her to standing to challenge USDA regulations that excluded birds, mice and rats from the AWA's definition of "animal."

While these cases are an enormous step in the right direction, they demonstrate that the development of citizen's standing on a case-

¹⁸ 5 U.S.C. § 702 (2000).

¹⁹ 5 U.S.C. § 706(1) (2000).

²⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

²¹ *Natl. Credit Union Admin. v. First Natl. Bank & Trust Co.*, 522 U.S. 479, 488 (1998).

²² See *Animal Legal Defense Fund v. Espy*, 29 F.3d 720 (D.C. Cir. 1994); *Animal Legal Defense Fund v. Espy*, 23 F.2d 496 (D.C. Cir. 1994).

²³ 154 F.3d 426 (D.C. Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1064.

²⁴ 101 F. Supp. 2d 7 (D.D.C. 2000).

by-case basis in the courts under the APA will certainly result in unpredictable, inconsistent, and spotty access to the courts.

First, the necessity that all actions be brought against the federal government to require it to enforce the Act, rather than against the party who actually violated the Act, means that the available remedies will always be at least one step removed from the violator and will still leave actual enforcement in the hands of an underfunded and disinterested agency.

Moreover, the necessity that actions be brought only by an individual human plaintiff who has suffered sufficient aesthetic harm to have constitutional standing means that only people who can establish that they have observed the animal[s] over a significant period of time and have had a strong emotional response can bring an action. While animal protection groups may have substantial evidence, gathered from various sources, that egregious, illegal abuse is ongoing, without the right plaintiff the merits will never reach the courts. Such plaintiffs are obviously few and far between, particularly for actions against institutional facilities such as puppy mills, where the animals are hidden from public view and seen regularly only by those who profit from their confinement. This result is anomalous and does not comport with the primary purpose of the Act, which is to protect animals, regardless of whether the harm to them is concurrent to a harm to a particular human. Fundamentally, an animal living in isolation and misery, such as the chimpanzee who was the subject of *Animal Legal Defense Fund v. Glickman*, is no less harmed by the fact that he has never been observed by a human who is saddened by his fate. Thus, these cases establish the necessity for immediate legislative action to provide consistent, efficient, and effective judicial enforcement of the Act.²⁵

E. Creating a Cause of Action and Overcoming Prudential Standing Concerns

A citizen suit provision explicitly enables a private citizen to bring an action arising from violation of that statute and, if sufficiently broad, can enable a private citizen to bring an action against anyone who has violated a statute, thus extending the ability to sue far beyond that provided by the APA (subject to constitutional limits). One example of a broadly worded citizen suit provision is that found in the Endangered Species Act ["ESA"], which permits "any person" to bring such a suit against any person or the government alleged to be in violation of the ESA or regulations issued thereunder.²⁶ The existence of

²⁵ See Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Stephen M. Wise*, 7 *Animal L.* 1, 3 (2001) ("[T]he worst loophole in those laws are the loopholes found in statutes like the . . . Animal Welfare Act. . . . The loopholes I have in mind are structural. What I mean by that is that existing state and federal statutes depend on enforcement by chronically underfunded agencies and by directly affected and highly motivated people—and that's just not a sufficiently reliable source of protection.")

²⁶ 16 U.S.C. § 1540(g)(1)(A) (2000).

this citizen suit provision has been held to negate the prudential standing zone-of-interest test as to actions brought under the ESA.²⁷ (Of course, a citizen suit provision cannot grant standing to people who cannot, under Article III, bring suit in Federal court. We turn to this issue below.)

In order to allay concerns over the use of a citizen's suit provision to permit harassment, it is important to point out that citizen's suit provisions have been in existence for many years in a wide array of statutes, and have not resulted in the often predicted flood of litigation. One reason is that such suits are generally subject to substantial restrictions, such as jurisdictional limitations,²⁸ limits on the available remedies,²⁹ notice requirements,³⁰ and provisions allowing the court to award attorney's fees where appropriate.³¹

First, an appropriate jurisdictional limitation for a citizen's suit provision under the AWA would be to limit access to the courts to claims of violation of standards and regulations that relate directly to the care and welfare of the animals. The Act sets licensing requirements and substantial recordkeeping requirements, which are appropriately enforced solely by the USDA and need not be the subject of a citizens' suit provision. Moreover, regulations requiring the consideration of pain management and the use of alternatives in research facilities could be exempt from the citizen's suit provision.

Second, an additional limitation that would help guard against excessive litigation would be the imposition of a notice requirement, similar to that in the Endangered Species Act and other citizen's suit provisions. This would require any potential litigant to notify the government and the alleged violator of the violation in writing sixty days prior to commencement of the action, thereby giving them an opportunity to rectify the situation. An exception could be made for emergencies threatening immediate grievous harm.³²

Third, a provision permitting the court to assess costs and attorney's fees to any party whenever the court determines such an award is appropriate would permit a court to assess such fees against plaintiffs where they have initiated a frivolous lawsuit.³³

Fourth, in order to further deter frivolous lawsuits, a requirement could be imposed that complaints must be stated with particularity.

