

## ANIMAL WELFARE ACT: WELFARE STANDARDS

*Cathy Liss discusses the changes to the standards after the 1985 Improved Standards for Laboratory Animals amendment to the AWA and the emphasis of performance standards that were implemented. Kimberly Ockene discusses the AWA regulations for commercial dog breeders and a petition for rulemaking that seeks to enhance these regulations. Naomi A. Rose and Georgia Hancock Snusz discuss captive marine mammals and their coverage under the AWA. Lastly, Anna Frostic speaks about public handling of exotic animals held at licensed exhibitors, which are regulated under the Act.*

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### I. THE 1985 IMPROVED STANDARDS FOR LABORATORY ANIMALS AMENDMENT TO THE ANIMAL WELFARE ACT: FROM ENGINEERING TO PERFORMANCE-BASED STANDARDS

By  
Cathy Liss\*

I'll be speaking about the shift from engineering to performance-based standards following passage of the 1985 Improved Standards for Laboratory Animals amendment to the Animal Welfare Act (AWA). I'll also touch on the continuing threat from the "regulatory reform" movement.

For those who aren't familiar with the Animal Welfare Institute (AWI), background on our work can be found at [www.awionline.org](http://www.awionline.org). I call particular attention to our efforts on behalf of animals in research. In the 1960s, the Institute sought adoption of the original AWA and worked towards adoption of various broadening and strengthening amendments thereafter. My involvement with the organization began

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\* © Cathy Liss is the President of the Animal Welfare Institute (AWI). She has been with AWI since she started as an undergraduate intern. She has served as Senior Research Associate, Executive Director, and is now the President.

as the work to pass a law intended to better protect animals in research was under way, in the early 1980s.

In 1954, AWI published a book, *Comfortable Quarters for Laboratory Animals*,<sup>1</sup> and last year published the 10th edition. We make it available free of charge to laboratory personnel to assist and inspire them in making improvements in the care and handling of animals in research. What is perhaps somewhat unique about our organization is that we make a point of reaching out to individuals within research and seek to provide them with tools to help improve the welfare of animals in the laboratories.

As you know, the AWA is the chief federal law for the protection of animals in research. AWI seeks to ensure the best possible implementation of the law. Some of the key tenets include frequent, routine unannounced inspections, penalties commensurate with the offenses, and transparency of the United States Department of Agriculture's (USDA) oversight and enforcement. Certainly, there is room for improvement in each of these areas, all of which are vitally important.

I began work for AWI in the early 1980s and this is a time when small, barren caging of animals was commonplace. Social species, including dogs, primates, cats, and rabbits, were typically confined to single cages. Enrichment was nearly nonexistent—viewed by labs as both costly and a source of extraneous variables. Laboratories seeking to maximize use of space commonly housed animals in tiered cages. In addition to the space constraints for the animals, this made observation of and attention to the animals in the dark lower-tier cages much harder.

There were many issues that cried out to be addressed via legislation—such that in 1981, there were seven different federal bills on regulation of animal experimentation and use of alternatives pending in Congress.<sup>2</sup> That same year, these bills were considered during a two-day-long hearing. Four years, three hearings, and numerous bill iterations later, Senator Robert Dole and Representative George Brown reintroduced the Improved Standards for Laboratory Animals amendment.<sup>3</sup> Each step of the way, the research industry—led by the Na-

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<sup>1</sup> ANIMAL WELFARE INST., *COMFORTABLE QUARTERS FOR LABORATORY ANIMALS*, (Cathy Liss et al. eds., 10th ed. 2015), [https://awionline.org/sites/default/files/publication/digital\\_download/-AWI-ComfortableQuarters-2015.pdf](https://awionline.org/sites/default/files/publication/digital_download/-AWI-ComfortableQuarters-2015.pdf) [<https://perma.cc/YZ4A-MA32>] (accessed Jan. 25, 2019).

<sup>2</sup> See H.R. 4406, 97th Cong. (1981) (introducing a bill to amend the AWA); H.R. 930, 97th Cong. (1981) (changing the Protection of Animals in Research Act); H.R. 6928, 97th Cong. (1981) (proposing the Humane Care Development of Substitutes for Animals in Research Act); H.R. 6245, 97th Cong. (1981) (informing about the Humane Care Development of Substitutes for Animals in Research Act); H.R. 556, 97th Cong. (1981) (informing about the Research Modernization Act); H.R. 220, 97th Cong. (1981) (informing about the Humane Methods of Research Act); H.R. 2110, 97th Cong. (1981) (informing about the Humane Methods of Research Act).

