1999 STATE AND FEDERAL LEGISLATIVE AND ADMINISTRATIVE ACTIONS

I. BAN ON DOMESTIC PET FUR FOR COMMERCIAL PURPOSES IN VIRGINIA AND OREGON

In December 1998, The Humane Society of the United States (HSUS) revealed the results of an eighteen-month investigation into the use of dog and cat fur in clothing sold in the United States.[1] The investigation revealed a thriving industry, with an estimated death toll of over two million dogs and cats.[2] The animals come from a variety of sources, including farms, captured strays, and stolen pets; animals may be slaughtered in one country, processed in another, and sold anywhere in the world.[3] Most domestic pet fur found during the investigation entered the United States in the lining of coats and gloves and most of the items were not labeled to identify the source of the fur.[4] DNA tests conducted on the fur garments sold in the U.S. confirmed that they were made from dog and cat fur.[5] The investigation tracked the source of the fur to China and the Philippines, the main source worldwide for dog and cat fur.[6] The investigation also revealed that dog and cat fur had been dyed to resemble wild animal fur.[7] Some garments labeled Gae-wolf, Sobaki, and Asian jackal were actually made from domestic dog fur.[8] Similarly, some fur garments labeled as Wildcat, Goyangi and Katzenfelle were actually made from domestic cat fur.[9]

In response to the investigation, federal legislation was introduced to ban the import and export of domestic pet fur and require that all fur and fur trimmed garments be labeled to denote the exact species composition.[10] Although the bill was introduced in the House of Representatives on April 29,1999, it remained under consideration by the Subcommittee on Telecommunications, Trade, and Consumer Protection at the end of 1999.[11] However, Virginia and Oregon did pass state

---

1 Humane Society of the United States (HSUS), *HSUS Urges Speedy Passage Of Dog And Cat Fur Ban* (visited Feb. 27, 2000) <http://www.hsus.org/news/pr/043099.html>.

2 HSUS, *Dog and Cat Fur Investigation: Betrayal of Trust* (visited Apr. 10, 2000) <http://www.hsus.org/current/dc_fur/title.html>.

3 *Id.*

4 Jeff Mapes, *Tracking the Legislation*, THE OREGONIAN, May 6, 1999, at D09.

5 *Id.*

6 *Id.*

7 HSUS, *supra* note 1.

8 *Id.*

9 *Id.*

10 H.R. 1622, 106th Cong. (1999).

11 *Id.*

legislation in 1999 to ban the commercial sale of fur harvested from domestic pets.

A. Virginia

The HSUS investigation and resulting public support[12] prompted the Virginia legislature to ban the commercial sale of pet fur. Representative David B. Albo introduced House Bill 2323 on January 21, 1999. The act was favorably received in both congressional houses.[13] The act passed in the House of Representatives with ninety votes in favor of the bill and ten against.[14] In the Senate, all forty senators voted unanimously for passage of the act.[15] The law became effective on July 1, 1999.[16]

The Virginia law makes it unlawful for any person in the state to sell any garment that the seller knows was made from the hide, pelt, or fur of a domestic dog or cat.[17] The law also requires the violator to have a culpable mental state—to knowingly sell an item containing domestic dog or cat fur.[18] The new law includes a penalty of not more than ten-thousand dollars; however, the legislature did not include provisions for jail time. Therefore, under Virginia law, the legal consequence of violating the act is limited to a monetary fine.[19]

B. Oregon

Oregon also passed legislation in 1999 to ban the commerce of products containing domestic dog and cat fur. Senate Bill 1168 passed in both the Oregon Senate and the House of Representatives on July 22, 1999.[20] Unlike the Virginia law, Oregon bans the purchase or sale of domestic dog and cat fur only if the process used to obtain the fur kills or maims the animal.[21] Therefore, the Oregon law allows the use of domestic animal fur if the animal was sheared, but not if it was skinned. The law defines domestic cat and dog as not including "coyote, fox, lynx, bobcat or another wild or commercially raised feline or wild canine species or hybrid thereof that is not recognized as an endan-

---

12 Susan E. Gaines, Editorial, *Brutal Undercover Film Told the Tale,* THE VIRGINIAN-PILOT & LEDGER STAR, Dec. 29, 1998, at B8; *see also* Susan Perna, Editorial, *Fur Trade Defense was Strange and Perverse,* THE VIRGINIAN-PILOT & LEDGER STAR, Dec. 29, 1998, at B8; John W. Grady, Editorial, *Would You Want To Wear Taffy Around Your Neck?,* THE VIRGINIAN-PILOT & LEDGER STAR, Jan. 16, 1999, at B6.

13 Legislative Information System, (visited Feb. 27, 1999) <http://leg1.state.va.us>.

14 *Id.*

15 *Id.*

16 *Id.*

17 VA. CODE ANN. § 3.1-796.128:2 (Michie 1999).

18 *Id.*

19 *Id.* § 18.2-14.

20 S.B. 1168, 70th Leg. Ass., Reg. Sess. (Or. 1999).

21 OR. REV. STAT. § 167.390 (1999).

gered species."[22] The wildlife exemptions were included as an amendment to the bill before passage to appease the trapping industry.[23]

Similar to the Virginia law, the Oregon law requires that the violator have a culpable mental state in order to be prosecuted.[24] A person who acts "intentionally, knowingly, recklessly or with criminal negligence" satisfies the culpable mental state required under Oregon law.[25] Violation of the statute is a Class A misdemeanor,[26] and a violator may be sentenced to a maximum of one-year in prison.[27]

II. STATE LAWS REQUIRING PSYCHOLOGICAL COUNSELING FOR ANIMAL ABUSERS

In 1999, seven states enacted laws regarding psychological counseling for animal abusers. This trend reflects the increasing recognition of the link between animal abuse and human violence by state legislatures.[28] Studies concluding that nearly one-third of animal abusers go on to commit violence against humans are not being ignored.[29] The FBI has recognized acts of animal cruelty as a common trait among serial killers.[30] Incidents of cruelty toward animals have been documented as predecessors to adolescent outbreaks of violence and school shootings.[31] Some believe these studies demonstrate that cruelty to animals raises a red flag indicating that the abuser may be more likely to commit violence against humans in the future.[32]

In recognition of the link to human violence, some states are amending their animal cruelty statutes to include felony offenses.[33] However, with jail overcrowding and early release programs, jail time for offenders may not be an adequate solution to the problem.[34] Nevertheless, prosecution is viewed as the most effective way of getting offenders into the system at the earliest stage possible so they can receive treatment before the violence escalates.[35] As a result, seven states recently enacted laws requiring mandatory counseling for offenders or giving judges discretion to order counseling for animal abusers.

---

22 *Id.*

23 Steve Suo, *Legislators' Work Hits High Gear*, OREGONIAN, July 12, 1999, at A01.

24 *Id.*

25 OR. REV. STAT. § 161.085(6)-(10) (1999).

26 *Id.* § 167.390.

27 *Id.* § 161.545.

28 Howard Rosenberg, *Strike One is Often Against an Animal*, L.A. TIMES, Feb. 15, 1999, at F1.

29 *Id.*

30 Randall Lockwood, *Animal Cruelty and Human Violence*, 5 ANIMAL L. 81, 82 (1999).

31 *Id.* at 83.