²⁷ See e.g. *Bennett v. Spear*, 520 U.S. 154, 164 (1997) (noting that it might be more accurate to say that the provision "expands" the zone of interests).

²⁸ See e.g. *Clean Air Act*, 42 U.S.C. § 7604(a)(1); *Emergency Planning and Community Right to Know Act*, 42 U.S.C. § 11046 (a)(1).

²⁹ See *Endangered Species Act*, 16 U.S.C. § 1540(g)(1).

³⁰ See *Endangered Species Act*, 16 U.S.C. § 1540(g)(2)(A)(1); *Clean Air Act*, 42 U.S.C. § 7604(b); *Clean Water Act*, 33 U.S.C. § 1365(b); *Columbia River Gorge National Scenic Area Act*, 16 U.S.C. § 544m(b)(3); *Surface Mining Control and Reclamation Act*, 30 U.S.C. 1270(b)(1)(A); *Safe Drinking Water Act*, 42 U.S.C. § 300j-8(b).

³¹ See e.g. *Clean Air Act*, 42 U.S.C.S § 7607(f); *Endangered Species Act*, 16 U.S.C. 1540(g)(4).

³² See e.g. *Endangered Species Act*, 16 U.S.C. 1540 (g)(2)(C).

³³ See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1977).

Fifth, as to available remedies, in light of the nature of the Animal Welfare Act and the wide variety of behavior it regulates, it would be appropriate to permit citizen's suits to seek both injunctions and civil penalties, payable to the government³⁴ to address both ongoing and past violations. For example, violations of the Act can be widespread, institutional policies, for which an injunction may be appropriate, along with the appropriate civil fines. On the other hand, a violation may relate to the abusive treatment of a small number of animals, or even a single animal, who may even be dead by the time the violation is discovered and the action brought. In this circumstance, a civil penalty, payable to the government, may be the only appropriate remedy. Plaintiffs however, would not have any prospect of obtaining compensatory damages either on their own behalf or on behalf of the animals. This has been recognized as a substantial deterrent to the bringing of frivolous actions under citizen's suit provisions.³⁵

In addition, the significant protections afforded generally in the federal courts to protect against frivolous or harassing practices would be in place to further protect the courts and potential defendants from excessive litigation. Under Rule 11 of the Federal Rules of Civil Procedure, the courts may impose significant sanctions for filings that are frivolous or designed to harass. Moreover, there is substantial authority on the part of the federal courts to limit discovery. Rule 26(g) subjects lawyers to sanctions for making frivolous discovery requests. Rule 26(b)(2) provides that a court may limit the availability of even relevant discovery if the discovery sought is disproportionate to any likely benefits from the information. Rule 26(c) allows courts to impose a wide array of tailored protective orders to protect a person from "annoyance, embarrassment, oppression, or undue burden or expense," including ones providing that "confidential research . . . not be revealed"

F. Overcoming Constitutional Standing Concerns

Citizen suit provisions do not create constitutional standing; that is, any citizen who brings suit must also meet the constitutional requirements for standing.³⁶ A lack of constitutional standing is, under current law, a particularly vexatious problem for those who wish to compel enforcement of the Animal Welfare Act. As noted, *supra*, while the purpose of the Act is to protect animals, in order to bring an action

³⁴ See e.g. *Clean Water Act*, 33 U.S.C. § 1365(a); *Resource Conservation and Recovery Act*, 42 U.S.C. § 6972(a); *Clean Air Act*, 42 U.S.C. § 7604(a); see also discussion of qui tam actions, *infra* pt. II(F) (regarding payment of portion of fine to persons bringing the suit).

³⁵ See 116 Cong. Rec. 33,104 (1970) (statement of Sen. Hart) (Citizen suits will not overburden the courts since damages are not available to the individual. Plaintiffs have nothing to gain and "the very real prospect of financial loss . . . [O]nly in the case where there is a crying need for action will action in fact be likely.")

³⁶ See e.g. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

it is necessary to find situations in which humans have been harmed as a result of violations of the Act.

One way that constitutional standing requirements could be met in actions seeking civil penalties is through the simple expedient of creating a *qui tam* action, which would permit a modest payment to be made out of the civil penalty assessed upon the violator to those who sue successfully for violations of the Act, thereby allowing them to sue as an assignee, or partial assignee, of the government's claim. By creating a *qui tam* action, Congress would obviate the necessity that the individual human plaintiff show that he or she had personally suffered an injury in order to sustain the action. Instead of allowing suits by people on their own behalf and to redress their own injury, the *qui tam* mechanism allows the complainant to sue as a private attorney general on behalf of the government.³⁷ The Supreme Court has recently held that it is not necessary for such a plaintiff to show that he or she suffered an injury to sustain the action and that the injury to the government is shown by the "injury to its sovereignty from violation of its laws."³⁸