<sup>3</sup> On June 4, 1985 Senator Dole and Representative Brown introduced the Improved Standards for Laboratory Animals amendment to the AWA in their respective

tional Association for Biomedical Research (NABR)<sup>4</sup>—sought to kill the legislation or, barring that, at least weaken it to the best of their ability. Nonetheless, on December 23, 1985, the bill was signed into law.<sup>5</sup>

The law requires investigators to consider alternatives to any potentially painful procedure. It establishes the Animal Welfare Information Center to provide data on alternatives and also training for laboratory personnel. It mandates Institutional Animal Care and Use Committees (IACUC), which must include a veterinarian and a nonaffiliated member to represent the community concerns for the welfare of the animal subjects. (Often, that description of their role is left off and they are merely referred to, generally, as an unaffiliated member.) Of course, it added the requirement for exercise for dogs and a physical environment to promote psychological well-being of primates.

The requirement for primates was inserted at the behest of Senator John Melcher, a veterinarian, after having seen laboratory chimpanzee cages. He characterized them as, “[e]xtremely efficient, extremely expensive, and extremely cruel.”<sup>6</sup> Although we prevailed in getting the bill passed, much of the battle still lay ahead. Having failed to prevent its passage, the next game by the enemies of the act was to delay promulgation of regulations as long as they could, and they succeeded in holding up the process for years.<sup>7</sup>

But final regulations were inevitable. So, the battle honed in on the content of those regulations. Initially, the USDA proposed regulations referred to as “engineering standards.”<sup>8</sup> That is, they describe requirements that need to be met in order to achieve a specific outcome. These were attacked by the biomedical research industry as being too rigid, costly, and burdensome. As an alternative, the industry rallied behind proposed “performance standards”<sup>9</sup> whereby, instead of mandating what must be done, the outcome being sought is defined, and the means to get there is left up to each regulated entity.

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houses of Congress. S. 1233, 99th Cong., 1st Sess., 131 CONG. REC. 7394 (1985); H.R. 2653, 99th Cong., 1st Sess., 131 CONG. REC. 3808 (1985).

<sup>4</sup> NABR proposed a list of sixteen changes in the legislation to Senator Dole and once these were addressed, the group came back with a new list of thirty-two proposed changes. Ultimately the legislation was adopted over the objections of the organization. NABR was created by Charles River, Inc., a company with a vested interest in maximizing sales of animals for experimentation. *The Animal Welfare Act: Lifeline for Some Lab Animals Turns 50*, AWI Q., Fall 2016 at 6, 8.

<sup>5</sup> The Improved Standards for Laboratory Animals amendments were added to and adopted into law as part of the Food Security Act of 1985. Pub. L. No. 99-198, 99 Stat. 1645 (codified as amended at 7 U.S.C. §§2131–57 (Supp. III 1985)).

<sup>6</sup> Christine Stevens, *Laboratory Animal Welfare*, in ANIMALS AND THEIR LEGAL RIGHTS 81, 83 (Animal Welfare Institute ed., 1990).

<sup>7</sup> Gwen Rubinstein, *Creature Discomforts*, ANIMAL WELFARE INST. Q., Summer 1990 at 5, 6.

<sup>8</sup> Animal Welfare; Standards, 54 Fed. Reg. 10,897 (Mar. 15, 1989).

<sup>9</sup> Animal Welfare; Standards, 55 Fed. Reg. 33,448 (Aug. 15, 1990).

Reagan-era executive orders came in handy for the industry, such as Executive Order 12291, which required agencies to prepare a regulatory impact analysis (RIA) for each “major rule,” setting forth a description of the potential costs and benefits of the proposed rule, a determination of its potential net benefits, and a description of alternative approaches that might substantially achieve regulatory goals at lower cost.<sup>10</sup> Further, the industry embraced the August 11, 1983 *Report of the Presidential Task Force on Regulatory Relief* which states in part, “[h]ealth, safety and environmental regulations should address ends rather than means.”<sup>11</sup> These were effective weapons in their attack on engineering standards—prompting claims of undue and costly regulatory burden and the need for a cheaper alternative. Meanwhile, the research industry offered inflated cost estimates for implementing engineering standards and exaggerated the changes that would be required as a means to ensure that the 1989 proposed regulations would be considered a “major rule.”