32 Rosenberg, *supra* note 28.

33 *Id.*

34 Lockwood, *supra* note 30, at 86.

35 *Id.*

A. California

California was among the states to add mandatory counseling provisions to its animal cruelty statute.[36] The new law, which became effective on January 1, 1999,[37] requires psychological counseling for all violators who are convicted under any section of the cruelty to animals statute and sentenced to probation.[38] The violator must pay for and successfully complete the counseling as a condition of his or her probation.[39] The court may establish a sliding payment schedule based on the violator's ability to pay, if the court finds the violator is unable to afford the treatment ordered.[40] California also incorporates felony and misdemeanor penalty provisions in its animal cruelty statute.[41] Under both penalties, a violator can receive a fine of up to twenty-thousand dollars.[42] However, the prison terms differ in that a misdemeanor is limited to no more than one year in a county jail.[43]

B. Illinois

The Illinois legislature amended the Humane Care for Animals Act to include a mandatory psychological evaluation for any offender found guilty of animal torture.[44] Section 3.03 defines torture as the "infliction of or subjection to extreme physical pain, motivated by an intent to increase or prolong the pain, suffering or agony of the animal."[45] The law gives the judge the discretion to order appropriate treatment based on the results of the evaluation.[46]

The amendment changes the penalty for a violation of section 3.03 from a misdemeanor to a Class 4 felony.[47] A second or subsequent offense of the section raises the degree of the offense to a Class 3 felony.[48] Under Illinois law, a conviction of a Class 4 felony is punishable by one to three years in prison.[49] A conviction of a Class 3 felony is punishable by two to five years in prison.[50] The Act took effect on July 22, 1999.[51]

---

36 1998 Cal. Legis. Serv. 450 (S.B. 1991) (West).

37 *See* CAL. CONST. art. IV, § 8.

38 CAL. PENAL CODE § 597(g) (West 1999).

39 *Id.*

40 *Id.*

41 *Id.* § 597(a)-(c).

42 *Id.*

43 *Id.*

44 510 ILL. COMP. STAT. 70/3.03 (West 1999).

45 *Id.*

46 *Id.*

47 *Id.*; *see also* Stanley Ziemba, *Torturing Of Animals Could Bring Stiff Penalty Prison, Mental Exams Sought in Legislation*, CHI. TRIB., Mar. 14, 1999, at 1.

48 *Id.*

49 730 ILL. COMP. STAT. 5/5-8-1(a)(6) (West 1999).

50 *Id.* 5/5-8-1(a)(7).

51 S.B. 374, 91st Gen. Ass., Reg. Sess. (Ill. 1999).

On August 19, 1999, a Chicago court ordered a seventeen-year-old defendant charged with aggravated animal cruelty to attend psychiatric counseling for setting his twelve-year-old brother's dog on fire.[52] The defendant and another nineteen-year-old man doused the Labrador-mix with gasoline and then ignited the dog because the dog refused to fight a pit bull terrier.[53] The twelve-year-old brother extinguished the flames, but the Labrador-mix was in so much pain that the police killed the dog after they arrived on the scene.[54]

In addition to counseling, the seventeen-year-old defendant was also sentenced to six months in jail and eighteen months probation.[55] The nineteen-year-old defendant was sentenced to one year in jail and three additional years for violating his probation for a prior conviction.[56] Both defendants were convicted under the previous aggravated animal cruelty statute, which classified the crime as a misdemeanor.[57] Under the new statute, each would have been guilty of a Class 4 felony punishable by up to three years in prison with mandatory court-ordered counseling.[58]

C. Maine

In 1999, the Maine Legislature amended its animal cruelty statute to include a discretionary psychological consultation option for the court. The statute reads: "The court . . . may order, as a condition of probation, that the violator be evaluated to determine the need for psychiatric or psychological counseling . . . ."[59] Based on the evaluation, the court has the discretion to order the violator to receive appropriate treatment at the defendant's expense.[60] Unlike the California amendment, no payment schedule based on ability to pay is provided. A violation of this statute is a Class D crime, requiring the violator to pay a fine.[61] This law does not expressly provide for a prison term, so the penalty is limited to a two-thousand dollar fine for the first offense.[62] The penalty can increase to a Class C crime, punishable by a five-thousand dollar fine, if the defendant has been convicted of two or more violations of this section or similar crimes.[63]

Subsequently, a new bill was introduced that would amend the discretionary counseling option of the court.[64] This new bill, if passed,

---

52 *Second Teen Sentenced to Jail in Attack On Brother's Dog*, CHI. TRIB., August 20, 1999, at 6.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 Ziemba, *supra* note 47, at 1.

58 510 ILL. COMP. STAT. 70/3.03 (West 1999).

59 ME. REV. STAT. ANN. tit. 7, § 4016 (West 1999).

60 *Id.*

61 *Id.*

62 *Id.*

63 ME. REV. STAT. ANN. tit. 17-A, § 1301 (West 1999).

64 H.B. 1646, 119th Leg., 2d Reg. Sess. (Me. 1999).

would require the court to order treatment for the violator if the evaluation indicated treatment was appropriate.[65] The amendment would still allow the court to retain the discretion to order the psychological evaluation, but removes the discretion to order treatment once an evaluation is made.[66]

D. Maryland

The Maryland legislature amended its animal cruelty statute to allow the courts to order psychological counseling if a defendant is found guilty of mutilation of animals.[67] The cruelty to animals section of the Maryland code is broken into two main subsections. Under cruelty to animals, a person who either mistreats an animal (e.g. overburdens, abuses, fails to provide adequate food or shelter, etc.), engages in cockfighting, or knowingly attends a dogfight as a spectator is guilty of a misdemeanor punishable with a fine of up to one-thousand dollars or ninety days imprisonment, or both.[68] Mutilation of animals is included in the second part of the statute, and is defined as 1) intentionally mutilating or cruelly killing an animal, 2) using or permitting a dog to be used in or arranging or conducting a dogfight, or 3) except in self-defense, intentionally inflicting bodily harm, disability, or death on an animal used in law enforcement.[69] Mutilation of animals is a misdemeanor punishable with a fine of up to five-thousand dollars or three years imprisonment, or both, and the court may order the offender to pay for and participate in psychological counseling.[70] The 1999 act increased the fine for mutilation from one-thousand dollars, added the penalty for injury to police animals, and added the counseling provision.[71] Similar to California and Maine, the violator pays the cost of the counseling.[72]

E. Nevada

The Nevada counseling law is specifically targeted at children. In 1999, the Nevada legislature amended its juvenile court procedures.[73] The amendment requires juvenile courts to order psychological counseling for children that are adjudicated (found guilty) of an act that involves animal cruelty or torture of an animal.[74] The amendment also requires the court to order the parents of the child to pay for the counseling, but only to the extent they are able to pay.[75] Directing the coun-

---

65 *Id.*
66 *Id.*
67 MD. ANN. CODE art. 27, § 59 (1999).
68 *Id.*
69 *Id.*
70 *Id.*
71 1999 Md. Laws 448.
72 MD. ANN. CODE art. 27, § 59 (1999).
73 NEV. REV. STAT. § 62.2295 (1999).
74 *Id.*
75 *Id.*

seling at children remains consistent with the idea that the earlier violence prevention is introduced, the more likely it is to be effective.[76]

The amendment received wide support from Nevada's juvenile justice officials.[77] The Judiciary Committee heard testimony from several county agency officials and accepted a study which demonstrated "children in a pathological triangle of pyromania, animal abuse and bedwetting are likely to commit serious crimes later in life."[78] The previous procedure forced the court to release the child to a responsible adult who promised to bring the child back for the hearing.[79] This amendment allows the court to retain custody of the child until the performance of a psychological evaluation.[80]

F. New Mexico

New Mexico amended its animal cruelty statute to include a mandatory psychological counseling requirement for children adjudicated of cruelty to animals and a discretionary judicial option for adult offenders.[81] While the other state legislative changes only call for counseling under the animal torture sections of their cruelty statutes, this amendment provides New Mexico courts with more options. The court may order psychological counseling for violations of either the cruelty to animals subsection of the act or the extreme cruelty to animals subsection.[82] Offenders must pay for the counseling if so ordered by the court.[83]

A conviction of general cruelty to animals is a misdemeanor.[84] Under New Mexico law, a misdemeanor is punishable by no more than one-year imprisonment in county jail, a fine of not more than one-thousand dollars, or both.[85] A fourth conviction of general animal cruelty will result in a fourth degree felony conviction.[86] The penalty for extreme animal cruelty also constitutes a fourth degree felony.[87] A fourth degree felony is punishable by eighteen-months in prison and, in addition to imprisonment, the court may assess a fine not to exceed five-thousand dollars.[88]

---

76 Lockwood, *supra* note 30, at 86.

77 Kiley Russell, *Lawmakers Welcome Testing Idea*, LAS VEGAS REV. J., Mar. 5, 1999, at 8B.

78 *Id.*

79 *Id.*

80 *Id.*

81 N.M. STAT. ANN. § 30-18-1 (Michie 1999).

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* § 31-19-1.