An alternative, and the most obvious, way to ensure that litigants have constitutional standing to bring actions against violators of the Animal Welfare Act is to create a mechanism whereby the primary victims of those violations, i.e., the animals themselves, may bring an action. There is no constitutional bar to permitting animals standing in this fashion. As stated recently by Professor Cass Sunstein, "Congress has the authority to grant animals standing to protect their interests, in the sense that injured animals might be counted as juridical persons, to be protected by human plaintiffs initiating proceedings on behalf of animals." Indeed, standing has never been limited to humans, and has been granted to fictional entities, such as corporations and trusts, and to inanimate objects, such as ships.³⁹ Similarly, Professor Laurence Tribe has recently stated:

Recognizing the animals *themselves* by statute as holders of rights would mean that they could sue in their own name and in their own right Such animals would have what is termed legal standing Guardians would ultimately have to be appointed to speak for these voiceless rights-holders But giving animals this sort of "virtual voice" would go a long way toward strengthening the protection they receive under existing laws

³⁷ See e.g. *False Claims Act*, 31 U.S.C. §§ 3729 et seq. See also 25 U.S.C. § 201 (permitting suit in the name of the United States, and share of recovery, by "informer" for penalties for violation of Native American protection laws); 35 U.S.C. § 292(b) (permitting suit by any person, and share of penalty, against a person falsely marking patented articles); cf. 18 U.S.C. § 962 (providing for forfeiture to informer of share of vessels privately armed against friendly nations, but not expressly authorizing suit by informer); 46 U.S.C. § 723 (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations, but not expressly authorizing suit by informer).

³⁸ *Vt. Agency of Nat. Resources v. U.S.*, 529 U.S. 765, 771 (2000).

³⁹ See e.g. *The Gylfe v. The Trujillo*, 209 F.2d 386 (2d Cir. 1954).

and hopefully improved laws, and our constitutional history is replete with instances of such legislatively conferred standing.⁴⁰

Professor Cass L. Sunstein has also voiced support for such an approach:

Reforms might be adopted with the limited purpose of stopping conduct that is already against the law, so that the law actually means, in practice, what it says on paper. Here, then, we can find a slightly less minimal understanding of animal rights. On this view, *representatives of animals should be able to bring private suits to ensure that anticruelty and related laws are actually enforced* In a sense, this would be a dramatic proposal. It might even be understood to mean that animals should be allowed to sue in their own name—and whoever the nominal plaintiff, there would be no question that the suit was being brought to protect animals, not human beings. The very idea might seem absurd. But is simpler and more conventional than it appears. Of course any animals would be represented by human beings, just like any other litigant who lacks ordinary (human) competence⁴¹

Nor is there any substantial practical bar. As Professors Tribe and Sunstein both note, it is clear that many parties who cannot properly speak for themselves, such as children and incompetent adults, appear in the courts on a very regular basis. Thus, the mere legal incompetence of animals is no obstacle to such a proposal. Since the subject matter of such an action would be limited to violation of the Act, there would be no difficulty in ensuring that a human attempting to bring such an action actually represented the interest of the animal—it could simply be presumed that Congress has determined that enforcement of the Act is in the interest of the animal. Because the scope of such a provision would permit actions based only on violations of this particular statute, there is no worry that this would open the “flood-gates” to lawsuits by animals, or humans purporting to represent them, on other subjects.

This approach, while perhaps startling at first glance, would provide the simplest and most direct access to the courts for enforcement of the Animal Welfare Act in a way that would most fully carry out Congress’s purpose in enacting it.

G. Recommendation

RESOLVED, that Congress should adopt an amendment to the Animal Welfare Act (7 USC § 2131 et. seq.) that provides that:

1. To the extent permitted by the Constitution, any person would have a right of action against any person or the government for violation of a provision of the Act or a regulation promulgated pursuant to the Act directly relating to the care and welfare of animals; excluding violations of 7 USC § 2143 (a)(3), regulations

⁴⁰ Tribe, *supra* n. 25, at 3 (emphasis in original).

⁴¹ Cass R. Sunstein, *The Rights of Animals*, 70 U. Chi. L. Rev. 387, 391–92 (2003).

promulgated pursuant to such section and all recordkeeping requirements; provided that:

- a. no action may be commenced under this section prior to sixty days after written notice of the violation has been given to the Secretary of Agriculture and to any alleged violator of any such provision or regulation, except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing an immediate risk of death or grievous suffering to the well-being of any animal covered by the Act;
 - b. no action may be commenced if the violation underlying such action has been resolved within the sixty day period referred to in paragraph (1)(a), *supra*;
 - c. any action must be commenced by a complaint in which the circumstances alleged to constitute the violation are stated with particularity;
 - d. the court is permitted to assess costs and attorney's fees to any party whenever the court determines such an award is appropriate; and
2. In order to satisfy Article III standing requirements, provides either:
- a. that any person may act as a private attorney general to bring an action on behalf of the government for a violation as set forth in Paragraph 1, *supra*, and, in the case of a success on the merits, would recover, in addition to legal fees, a modest civil penalty; or
 - b. that, solely for the purpose of bringing an action based on a violation as set forth in Paragraph 1, *supra*, animals covered by the Act would have standing.