All the while, we were seeking to facilitate positive change at minimal cost. One idea might be to permit two primates who were singly housed to be together by opening up the cage wall between them thereby allowing them to at least have each other’s company without necessarily having to mandate new cages. Clearly, it would be beneficial to do more, but the hope was to at long last provide social housing for social species.

Ultimately, industry prevailed. The final regulations adopted by the USDA, nearly six years after the law was passed, rely heavily on performance-based standards in fulfilling the new mandates for dogs and primates.<sup>12</sup> For instance, dogs kept individually in cages require exercise. But the regulations for exercise of dogs allowed a dealer, exhibitor, or a research facility to develop their own plan regarding the frequency, method, and duration of the opportunity for dogs to exercise, as determined by the attending veterinarian and the research facility’s IACUC, which must be consulted and give approval.<sup>13</sup>

By contrast, what we would have liked to see was an engineering standard that mandated daily removal from cages and perhaps a minimum amount of time for the dogs to be in an exercise room. Meanwhile, the cages could be cleaned and dried while the dogs were out. Again, there need not be tremendous additional cost.

For the psychological well-being of primates under the final regulations, there was a need to develop, document, and follow a plan for environmental enrichment to promote psychological well-being. The plan must be in accordance with currently accepted professional standards, as cited in appropriate professional journals, reference guides,

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<sup>10</sup> ORG. FOR ECON. CO-OPERATION & DEV., PUBLIC MANAGEMENT OCCASIONAL PAPERS: THE DESIGN AND USE OF REGULATORY CHECKLIST IN OECD COUNTRIES 23 (1993).

<sup>11</sup> *Id.* at 21.

<sup>12</sup> Animal Welfare; Standards, 56 Fed. Reg. 6426–6505 (Feb. 15, 1991).

<sup>13</sup> *Id.* at 6446.

and as directed by the attending veterinarian. The plan must include specific provisions to address the social needs of primates. Critically, exceptions are allowed.

In 1996, five years after the regulations were finalized and eleven years after the law was passed, the USDA inspectors were surveyed to see how it was going.<sup>14</sup> Not surprisingly, the USDA found that there was much confusion about what the regulated industries should be putting into their plans. What should they really be doing? What do the performance standards mean? The USDA inspectors were confused too. The inspectors needed to review the plans, yet they had no idea how to determine whether the plans were appropriate or not.

In 1999, in response to this concern, the USDA published in the *Federal Register*, a draft primate policy which included a report prepared by a team from the USDA.<sup>15</sup> My hat's off to the individuals who sought to provide greater understanding to the vague performance standards. The *Final Report on Environment Enhancement to Promote the Psychological Well-Being of Nonhuman Primates* was described as the current accepted professional standard for promoting psychological well-being of primates.<sup>16</sup> The background work was extensive and included a review of primate literature, professional journals, and reference guides, as well as discussions with veterinarians, primatologists, and USDA inspectors.

The policy offered a detailed framework on what should be in primate plans. In essence, what the institutions were failing to incorporate in their plans, the USDA team laid out for them. However, the policy was never finalized because the industry wanted to keep requirements vague to make it difficult to bring enforcement action. Performance standards have allowed the industry to self-regulate, with each facility doing its own thing. Many have maintained the status quo for years—and even now there are primates that are lacking the species appropriate environment they are entitled to under the law. It was in keeping with the industry's resistance to true reform that they ensured that the policy, with its more detailed requirements, was scuttled.

Nonetheless, the primate plans required under the final regulations are supposed to be in accordance with currently accepted professional standards.<sup>17</sup> But whose standards are those? The USDA's? The

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<sup>14</sup> USDA, APHIS, ANIMAL CARE SURVEY: USDA EMPLOYEE OPINIONS ON THE EFFECTIVENESS OF PERFORMANCE-BASED STANDARDS FOR ANIMAL CARE FACILITIES (1996).