86 *Id.* § 30-18-1.

87 *Id.*

88 *Id.* § 31-19-1.

G. Virginia

In addition to enacting a new law banning the commerce of domestic pet fur in 1999, the Virginia legislature amended its animal cruelty law to include a discretionary psychological counseling option for the court system.[89] The court may now order the violator to undergo psychological, anger management, psychiatric, or other treatment programs the court finds appropriate.[90] The violator may also be ordered to pay the costs of the treatment.[91] Violation of this statute is a Class 1 misdemeanor.[92] A person convicted may receive a sentence of up to one-year in prison and a fine not to exceed twenty-five hundred dollars.[93]

The counseling amendment was well received in both congressional houses. The House of Representatives passed the amendment by a vote of ninety-three to six.[94] In the Senate, all forty senators unanimously passed the amendment.[95] The law became effective July 1, 1999.[96]

III. Canned Hunting Ban in Oregon

The Oregon Department of Fish and Wildlife (ODFW) has been concerned about protecting native wildlife from exotic species since implementing regulatory standards for game ranches in 1993.[97] Canned hunting is a practice where hunters within a fenced enclosure shoot non-native or exotic animals on private game ranches for a fee.[98] Originally, ODFW found that exotics have shown an amazing "ability to out compete native wildlife for food and [habitat]."[99] The spread of disease and parasites was also of primary concern.[100] ODFW felt the only way these problems could be controlled would be for game ranching operations to guarantee that no ranch animal would come into contact with native wildlife.[101] However, a survey of other game ranches in the western United States and Canada showed that game animals consist-

89 Va. Code Ann. § 3.1-796.122 (Michie 1999).

90 *Id.* § 3.1-796.122(E).

91 *Id.*

92 *Id.*

93 *Id.* §18.2-11.

94 Legislative Information System, (visited Feb. 27, 1999) <http://legl.state.va.us>.

95 *Id.*

96 *Id.*

97 Oregon Department of Fish and Wildlife (ODFW), *Protecting Our Native Deer and Elk,* Backgrounder, Apr. 18, 1995, at 1, *available in* <http://www.dfw.state.or.us/ODFWhtml/InfoCntrWild/PDFs/BKGProtectDeerElk.pdf>.

98 Bill Monroe, *Vote Bags 'Canned Hunting' in Oregon*, Oregonian, Apr. 24, 1999, at C01.

99 ODFW, *supra* note 97, at 2.

100 *Id.*

101 *Id.* at 3.

ently escape,[102] and ODFW realized guarantees alone would not solve the problem.

On April 23, 1999, the Oregon Fish and Wildlife Commission voted unanimously to ban canned hunting in Oregon.[103] The administrative rule makes it unlawful for any person to "hunt, kill or attempt to hunt or kill, exotic animals . . . or game animals . . . held or obtained by private parties."[104] The rule includes native wildlife raised or kept by private parties for hunting purposes. The rule does allow for the slaughter of privately held exotic and game animals for meat, leather, or fur.[105] The rule also allows for euthanasia of these animals for health, safety, scientific, or animal husbandry reasons.[106] A final exception allows the Division Director to authorize a person to hunt an exotic in the interest of wildlife management.[107]

The Commission considered a grandfather clause, which would allow the state's only game ranch to continue operating, but ultimately rejected it.[108] Commissioner Henry Lorenzen planned to support the grandfather clause and allow the owner to operate for another twenty years, but did not do so at the final meeting.[109] After considering the testimony at the hearing, including documentation of animals escaping off the ranch, Commissioner Lorenzen withdrew his support.[110] His primary responsibility, Commissioner Lorenzen stated, was protecting Oregon Wildlife.[111]

Strong public support for the ban exists. In March 1999, HSUS released the findings of a study conducted by Decision Research, Inc., which polled six-hundred Oregon voters. Seventy-three percent of those polled were in favor of the ban, twenty percent opposed the ban, and seven percent were undecided.[112] ODFW conducted its own study and made comparable findings.[113] Kelly Smith, the former President of the Oregon Hunters Association urged the Commission to vote for the ban because canned hunting creates a bad image of hunting and paints all hunters "with the same brush."[114] However, the Oregon Hunters Association voted against supporting the ban, instead choos-

---

102 *Id.* at 4.

103 Monroe, *supra* note 98.

104 OR. ADMIN. R. 635-064-0010(1) (1999).

105 *Id.* at (1)(a).

106 *Id.* at (1)(b).

107 *Id.* at (1)(c).

108 Monroe, *supra* note 98.

109 *Id.*

110 *Id.*

111 *Id.*

112 The Humane Society of America (HSUS), *HSUS Lauds Oregon Fish and Wildlife Commission for Banning "Canned Hunts,"* Apr. 23, 1999 (visited Feb. 27, 2000) <http://www.hsus.org/news/pr/042399b.html>.

113 *Id.*

114 Cindy Simmons, *Wildlife Commission Unanimously Bans Private Hunting*, ASSOCIATED PRESS NEWSWIRES, Apr. 23, 1999.

ing to support more stringent regulations to prevent animals from escaping.[115]

IV. Federal Prohibition on Crush Videos

A. Introduction

Congress responded to a proliferation in the production and sales of "crush videos"[116] with the enactment of H.R. 1887.[117] The new law makes it a felony to knowingly create, sell, or possess a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain.[118] Violations are punishable by a fine, imprisonment for not more than five years, or both.[119]

Generally, crush videos feature a woman, either bare footed or wearing high-heeled shoes, slowly crushing a small animal to death.[120] Animals, including mice, hamsters, kittens, cats, dogs, monkeys, birds, and guinea pigs, are taped to the floor or a glass table and killed.[121] In some videos, the woman's voice can be heard talking to the animals in a dominatrix manner.[122] Usually, the faces of the women engaged in the torturous act are not shown.[123] The painful cries of the animals can also be heard.[124] The videos often appeal to people with a very specific sexual fetish, who find the depictions sexually arousing or otherwise exciting.[125] These videos, most of which originate in the United States, are commonly available through the Internet (over two-thousand titles) and are distributed almost exclusively for sale in interstate or foreign commerce for up to three hundred dollars each.[126]

---

115 *Poll Finds 73 percent of Oregonians Favor Ban on Canned Hunts*, Associated Press Newswires, Mar. 16, 1999.

116 The bill was introduced after Ventura County, California, District Attorney Michael Bradbury encountered problems using existing state animal-cruelty laws to prosecute a Thousand Oaks man who was allegedly selling crush videos over the Internet. 145 Cong. Rec. E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly); Richard Simon, *Local Activists Hail Anti-'Crush Video' Law*, L.A. Times, Dec. 11, 1999, at B4.

117 In October 1999, the bill cleared the House by a 372-42 vote. Elton Gallegly, *Gallegly's Animal Cruelty Legislation Signed by President*, Cong. Press Release, Dec. 10, 1999. The Senate approved the bill unanimously one month later. *Id.* President Clinton signed the bill December 9, 1999. *Id.*

118 Act of Dec. 9, 1999, Pub. L. No. 106-152, 113 Stat. 1732, 1732 (1999) (to be codified at 18 U.S.C. § 48).

119 *Id.*

120 H.R. Rep. No. 106-397, at 2 (1999); *see also* Gallegly, *supra* note 117.

121 Simon, *supra* note 116; Gallegly, *supra* note 117.

122 H.R. Rep. No. 106-397, at 2.

123 *Id.* at 3.