<sup>15</sup> Animal Welfare; Draft Policy on Environment Enhancement for Nonhuman Primates, 64 Fed. Reg. 38,147 (July 15, 1990) (to be codified at 9 C.F.R. pt. 3).

<sup>16</sup> USDA, APHIS, FINAL REPORT ON ENVIRONMENT ENHANCEMENT TO PROMOTE THE PSYCHOLOGICAL WELL-BEING OF NONHUMAN PRIMATES (1999), [https://www.nal.usda.gov/sites/default/files/-environmentalenrichmentnhp\\_0.pdf](https://www.nal.usda.gov/sites/default/files/-environmentalenrichmentnhp_0.pdf) [https://perma.cc/4ETY-3QZX] (accessed Jan. 25, 2019).

<sup>17</sup> Animal Welfare; Draft Policy on Environmental Enhancement for Nonhuman Primates, 64 Fed. Reg. at 38,147.

institution's? What profession? There are regional, institutional, and individual differences. How does cost affect the standard?

If the industry stands by the individual plans they have prepared—and if the plans demonstrated a sincere and thorough approach to promoting psychological well-being—they wouldn't have to be kept hidden from the public. But these plans are merely held at the facility, not sent to the USDA; its inspectors must read and review them while on the premises only. This leaves the public and the humane community in the dark.

Accountability is impossible without transparency. How can advocates hold research facilities accountable for what they do or don't do for primates, if we don't know? How can we be certain that the USDA is doing the job it should of ensuring that the primate plans are thorough and appropriate?

It can get worse. Donald Trump will be sworn in as the 45th president of the United States on January 20th. Here are some agenda items from his website: He speaks of eliminating various regulations, issuing a moratorium on new regulations, decreasing the size of government. He also wants agencies to create a list of the regulations the government imposes on American business and rank them from most critical to health and safety to least critical so he can consider repeal of those that aren't critical.<sup>18</sup> Even if the AWA is not in his sights now, be assured that the regulated industries will seek to bring it to the attention of his administration.<sup>19</sup> For those who feel a sense of déjà vu, his plans are very much reminiscent of the Reagan era of deregulation that led to the weak performance-based standards. The Reagan administration also called for a zero-dollar budget for enforcement of the AWA in the mid-1980s.<sup>20</sup> So steel yourselves for what lies ahead.

I'd like to take a moment to respond quickly to the Association of Primate Veterinarians, who conducted a survey in 2014 on primate housing.<sup>21</sup> Taylor Bennett of the National Association for Biomedical Research touts the progress that's been made in providing social housing under performance standards. First, his data lumps breeding pri-

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<sup>18</sup> Press Release, Donald J. Trump for President, Unleashing America's Prosperity to Create Jobs and Increase Wages (Aug. 8, 2018) <https://www.donaldjtrump.com/press-releases/unleashing-american-prosperity-to-create-jobs-and-increase-wages> (accessed Nov. 13, 2018) (site only available in archive).

<sup>19</sup> In February 2017, the USDA's APHIS removed all previously posted AWA inspection reports, citing "privacy" reasons. In August 2017, some of the information was added back to the website, heavily redacted. Karin Brulliard, *USDA Abruptly Purges Animal Welfare Information From Its Website*, WASH. POST (Feb. 3, 2017), [https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?noredirect=on&utm\\_term=.de6af0bc36a5](https://www.washingtonpost.com/news/animalia/wp/2017/02/03/the-usda-abruptly-removes-animal-welfare-information-from-its-website/?noredirect=on&utm_term=.de6af0bc36a5) [<https://perma.cc/EFG4-YEVB>] (accessed Jan. 25, 2019).

<sup>20</sup> Animal Welfare Inst., *A Return to the Bad Old Days*, ANIMAL WELFARE INST. Q., Winter 1985 at 1; Society for Animal Protective Legislation, Alert from the Society for Animal Protective Legislation (Feb. 21, 1986).