124 *Id.* at 2.

125 *Id.* at 2, 3.

126 *Id.* at 3; *see also* 145 Cong. Rec. E1067, E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly); Simon, *supra* note 116.

B. Debate in the House of Representatives

Sponsors and co-sponsors of the bill argued that a compelling governmental interest exists in restricting this form of speech, that the restriction is necessary to serve that interest, and that the means used to further that interest are narrowly tailored. Opponents, concerned primarily with infringement of individual's first amendment right of protected speech, found the speech not to be obscene, and therefore constitutionally protected.

1. Compelling Governmental Interest

The House Judiciary Committee's report states that justification for the ban on this form of obscene speech is derived from a governmental interest in regulating the treatment of animals.[127] Society values animals in a variety of ways, such as sources of food and clothing, laborers, entertainment, and companionship.[128] The Committee recognized that the majority of Americans believe that even those animals used for mere utilitarian purposes should be treated in ways that do not cause them to experience excessive physical pain and suffering.[129] The Committee also noted the fact that all fifty states have animal anti-cruelty statutes, and that Congress had previously enacted laws regarding the care and treatment of animals.[130]

The governmental interest in banning the sale of crush videos also extends to preventing criminal acts. Research suggests that abuse of other people begins with the torture and killing of animals.[131] When such animal cruelty is not prevented or remedied, the individual may fail to learn respect for any living being, may become desensitized, and may lose the ability to empathize with other human beings.[132]

Critics of the amendment argued that crush videos are merely offensive speech, and are therefore protected under the First Amendment of the Constitution. Opponents found no compelling governmental interest. Citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[133] opponents noted that although the Supreme Court recognized a governmental interest in protecting animals from cruelty, this interest did not prevail against the constitutional right of free exercise of religion.[134] Opponents did not outright deny a correlation be-

---

127 H.R. REP. No. 106-397, at 3; 145 CONG. REC. E1067, E1067 (daily ed. May 24, 1999) (statement of Rep. Elton Gallegly).

128 H.R. REP. No. 106-397, at 3.

129 *Id.* at 4.

130 *Id.* at 3.

131 *Id.* at 4; 145 CONG. REC. H10267, H10269, H10271, H10273 (daily ed. Oct. 19, 1999) (statements of Rep. Gallegly, Rep. Morella, and Rep. Lantos). *See generally* Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81 (1999).

132 H.R. REP. No. 106-397, at 4.

133 508 U.S. 520 (1993).

134 145 CONG. REC. H10267, H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Scott); *see also Church of Lukumi Babalu Aye*, 508 U.S. at 539, 544.

tween future criminal behavior and present acts of animal cruelty. However, they did point out that the person seeking satisfaction is the person watching the video, not the one crushing the animal.[135] Therefore, they argued, the connection to the viewer of the crush video and future criminal behavior is too tenuous to survive under the strict scrutiny test imposed when a law restricts a fundamental human right.[136]

2. Necessity of the Restriction

The act of crushing small animals is already illegal under state animal cruelty laws. Still, prosecution of the actor under state law is difficult for three reasons.[137] First, the prosecutor must identify the actor.[138] This is a near impossibility when the only feature with which to identify the actor is a voice.[139] Second, the prosecutor must show that the act featured in the video occurred within the court's jurisdiction and within the statute of limitations.[140] Usually, however, the date and location of the production of the crush video can not be ascertained from the video itself.[141] As a result, lack of jurisdiction and statutory bar are often successful defenses.[142] Third, production, sale, and possession of the video are not prohibited by state animal cruelty laws.[143] Therefore, prosecution under state animal cruelty law is feasible only if the person making the video was caught in the act,[144] and even they were caught in the act, the actor could be prosecuted only for the act itself, not for production or sale of the video.[145]

Opponents argued that the restriction on speech is not necessary. Opponents stated that already existing Federal anti-pornography laws can be used to prosecute these cases, and furthermore, the states are the appropriate body to address the issue.[146]

3. Narrowly-Tailored Means

Although opponents recognized that the bill exempted purely personal creation, possession, or distribution, as well as serious political, scientific, educational, historical, religious, artistic, or journalistic uses

---

135 145 CONG. REC. at H10268.

136 *Id.*

137 *Hearings on H.R. 1887 Before the Subcomm. on Crime of the House Judiciary Comm.*, 106th Congress (1999) (statement of Tom Connors, Office of the Ventura County District Attorney, California).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 H.R. REP. No. 106-397, at 13 (1999); 145 CONG. REC. H10267, H10269, H10270 (daily ed. Oct. 19, 1999) (statements of Rep. Barr and Rep. Paul).

of any such films, they still argued that the means were not narrowly tailored.[147] Opponents were concerned that the bill makes illegal those depictions that are not illegal when made, if they are illegal in the state where possessed.[148] For example, bullfighting is illegal in Virginia. Therefore, possessing or selling a film in Virginia that depicts a bullfight in Spain would seem to violate the act.[149]

Proponents of the bill still disagree. They countered the opponents' argument by stating that the exception for serious religious, political, scientific, educational, journalistic, historic, or artistic value ensures that entertainment programs on Spanish bullfighting or news documentaries on elephant poaching will not violate the new statute.[150]

C. The Statutory Provisions

H.R. 1887 adds Section 48 to Title 18 of the United States Code.[151] Section 48 punishes a person who "knowingly creates, sells, or possesses a depiction of animal cruelty with the intention of placing that depiction in interstate or foreign commerce for commercial gain . . . ."[152] This section "does not apply to any depiction that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[153] The phrase "depiction of animal cruelty" is defined as "any visual or auditory depiction, including any photograph, motion-picture film, video recording, electronic image, or sound recording of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed, if such conduct is illegal under Federal law or the law of the State in which the creation, sale, or possession takes place, regardless of whether the maiming, mutilation, torture, wounding, or killing took place in the State."[154] The definition of "State" is broad, including all states, territories, or possessions of the United States.[155]

The House Judiciary Committee noted that when interpreting this statute, the term "animal" should be given its common, rather than scientific, meaning.[156] Congress did not intend for "animal" to include insects, invertebrates, crustaceans, or fishes.[157] Further, the depiction

---

147 H.R. REP. No. 106-397, at 11-12.

148 *Id.* 145 CONG. REC. H10267, H10268 (daily ed. Oct. 19, 1999) (statement of Rep. Scott).

149 H.R. REP. No. 106-397, at 11-12.

150 *Id.*

151 Act of Dec. 9, 1999, Pub. L. No. 106-152, 113 Stat. 1732, 1732 (1999) (to be codified at 18 U.S.C. § 48).

152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*

156 H.R. REP. No. 106-397, at 7 (1999).

157 *Id.*

must be of a real animal. The statute does not apply to simulated depictions of animal cruelty.[158]

The burden of proof lies with the prosecution to show that the defendant intended to place the depiction in the stream of commerce. The prosecution need not show that the depiction did in fact enter the stream of commerce, only that the defendant had intended such an event at some future time.[159] With respect to commercial gain, the prosecution does not need to prove that the defendant profited financially.[160] Rather, the prosecution must prove that it was the defendant's intent to gain financially.[161] Mere possession is not punishable by this statute. Possession is only punishable when coupled with the intent to transmit the depiction in interstate commerce for commercial gain.[162]

The conduct depicted must be illegal under either Federal law or the State's law in which the creation, sale, or possession actually takes place.[163] Therefore, depictions of hunting and fishing are outside the scope of the statute.[164] "Sale" includes both the place from which the seller sends the depiction, and the place where the buyer receives the depiction.[165] Thus, if the act depicted would violate the law of the buyer's state, had it occurred there, the seller violates the statute even though the act depicted might not be prohibited by the law of the state where the seller is located at the time the depiction entered interstate commerce.[166]

Regarding the exception for serious religious, political, scientific, educational, journalistic, historic, or artistic works, defendants charged with a violation of the statute bear the burden of showing the value of the depiction by a preponderance of the evidence.[167] The Committee cited examples of depictions to which the amendment does not apply, including documentaries on Spanish bullfighting or elephant poaching.[168]

V. THE STANDARD FOR DOLPHIN-SAFE TUNA

For the past ten years, the "dolphin safe" label found on tuna cans sold in the United States has meant that no dolphins were intentionally chased and encircled with deadly purse seine nets during the

158 *Id.*
159 *Id.*
160 *Id.* at 8.
161 *Id.*
162 *Id.* at 7, 8.
163 *Id.* at 8.
164 *Id.*
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*

tuna's capture.[169] Over the past four decades, the tuna fishing industry has killed more than seven million dolphins, although there have been less than five-thousand deaths per year since 1993.[170] In 1990, consumer pressure brought about the "dolphin safe" tuna labeling program along with a moratorium on the importation of non-dolphin safe tuna into the United States; this action, combined with revised fishing techniques, has successfully decreased dolphin deaths by ninety-seven percent since 1990.[171] The meaning of the term "dolphin safe," however, may be dramatically altered if the Secretary of Commerce finds that sets on dolphins where no dolphin is killed or seriously injured result in no significant impact to the dolphin species in question.[172]

A. Background

One of the primary methods of harvesting tuna in the Eastern Tropical Pacific (ETP) is "purse seining" or encirclement.[173] Fishermen set nets around groups of dolphins knowing that, in the ETP, schools of tuna often associate with dolphins.[174] Tuna fishers send out speedboats to chase a group of dolphins; once the dolphins are exhausted and in a group, a weighted net called a "seine" is drawn out from the vessel, encircling the dolphins and tuna.[175] Once surrounded, the bottom of the seine is drawn together, or pursed, trapping the tuna.[176] Purse seining has been modified over time to reduce dolphin mortality; however, dolphin deaths remain inevitable with this method, and animal rights groups claim that the stress of the chase and encirclement creates a significant negative impact on them.[177]

In the late 1980s, the American public became increasingly aware of dolphin deaths associated with tuna fishing.[178] Due to public pressure, U.S. tuna canneries agreed to use only tuna caught by methods other than encirclement.[179] This policy produced the first dolphin-safe

---

169 Earth Island Institute, *International Marine Mammal Project* (visited Apr. 17, 2000) <http://www.earthisland.org/immp>. For a complete analysis of the tuna-dolphin dispute, see Kristin L. Stewart, *Dolphin-Safe Tuna: The Tide is Changing*, 4 ANIMAL L. 111 (1998).

170 Stewart, *supra* note 169, at 113-14.

171 *Id.*

172 *Id.*

173 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24590 (1999).

174 *Id. See also* RONALD M. NOWAK, WALKER'S MAMMALS OF THE WORLD 988 (5th ed. 1991); Mark J. Palmer, *Earth Island Sues U.S. Over Fraudulent "Dolphin-Safe" Label*, EARTH ISLAND INSTITUTE PROJECT REP., Winter 1999-2000, at 6.

175 Palmer, *supra* note 174; *see also* Bumblbee Seafoods, *Methods of Harvesting Tuna* (visited Mar. 5, 2000) <http//bumblebee.com/about/catchingtuna.htm>; Chicken of the Sea, *Product Info* (visited Mar. 5, 2000) <http://www.chickenofthesea.com/gofish.asp>.

176 Palmer, *supra* note 174.

177 *Id.*

178 *Stewart, supra* note 169, at 117-18.

179 *Id.*

labels on tuna products.[180] In 1990, under the Dolphin Protection Consumer Information Act (DPCIA), "dolphin safe" tuna was defined as yellowfin tuna caught by a vessel too small to use nets on dolphins, or tuna caught during a voyage in which no nets were intentionally set on dolphins.[181]

B. The International Dolphin Conservation Program

In June 1992, participating countries reached an agreement, the International Dolphin Conservation Program (IDCP), to better protect dolphins adversely affected by tuna fishing in the ETP.[182] One of the most successful provisions of the IDCP creates a schedule designed to combat increasing dolphin mortality in the ETP.[183]

The IDCP achieved early success. By 1995, the participating countries reduced the annual dolphin mortality to below five-thousand individuals, two years ahead of the IDCP schedule.[184] Due to the success, the United States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela signed the Panama Declaration in October of 1995.[185] The Panama Declaration strengthened the IDCP by providing greater protections for dolphins and enhancing conservation of yellowfin tuna and other resources in the ETP ecosystem.[186] As a result, signatory nations anticipated that the United States would amend the Marine Mammal Protection Act (MMPA) to end the existing embargo and allow importation of yellowfin tuna into the United States from those nations in compliance with the IDCP.[187]

On August 15, 1997, Congress enacted the International Dolphin Conservation Program Act (IDCPA) to recognize and implement the IDCP.[188] The IDCPA primarily amends the MMPA provisions regarding marine mammal mortality in the ETP, and oversees the importation of yellowfin tuna, or products therefrom, from nations engaged in purse seine methods of fishery in the ETP.[189] Conservation groups were split over whether to support or oppose the act.[190] Opponents to the Act argued that the current dolphin safe standard should remain because setting on dolphins will always cause stress on the dolphins

---

180 *Id.*

181 *Id.* at 118 (citing Marine Mammal Protection Act of 1972, 16 U.S.C. § 1385(d)(2) (1994)).

182 50 C.F.R. § 216.3 (1999).

183 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Proposed Rule, 64 Fed. Reg. 31,806 (1999). The IDCP is also referred to as the La Jolla Agreement.

184 *Id.*

185 *Id.*

186 *Id.* at 31,807.

187 *Id.*

188 International Dolphin Conservation Program Act, Pub. L. No. 105-42, 111 Stat. 1122 (1997) (codified as amended in scattered sections of 16 U.S.C.).

189 64 Fed. Reg. at 31,807.

190 Stewart, *supra* note 169 at 126-27.

along with possible injury or death.[191] Supporters, however, argued that a unilateral approach could only go so far, and support of an international agreement remained the only way to influence the actions of other countries, which still actively engage in non-dolphin safe practices.[192]

On July 27, 1998, the Secretary of Commerce certified to Congress the commencement of a study regarding the effects of "encirclement" trapping on dolphins, and that adequate funding was available for at least one year of the study.[193] In May 1998, eight nations agreed to implement a binding version of the IDCP (hereinafter "Agreement on the IDCP"), effective upon ratification, acceptance, or approval by four nations.[194] On February 15, 1999, the United States, Panama, Ecuador, and Mexico became the first four nations to accept the agreement, allowing the Secretary of State to certify to Congress that there was a binding legal instrument establishing the IDCP.[195] Subsequently, the IDCPA went into effect on March 3, 1999.[196]

On January 3, 2000, the National Marine Fisheries Service (NMFS) promulgated an interim final rule implementing provisions of the IDCPA.[197] These regulations would allow the following: 1) yellowfin tuna, otherwise under embargo, to be imported from signatory nations of the IDCP; 2) U.S. vessels to participate in the fishery of the ETP; and 3) changes in the standards of the "dolphin-safe" labels on tuna products.[198] Many marine conservation groups are concerned that NMFS regulations will have detrimental impacts on dolphin populations.[199]

C. The Present Dolphin Safe Standard

The MMPA requires NMFS to "conduct a study of the effect of intentional encirclement (including chase) on dolphins and dolphin stocks incidentally taken in the course of purse seine fishing for yellowfin tuna in the ETP."[200] The future of the standard for labeling

---

191 *Id.* at 126.

192 *Id.* at 127. One of the main concerns is that other methods of tuna fishing, such as setting "on log" or "on school," result in up to 100 times greater bycatch of juvenile tuna and other species. *Id.* at 134.