<sup>21</sup> Taylor Bennett, *Association of Primate Veterinarians 2014 Nonhuman Primate Housing Survey*, 55 J. OF THE AM. ASS'N OF LABORATORY ANIMAL SCI. 172, 172 (2016).

mates in with those primates on active research protocols.<sup>22</sup> Well, of course, breeding animals are socially housed. That makes the results appear much better than the situation really is. Why can't we focus on the status of those animals actively in research alone? Nonetheless, according to this data (and twenty-nine years after the Improved Standards for Laboratory Animals amendment), there were nearly 14,000 primates in single housing.<sup>23</sup> Most of these are identified as having some contact. But "contact" typically means they have auditory, visual, and/or olfactory contact only.<sup>24</sup>

I want to speak about friendly contact with humans, which can provide some environmental enrichment. Use of positive reinforcement training of primates builds a trust relationship between the human and nonhuman primates and reduces handling and procedural stress. As the USDA is assessing plans, I hope they're requiring positive reinforcement training as an alternative—a critical one—in place of involuntary restraint of animals during common handling procedures. Without a mandate, the transition from stress and fear-inducing restraint to positive, trusting contact isn't going to happen or will occur at far too slow a pace.

Animals are being denied protection under the law because the standards in the act are woefully out of date. Where do we go from here? I hope that we can take the knowledge that we have amassed on the needs of animals and set meaningful, clear, and enforceable requirements that will not take decades to implement; this is my hope for the animals.

Finally, very briefly, I just wanted to take a moment to recognize a very special person who died last month: Tim Allen. Tim worked as the technical information specialist at the USDA Animal Welfare Information Center, created under the Improved Standards for Laboratory Animals amendment. Tim had been with AWIC for twenty-four years, and during his tenure, developed and delivered the center's training program for compliance with the AWA by research facilities. He aided countless people in their search for alternatives to potentially painful procedures. He was a champion for the AWA, and Tim will be greatly missed.

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<sup>22</sup> *Id.* at 172–73. The survey data includes columns B and F of the 2013 fiscal year USDA reports. Column B includes animals that are held by a facility but not used in research. *Research Facility Annual Summary & Archive Reports*, APHIS, USDA, [https://www.aphis.usda.gov/aphis/-ourfocus/animalwelfare/SA\\_Obtain\\_Research\\_Facility\\_Annual\\_Report](https://www.aphis.usda.gov/aphis/-ourfocus/animalwelfare/SA_Obtain_Research_Facility_Annual_Report) [<https://perma.cc/SZ2U-WB3C>] (accessed Jan. 25, 2019).

<sup>23</sup> Bennett, *supra* note 21 at 173.

<sup>24</sup> *Id.*

## II. STANDARDS FOR COMMERCIAL DOG BREEDERS

By  
Kimberly Ockene\*\*

Good morning. My name is Kim Ockene and I'm an attorney at the Humane Society of the United States (HSUS). My practice focuses largely on commercial dog breeders, otherwise known as Puppy Mills. I'll give a little background on regulation under the Animal Welfare Act (AWA) of commercial dog breeders, then talk a little bit about a rulemaking petition that we submitted to improve and upgrade the current regulations governing dog breeders.<sup>25</sup>

First, who has to be licensed as a dog breeder under the Act? Anyone who qualifies as a dealer under the Act must be licensed, if they're selling dogs as pets in the pet trade.<sup>26</sup> There are a few exceptions to this, including small scale breeders who have four or fewer female breeding dogs. Recently, there were some amendments made to the regulations that now exempt breeders who are selling exclusively in face-to-face transactions with consumers; they also do not need to be licensed.<sup>27</sup>

At the moment, there are approximately 2,000 commercial dog breeders who are licensed by the United States Department of Agriculture (USDA), but we think there are many, many more who should be licensed but are managing to escape licensing.<sup>28</sup> In our view at HSUS, many commercial dog breeders can reasonably be characterized as puppy mills, which are essentially breeding facilities where profit takes priority over the treatment of the animals. In puppy mills, breeding dogs are viewed essentially as machinery to produce puppies for the pet trade.<sup>29</sup>

Common puppy mill conditions include: Stacked wire cages, inadequate exercise, inadequate veterinary care, limited access to human interaction, and often inadequate food and water. Unfortunately, the

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<sup>25</sup> Petition for Rulemaking from HSUS et al. to Tom Vilsack, Secretary of USDA (Sept. 21, 2015), [https://blog.humanesociety.org/wp-content/uploads/2015/09/HSUS-Puppy-Mill-Petition-for-Rulemaking-FINAL3625509\\_18\\_DC.pdf](https://blog.humanesociety.org/wp-content/uploads/2015/09/HSUS-Puppy-Mill-Petition-for-Rulemaking-FINAL3625509_18_DC.pdf) [<https://perma.cc/34MX-5R9R>] (accessed Jan. 25, 2019).