193 *Id.* at 126.

194 *Id.*

195 *Id.* To date, El Salvador, Nicaragua, and Venezuela have also ratified, accepted, or adhered to the Agreement on the IDCP. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Interim Final Rule, 65 Fed. Reg. 30, 44 (2000).

196 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Proposed Rule, 64 Fed. Reg. 31,806, 31,807 (1999).

197 65 Fed. Reg. at 45.

198 64 Fed. Reg. at 31,806.

199 Earth Island Institute, *supra* note 169.

200 16 U.S.C. § 1380(a) (1994). This study is the same that was certified by the Secretary of Commerce to Congress on July 27, 1998. "Stock" assessment refers to making

tuna dolphin safe depends on the results of this study. The IDCPA directed the Secretary of Commerce to make an initial finding as to whether the encirclement method affects dolphin populations in a significant and adverse manner by March 1999, and a final finding between July 1, 2001 and December 31, 2002.[201]

On May 7, 1999, NMFS announced there was insufficient evidence that chase and encirclement by the tuna purse seine fishery had a significant adverse impact on depleted dolphin stocks in the ETP.[202] Preliminary results from the study indicated that dolphin population levels were greater than expected.[203] Yet, results from a population viability model indicated that actual population growth rates were not reaching expected rates despite decreased mortality in the ETP and a relatively high reproductive potential.[204] Possible causes for the lowered rates of population increase include stress, separation of cows and calves, and under-reported direct kills caused by encirclement.[205] No evidence suggested that changes in ocean environmental conditions constituted a contributing factor.[206] However, there may be flaws in the model due to biased tuna vessel observer data,[207] and from an insufficient time span that did not account for the lag time between birth and sexual maturity.[208]

Based on the NMFS finding, a new, less proactive dolphin-safe labeling standard (no dolphins killed or seriously injured during the sets in which the tuna are caught)[209] replaced the prior labeling standard (no intentional encirclement of dolphins during the entire tuna fishing trip and no dolphin is killed or seriously injured during the set).[210] Under the old, or default standard, any nets used in harvesting tuna—whether a dolphin was killed or not—rendered the product unqualified for the dolphin-safe label.[211] Now, tuna captured using methods that

---

quantitative predictions about the response of the biological population to alternative management choices. MICHAEL BEGON ET AL., ECOLOGY 161 (3d ed. 1996).

201 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Seine Vessels in the Eastern Tropical Pacific Ocean (ETP); Initial Finding, 64 Fed. Reg. 24,590, 24,591 (1999).

202 *Id.* at 24,592. Comments on the initial finding will be considered throughout the remainder of the three year process. Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Interim Final Rule, 65 Fed. Reg. 30, 45 (2000).

203 64 Fed. Reg. at 24,591. Population estimates for northeastern offshore spotted dolphins (*S.* spp.) 1,011,104; eastern spinner dolphins (*S.* spp.) 1,157,746; coastal spotted dolphins (*S.* spp.), 108,289. *Id.*

204 *Id.*

205 *Id.*

206 *Id.*

207 *Id.*

208 *Id.*

209 16 U.S.C. § 1385(h)(1) (1994).

210 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Proposed Rule, 64 Fed. Reg. 31806, 31809 (1999).

211 *Id. See also* Stewart, *supra* note 169, at 118 (citing 16 U.S.C. § 1385(d)(2) (1994)).

chase, harass, net, injure, or even kill dolphins qualify for the dolphin-safe label, so long as an on-board observer reports that no dolphins were outright killed or seriously injured.[212]

Between July 1, 2001 and December 31, 2002, NMFS will publish their final findings on whether intentional encirclement of dolphins with purse seine nets creates a significant adverse impact on any depleted dolphin stock in the ETP.[213] If the Secretary's final finding similarly concludes no significant adverse impact, then the definition of "dolphin-safe" under section (h)(1) of the DPCIA will apply.[214] Alternatively, if the Secretary finds a significant adverse impact, the definition of "dolphin-safe" would revert to the default standard.[215]

D. Court Challenge to the Secretary's Findings

On August 18, 1999, a coalition of environmental groups brought an action in Federal District Court, challenging the Secretary's findings.[216] The groups argued that the finding was arbitrary and capricious, in violation of the Administrative Procedures Act.[217] On April 11, 2000, the judge ruled in favor of the groups, overturning the Secretary's finding.[218] The court stated that:

> [T]he Secretary's actions can not be reconciled with Congress' intent that the initial finding—and any resulting label change—would be informed by preliminary data from the mandated stress research projects. Indeed it would flout the statutory scheme to permit the Secretary to fail to conduct mandated research, and then invoke a lack of evidence as a justification for removing a form of protection for a depleted species, particularly given that the evidence presently available to the Secretary is all suggestive of a significant adverse impact.[219]

While this means that the interim rule promulgated on January 3, 2000 will not go into effect, NMFS still must make findings regarding

---

212 16 U.S.C. § 1385(h)(1) (1994). The IDCPA does not restrict ETP purse seine harvested tuna from being imported if caught by a nation that is in compliance with the Agreement on the IDCP, a member of the Inter-American Tropical Tuna Commission meeting its financial obligations, and is not exceeding total dolphin mortality limits. 65 Fed. Reg. 30, 36 (2000). *See also* Earth Island Institute, *"Dolphin Safe" Tuna Label Gutted by U.S. Commerce Secretary* (visited Mar. 5, 2000) <http://www.earthisland.org/news/news_immp4.html>.

213 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Interim Final Rule, 65 Fed. Reg. 30, 45 (2000).

214 Taking of Marine Mammals Incidental to Commercial Fishing Operations; Tuna Purse Sein Vessels in the Eastern Tropical Pacific Ocean (ETP); Proposed Rule, 64 Fed. Reg. 31,806, 31,809 (1999).

215 *Id.*

216 Palmer, *supra* note 174.

217 *Id.*

218 Corrected Memorandum and Order at 1-2, Brower v. Daley, No. C99-3892 TEH (N.D. Cal. Apr. 11, 2000).

219 *Id.* at 29.

the impact that sets have on dolphins, and a similar finding is not precluded in the future.

VI. The Environmental Protection Agency's High Production Volume Chemical Testing Program

A. *Introduction and Overview*

The Environmental Protection Agency (EPA) recently developed the High Production Volume (HPV) Chemical Program (hereinafter "HPV Program") in consultation with the Environmental Defense Fund, the Chemical Manufacturer's Association, and the American Petroleum Institute.[220] The HPV Program is a part of the Chemical Right-to-Know Initiative, which was announced by Vice President Al Gore and EPA Administrator Carol Browner on Earth Day, April 21, 1998.[221] The initiative was created in response to reports[222] concluding that basic information regarding toxicity of a large number of HPV chemicals is lacking, if not altogether absent.[223] HPV chemicals are those chemicals imported into or manufactured in the United States at the rate of one million pounds per year or more; these chemicals are primarily used in industrial settings.[224] While EPA acknowledged that these reports were by no means an exhaustive review of all existing scientific evidence on the chemicals in question,[225] they nonetheless

---

220 High Production Volume Chemical Testing Program, *Hearings Before the Subcomm. on Energy and Env of the House Science Comm.*, 106th Cong. (June 17, 1999) (statement of Dr. William Sanders, Director, Office of Pollution Prevention and Toxics, U.S. EPA) [hereinafter Sanders' Testimony].

221 Export of Toxic Chemicals; Agency Information Collection Activities, 64 Fed. Reg. 2486, 2487 (1999).

222 The studies were conducted independently by the Environmental Defense Fund, EPA, and the Chemical Manufacturers Association. Sanders' Testimony, *supra* note 220.