<sup>26</sup> Animal Welfare Act of 1966, 7 U.S.C. § 2133 (2013).

<sup>27</sup> Animal Welfare; Retail Pet Stores and Licensing Exemptions, 78 Fed. Reg. 57,227 (Sept. 18, 2013) (to be codified at 9 C.F.R. pt. 1).

<sup>28</sup> *Federal Licensing & USDA Standards*, ASPCA, <https://www.aspc.org/barred-from-love/laws-rules/federal-licensing-usda-standards> [<https://perma.cc/D99P-LSPT>] (accessed Jan. 25, 2019).

<sup>29</sup> *Mother Dogs at Puppy Mills Have Nothing to Celebrate*, HUMANE SOC'Y OF THE U.S. (May 9, 2009), [http://www.humanesociety.org/news/press\\_releases/2009/05/mother\\_dogs\\_at\\_puppy\\_mills\\_050909.html](http://www.humanesociety.org/news/press_releases/2009/05/mother_dogs_at_puppy_mills_050909.html) (accessed Sept. 25, 2018) (site no longer available).



conditions in commercial breeding facilities often lead to sick puppies. HSUS hears annually from hundreds of consumers who went to the pet store, bought a dog who was bred in a USDA regulated facility, and are heartbroken because their dog was sick.<sup>30</sup>

A lot of communicable diseases are produced through the unhealthy conditions of puppy mills, and hereditary conditions are passed on from the parent dogs. The breeders do not remove those dogs [from the breeding population], or screen them for these traits, so those conditions are passed on to the puppies. This leads to consumer protection concerns, and we work a lot on consumer protection litigation for that reason.<sup>31</sup>

In our view, the USDA has the authority and mandate to improve the conditions in licensed breeding facilities. The AWA delegates to the USDA the obligation to promulgate standards that govern the humane handling, care, treatment, and transportation of animals by dealers.<sup>32</sup> Unfortunately, a lot of the current regulations, many of which were promulgated in the late or mid-1990s, do not provide for the humane care or treatment and transportation of animals. It's our view that in order to bring the regulations into compliance with the statute, the agency has an obligation to update and improve the regulations. The current regulations allow for wire flooring, inadequate space, stacked cages, minimal exercise, and no limit on the frequency of breeding.<sup>33</sup>

Breeding frequency is one of the key problems in puppy mills because mother dogs are bred repeatedly throughout their lives, with no rest.<sup>34</sup> Last year, at the end of 2015, HSUS, along with the ASPCA, filed a rulemaking petition with the USDA to upgrade the regulations, and in our view, to bring them into compliance with the AWA. Our petition focused on two key areas: One was the physical requirements that the facility must meet, and the other was the breeders' attention to the dogs' health and welfare needs.<sup>35</sup>

I'm going to briefly discuss some of our key requests in that petition. Our petition provides background and current research along

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<sup>30</sup> PUPPY BUYER COMPLAINTS: A TEN YEAR SUMMARY 2007-2017, HUMANE SOC'Y OF THE U.S. (2018), <https://blog.humanesociety.org/wp-content/uploads/2018/05/HSUS-Puppy-Buyer-Complaints-Summary-Final-Web-Version-2018-1.pdf> [<https://perma.cc/EP25-G62T>] (accessed Jan. 25, 2019).

<sup>31</sup> See, e.g., "PuppyFind" Faces Consumer Lawsuit Alleging Deceptive Conduct for Promoting the Sale of Sick Puppy Mill Puppies, HUMANE SOC'Y OF THE U.S. (Oct. 14, 2016), [http://www.humanesociety.org/news/press\\_releases/2016/10/puppyfind-faces-consumer.html](http://www.humanesociety.org/news/press_releases/2016/10/puppyfind-faces-consumer.html) [<https://perma.cc/2F4D-26T>] (accessed Jan. 25, 2019) (stating "[a] group of consumers filed a lawsuit in Maricopa County Superior Court against the Arizona-based online puppy marketplace PuppyFind.com").