223 Environmental Protection Agency, Chemical Hazard Data Availability Study (1998). The international standard developed by the Organization for Economic Cooperation and Development requires six necessary tests for a basic understanding of toxicity of a particular chemical. *Id.* The Screening Information Data Set (SIDS) includes testing for six "endpoints:" 1) acute toxicity (a measure of toxicity from an acute or one-time exposure), 2) chronic toxicity (a measure of toxicity from long-term exposure), 3) developmental and reproductive toxicity (a measure of the chemical's ability to interfere with reproduction and fetal development), 4) mutagenicity (a measure of the chemical's potential to cause cancer), 5) eco-toxicity (effects to the environment in event of a release of the chemical into water), and 6) environmental fate (time required for degradation of the chemical, and distribution of the chemical in the environment). *Id.* The U.S. produces or imports close to 3,000 HPV chemicals. *Id.* Of these, 93% are missing one or more endpoints and 43% are missing all endpoints. *Id.* Complete SIDSs exist for only 7% (210) of the 3,000 HPV chemicals. *Id.* These results are based on information reported to EPA under the Toxic Substances Control Act. *Id.* Not all available information may have been reported to EPA, however, so these results may underestimate SIDS actually developed for HPV chemicals. Sanders' Testimony, *supra* note 220.

224 Humane Society of the United States (HSUS), *The EPA's High Production Volume Chemicals Testing Program: Question & Answers* (visited Apr. 4, 2000) <http://www.hsus.org/programs/research/faq_invitro.html>.

225 Sanders' Testimony, *supra* note 220.

highlighted the serious need for a comprehensive toxicity testing program.

The Toxic Substances Control Act (TSCA)[226] provides the legislative basis for EPA to establish the testing requirements. The Emergency Planning and Community Right-to-Know Act (EPCRA)[227] compliments TSCA's provisions, and provides the chemical reporting authorities for the HPV Program.[228] TSCA's policy statement provides:

> It is the policy of the United States that adequate data should be developed with respect to the effect of chemical substances and mixtures on health and the environment and that the development of such data should be the responsibility of those who manufacture and those who process such chemical substances and mixtures.[229]

The goal of the HPV Program is to close the information gap—to ensure that a baseline set of environmental and health effects data on 2800 HPV chemicals is made available to the public, chiefly via the Internet.[230] Relying on partnerships with industrial companies and rule-making authority,[231] the Right-to-Know Initiative takes a three-tiered approach to implementation: 1) baseline toxicity testing for widely used commercial chemicals (the HPV Program), 2) additional health effects testing for chemicals to which children are disproportionately exposed, and 3) information gathering for Toxic Release Inventory (TRI) chemicals, commonly known as persistent, bioaccumulative, toxins.[232]

The information collected under TSCA's Inventory Update Rule provided the identification of HPV chemicals targeted for testing.[233] Organic chemicals that are manufactured in, or imported into, the United States in amounts equal or exceeding ten-thousand pounds per year must be reported every four years under the update rule.[234] EPA selected the 1990 Inventory Update Rule list as a starting point for the

---

226 15 U.S.C. §§ 2601-2692 (1994 & Supp. IV 1998).

227 Emergency Planing and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11,001-11,050 (1994).

228 *Id.* § 11,023.

229 15 U.S.C. § 2601(b)(1) (1994).

230 EPA Statement of Regulatory Priorities, 63 Fed. Reg. 31,340, 31,353 (1998); Export of Toxic Chemicals; Agency Collection Activities, 64 Fed. Reg. 2486, 2487 (1999); EPA, *Fact Sheet on Animal Welfare* (last modified June 1999) <http://www.epa.gov/chemrtk/anfacs.pdf>; EPA, *High Production Volume Chemicals Frequently Asked Questions* (visited Apr. 7, 2000) <http://www.epa.gov/chemrtk/hpvq&a.pdf>. For extensive program information, see EPA, *Chemical Right to Know Initiative* (visited Apr. 4, 2000) <http://www.epa.gov/chemrtk/index.htm>.

231 EPA Statement of Regulatory Priorities, 63 Fed. Reg. 31,340, 31,353 (1998).

232 *Id.*

233 EPA, *ChemRTK HPV Challenge Program Chemical List* (visited Apr. 4, 2000) <http://www.epa.gov/opptintr/chemrtk//hpvchmlt.htm>.

234 *Id.*

program.[235] As subsequent reporting years identify additional chemicals, editions to the HPV Program list of chemicals will be made.[236] EPA anticipates that testing new additions will become routine.[237]

Focusing first on gathering baseline data, the HPV Program requires that chemical and petroleum companies volunteer (through December 1, 1999) to sponsor testing of chemicals they produce.[238] Those HPV chemicals not sponsored will be subject to mandatory testing under EPA's rulemaking authority under section 4 of TSCA.[239] As of November 1999, approximately 1100 of the 2800 HPV chemicals have been sponsored.[240] EPA has proposed that the initial test rule will address four-hundred unsponsored chemicals, with further rules addressing the remaining unsponsored HPV chemicals.[241]

The first step for a sponsor is to gather existing data and assess its quality as against the Screening Information Data Set (SIDS).[242] Sponsors first determine which information gaps exist, and then develop test plans to fill those gaps.[243] Sponsors have until the beginning of their "start year" (most in 2001, 2002, or 2003) to gather and review existing data. Test plans, due at the beginning of the start year, will be available for public comment before being executed.[244] The deadline for the first-level of screening is 2004, following which, results are to be made publicly available.[245] The chemical industry estimates project a cost for the HPV Program at approximately $750 million dollars.[246]

---

235 *Id.* Note that additions resulting from the 1994 Inventory Update Rule list have not been included in the HPV Program at this time. Export of Toxic Chemicals; Agency Collection Activities, 64 Fed. Reg. 2486, 2487 (1999).

236 *ChemRTK HPV Challenge Program Chemical List*, *supra* note 233.

237 *Id.*

238 Glenn Hess, *CMA Members Volunteer for Early Testing of HPV Chemicals*, 225 CHEMICAL MARKET REPORTER 72, 73 (1999); Environmental Defense Fund, *Statement of Environmental Defense on the High Production Volume (HPV) Chemical Challenge Initiative* (visited Apr. 4, 2000) <http://www.edf.org/programs/Health/hpv_initiative.html>.

239 Export of Toxic Chemicals; Agency Collection Activities, 64 Fed. Reg. 2486, 2487 (1999). Additionally, those HPV chemicals requiring mandatory testing will also be subject to TSCA § 12(b) export notification requirements. *Id.*

240 EPA Toxic Substances Control Act; Proposed Rule Stage, 64 Fed. Reg. 65,105, 65,110 (1999).

241 *Id.*

242 Sanders' Testimony, *supra* note 220.

243 *Id.*

244 Environmental Defense Fund, *supra* note 238. Test plans will be posted on the Internet at <http://www.hpvchallenge.com>. *Id.* An industry-funded tracking system, developed with input from EPA and EDF, will allow the public to track the progress of the testing program. Hess, *supra* note 238, at 73. The tracking system will be maintained by a third party, and will be used by all companies and testing consortia that volunteer. *Id.*

245 Environmental Defense Fund, *supra* note 238.

246 Daily Env't Rpt. (BNA) 104 DEN AA-1 (Oct. 18, 1999).

B. *Animal Welfare Issues*

Following the public announcements regarding the HPV Program, animal welfare groups expressed serious opposition to the program.[247] People for the Ethical Treatment of Animals (PETA) estimated that as many as 1.3 million animals would be killed in pursuit of the program.[248] Organizations opposing the program presented several arguments. First, all information that has been developed for each chemical has not necessarily been collected.[249] The groups argued that study information not previously released would remain hidden due to concerns of enforcement liability;[250] considering that an amnesty program for companies to release such data in 1990 resulted in over 10,000 submissions, it is very likely that some additional information may still remain unreleased.[251] Additionally, publicly available information in a variety of databases can provide much of the information missing from EPA's hasty compilation.[252] This would operate to create a disincentive for companies to release previously withheld data, forcing a repeat of the same tests. Second, animal-based testing is often inconclusive, with results simply calling for more testing or actually clearing a chemical already known to be toxic.[253] Finally, other non-animal based tests should be used where available, and developed when not otherwise known.[254] The organizations also complained that they were not involved during the formation of the program, no time was made avail-

---

247 Seventeen groups were represented in the lobbying campaign, including the American Anti-Vivisection Society, Animal Legal Defense Fund, Doris Day Animal League, Earth Island Institute, Fund for Animals, Medical Research Modernization Committee, Humane Society of the United States, In Defense of Animals, People for the Ethical Treatment of Animals, and Physicians Committee for Responsible Medicine. *See* High Production Volume Chemical Testing Program *Hearings Before the Subcomm. on Energy and Environment of the House Science Comm.*, 106th Cong. (June 17, 1999) (statement of Jessica Sandler, M.H.S., Industrial Hygienist and Consultant to Doris Day Animal League and People for the Ethical Treatment of Animals) [hereinafter Sandlers' Testimony].

248 PETA, *Clinton Administration Spares 800,000 Animals Slated for Chemical Tests* (visited Oct. 15, 1999) <http://www.peta-online.org/pn/1099hpvvict.html>.

249 Sandlers' Testimony, *supra* note 247.

250 *Id.*

251 *Id.* The 1991 amnesty program resulted in the release of over 10,000 submissions of previously withheld data. *Id.*

252 High Production Volume Chemical Testing Program, *Hearings Before the Subcomm. on Energy and Environment of the House Science Comm.*, 106th Cong. (June 17, 1999) (statement of Neal Barnard, M.D., President, Physicians Committee for Responsible Medicine).

253 *Id.*

254 *Id.* Animal rights groups argue that development and validation of alternative methods have made significant progress, but the final barrier to use by industry continues to be regulatory acceptance. *Hearings Before the Subcomm. on Energy and Environment of the House Science Comm.*, 106th Cong. (June 17, 1999) (written response to post-hearing questions of Jessica Sandler, M.H.S., Industrial Hygienist and Consultant to Doris Day Animal League and People for the Ethical Treatment of Animals) (on file with *Animal Law*).

able for public comment, and EPA did not receive input from Congress or consult with other Federal agencies before beginning the program.[255]

EPA responded in February 1999, issuing guidance to limit the number of animals that would be used during the testing. The agency stated that it supported the use of a combined protocol, which combines testing for repeat dose, developmental, and reproductive toxicity.[256] EPA also recommended replacing the LD50 test with the "Up-and-Down Procedure" to evaluate acute toxicity.[257] Regarding genetic toxicity, EPA decided to allow the use of either animal or non-animal studies.[258] EPA estimated that as a result of following this alternate program, the number of animals used for a complete testing program for each chemical would be reduced sixty-eight to eighty percent over the standard OECD SIDS program.[259] Finally, EPA expressed its continued commitment to examining alternative methods to reduce the numbers of animals used in testing, reducing the pain and suffering of the test animals, and to replacing animal-based testing procedures with in vitro (non-animal) testing.[260]

Animal welfare organizations, however, were unsatisfied with EPA's response. Representatives from EPA and the White House Council on Environmental Quality met with animal welfare organization officials on March 11, 1999, regarding their continuing concerns.[261] The organizations presented eight main issues, but did not receive a response in writing.[262] Subsequently, the groups initiated a lobbying campaign, with advertisements in major newspapers, criticism from several celebrities, a television commercial, and a letter writing campaign.[263] PETA also had a protestor dressed as a giant rabbit with visible injuries from toxicological testing follow Al Gore to all of his campaign stops.[264] The bunny wore a placard that read:

---

255 *See* HSUS, *supra* note 224. The voluntary nature of the HPV program allowed EPA to create and carry out the program without publishing any Federal Register notices, and no notices are expected until the first test rule ordering testing of unsponsored chemicals. Telephone Interview with Jessica Sandler, Industrial Hygienist and Consultant to Doris Day Animal League and People for the Ethical Treatment of Animals (May 2, 2000).

256 *See* Sanders' Testimony, *supra* note 220.

257 *Id.* The Up-and-Down procedure uses approximately 8 animals per test, as opposed to 20 used in the LD50 test. *Id.*

258 *Id.*

259 *Id.*

260 EPA, *Fact Sheet on Animal Welfare, supra* note 233. There was no concrete action on this point, however, and PETA argues that EPA has never activly pursued this development. Telephone Interview with Jessica Sandler, *supra* note 255.

261 *Chemical Safety: Animal Welfare Advocates Angered by Lack of EPA Response to Concerns*, Daily Env't Rpt. (BNA) 104 DEN A-3 (June 1, 1999).

262 *Id.*

263 *Id.*; PETA, *supra* note 248.

264 *Chemical Safety*, *supra* note 261.

"Gore: Burn Bunnies, Lose Votes."[265] Additional protestors accompanied the rabbit and passed out informational brochures.[266]

Finally, in the fall of 1999, White House officials met with representatives from the animal welfare organizations, EPA, Environmental Defense Fund, and several chemical and petroleum manufacturing groups. After two months of negotiations, the participants announced a final agreement on October 15, 1999. The day before, EPA sent out a letter to nine-hundred top chemical companies describing the changes to the program.[267] The letter established a general principle that "animal experiments should not be performed if another validated method—not involving the use of animals—is reasonably and practically available for use in the HPV Challenge program."[268] The program participants were asked to observe several principles as the program continued, including: 1) use of a thoughtful, qualitative approach to the adequacy of existing data as opposed to a rote, checklist approach; 2) maximizing the use of existing scientific data (for which EPA has expanded the list of recognized databases to include international databases as well as allowing an additional amnesty period for release of previously withheld data); 3) canceling terrestrial toxicity testing and not developing any additional dermal toxicity testing; 4) maximizing the use of in vitro genetic toxicity testing, unless known chemical properties preclude its use; and 5) deferment for individual chemicals that require testing on animals until November 2001, with deferment of testing of closed system intermediaries until 2003 to allow for development of non-animal test methods.[269] Additionally, the National Institute of Environmental Health Sciences and the National Toxicology Program will commit $1.5 million in fiscal year 2000, and $3 million in fiscal year 2001 towards development of non-animal based testing standards.[270] EPA will also contribute $250,000 in fiscal year 2000, and seek the same amount for funding in fiscal year 2001.[271]

The landmark final agreement represents a significant victory for the coalition of animal welfare groups. The campaign resulted in a significant decrease in the number of animals to be used during the program—PETA estimated that 800,000 lives were saved.[272] Additionally, serious commitment towards the development of non-animal based testing standards will allow progression towards a fu-

---

265 *Id.*

266 *Id.*

267 Letter from Susan Wayland, Deputy Assistant Administrator of the Office of Prevention, Pesticides, and Toxic Substances (Oct. 14, 1999), *available at* EPA, Letters to Manufacturers/Importers: Chemical Right-to-Know Initiative (last modified Oct. 15, 1999) <http://www.epa.gov/opptintr/chemrtk/ceoltr2.htm>.

268 *Id.*

269 *Id.*

270 *Id.*

271 *Id.*

272 PETA, *supra* note 248.

ture free of animal-based laboratory testing. Finally, the recognition of animal welfare groups as significant stakeholders in the design of Federal testing programs should work to improve their access and influence in future planning of toxicity testing programs.[273]

[273] As of May 1, 2000, EPA has yet to issue a proposed or final rule putting the October 14, 1999 agreement into effect. In the meantime, EPA rejected a citizen petition from PETA under section 21 of TSCA, requesting a mandatory test rule. Animal welfare organizations also point out that the HPV program is only the beginning; under EPA's proposed Endocrine Disrupter Testing Program, as many as 150 million animals may be killed in a program whose entire basis is scientifically flawed. Telephone Interview with Jessica Sandler, *supra* note 255.