<sup>32</sup> 7 U.S.C. § 2132 (2013).

<sup>33</sup> See generally 9 C.F.R. §§ 3.1–3.12 (providing the USDA housing facility standards for cats and dogs). See also *Federal Licensing & USDA Standards*, *supra* note 28 (detailing the standards required for the care of dogs under the USDA).

<sup>34</sup> *Federal Licensing & USDA Standards*, *supra* note 28.

<sup>35</sup> See Rulemaking Petition, *supra* note 25 (providing a petition to the USDA asking that there be an increase to minimum standards at commercial dogs breeding facilities).

with the agency's own experience through inspection reports and regulation that demonstrate that these standards need to be updated. One of the most important things that we ask for is that the agency prohibit wire flooring in commercial breeding facilities. The existing regulation on wire flooring was promulgated in the late '90s.<sup>36</sup>

At that time, the agency said that it found no evidence that wire mesh flooring was harmful as long as each strand was greater than an eighth of an inch in diameter, or, if it was less than that, that the strands were coated with plastic or fiberglass.<sup>37</sup> The agency found that this was adequate to provide for the welfare of the dogs. The agency said there was no evidence to the contrary. In fact, at that time, the agency also removed a provision that had previously been in place from the 1991 regulations that required a solid resting board or platform in the dogs' cages if the flooring was made of wire mesh.<sup>38</sup>

The agency removed that in 1998, largely because the industry pushed back against it, arguing that requiring resting boards was inconvenient, unnecessary, and created an unhealthy, unsanitary situation because it was difficult to clean the resting boards.<sup>39</sup> Unfortunately, the regulation as it currently stands has no requirement for a solid resting area at all. Inspection reports make very clear, along with current research, that wire mesh flooring, even if it's completely compliant with the current regulations, is not adequate to protect the welfare of the dogs. The dogs' feet and joints develop injuries, the dogs have difficulty balancing, and sometimes have difficulty regulating body temperature as a result of the wire flooring.<sup>40</sup>

So, we have asked that wire flooring be eliminated. We've also asked that the cage space requirements be doubled in size from what they currently are.<sup>41</sup> The current regulation, which was passed in 1991, requires only that the cage be six inches longer on all sides than the biggest dog in the cage and six inches higher than the dog's height in a standing position.<sup>42</sup> It's our position that this is inadequate for dogs to protect their psychological and physical needs. Anyone who has a dog knows that this amount of space is probably inadequate, especially if the dogs are kept there day in and day out for their entire lives.

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<sup>36</sup> Animals and Animal Products, 9 C.F.R. § 3.6(a)(2)(xii) (2014); *see also* Humane Treatment of Dogs and Cats; Wire Flooring, 63 Fed. Reg. 3017 (Jan. 21, 1998) (to be codified at 9 C.F.R. pt. 3) (showing the amendment requiring the current standard for wiring).

<sup>37</sup> Humane Treatment of Dogs and Cats; Wire Flooring, 63 Fed. Reg. at 3017–19.

<sup>38</sup> *See* Animal Welfare; Primary Enclosures for Dogs and Cats, 63 Fed. Reg. at 37,480 (July 13, 1998) (showing the removal of the flooring requirement for wire mesh).

<sup>39</sup> *Id.*

<sup>40</sup> *See* Rulemaking Petition, *supra* note 25, at 15, 17 (showing evidence that current mesh flooring creates foot injuries, balance issues, and temperature regulation difficulties).

<sup>41</sup> Rulemaking Petition, *supra* note 25, at 24.

<sup>42</sup> 9 C.F.R. §§ 3.6(c)(1)(i), 3.6(c)(1)(iii).

Interestingly, one of the bases for the agency's rationale behind why the space was adequate at the time was because they said there was also, as a result of the 1985 amendments in the AWA, an exercise requirement.<sup>43</sup> But as Cathy alluded to and as I'll discuss momentarily, the exercise requirements are totally inadequate so that does not counterbalance the need for increased primary enclosure space.

We've also asked that the agency eliminate the practice of cage stacking.<sup>44</sup> The agency has never addressed this even though it is a key component of puppy mills. The reason that a lot of breeders do this is because it allows them to maximize the use of their space. Unfortunately, it creates a situation where there's overcrowding in limited space. The air quality is extremely poor, disease transmission is elevated because of the close quarters, and it makes access to the dogs more difficult. In extreme cases, there are also situations where the waste from the upper deck can fall onto the dogs in the lower cages.

One of the other key components of our petition is a request for unfettered access to an exercise run that is at least double the size of the primary enclosure and with solid flooring, ideally, outside.<sup>45</sup> As Cathy discussed, the 1985 amendments to the AWA did mandate an exercise requirement. Those amendments delegated to the agency the obligation to promulgate regulations on exercise. In one of their proposed regulations, in 1989, the agency did actually propose a minimum exercise requirement of thirty minutes a day for dogs. That was ultimately overcome in the final regulations in response to industry push back and not wanting to have to comply with a minimum requirement. Instead, ultimately, the agency passed regulations which allow for the breeders, in conjunction with their veterinarians, to develop a plan.<sup>46</sup> Again, as Cathy discussed with regard to research dogs, this allows for altogether too much discretion to the breeders and their veterinarians to come up with a plan that there are no strict standards for.

The regulations require that the exercise plan allow for a regular opportunity for exercise, but there's no definition of "regular" and there's a lot of discretion.<sup>47</sup> That's one of the key problems. The other one is the complete inability to enforce. Even if an exercise plan says dogs have to be allowed out once a day, there's no way for the inspectors to know whether that's happening or not. That's one of the key reasons why we think there should be an engineering standard. In other words, unfettered access from the cage to an exercise run.

In addition, with regard to the exercise regulations as they currently stand, there is a complete waiver of minimum exercise requirements if dogs are housed in groups. As long as each dog has the

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<sup>43</sup> Animal Welfare; Standards, 56 Fed. Reg. 6426, 6443 (Feb. 15, 1991) (to be codified at 9 C.F.R. pt. 3).

<sup>44</sup> Rulemaking Petition, *supra* note 25, at 27.

<sup>45</sup> *Id.* at 54.

<sup>46</sup> See 56 Fed. Reg. at 6427 (showing that many exceptions are at the "professional discretion" of veterinarians).

<sup>47</sup> See 9 C.F.R. § 3.8 (showing the ambiguity in the statutory language).

minimum mandated space, there is no exercise requirement at all.<sup>48</sup> So they could literally spend their entire lives in a cage. The two other big-ticket items that we asked for are: A restriction on the frequency of breeding, which the agency has never addressed, and an annual hands-on veterinary exam.

The lack of breeding restrictions is very problematic for breeding dogs who are bred from the time they're very young until they're no longer able to breed. Just litter after litter, with no rest. There are different opinions among veterinarians and experts as to what are the appropriate parameters for breeding restrictions. However, there's widespread consensus that there should be some restrictions on the frequency of breeding.<sup>49</sup> Our petition requests no more than two litters in an eighteen-month period.<sup>50</sup>

For veterinary care, the current regulations require that there be a written veterinary plan that the breeder come up with in conjunction with their veterinarian and do require adequate veterinary care. However, there are no specific requirements as to what that means.<sup>51</sup> We have asked for there to be a requirement for an annual hands-on veterinary exam, which there currently is no requirement for.<sup>52</sup>

We think that there should also be a mandated screening of breeding dogs, on at least an annual basis, to screen them for hereditary defects before they're cleared for breeding, and also just to make sure that their body is in a reasonable condition to breed.<sup>53</sup> We also asked for certain types of preventive care such as vaccinations.<sup>54</sup>

Thank you.

### III. MARINE MAMMAL STANDARDS UNDER THE ANIMAL WELFARE ACT

By

Naomi A. Rose and Georgia Hancock Snusz\*\*\*

**Naomi A. Rose:** Good Morning, my name is Naomi Rose and this is my colleague Georgia Hancock Snusz, and we are going to talk about

<sup>48</sup> *Id.*

<sup>49</sup> *How Often Can You Breed a Female Dog?*, WHELPINGPUPPIES.COM (Feb. 3, 2017), <https://whelpingpuppies.com/how-often-can-you-breed-a-female-dog/> [https://perma.cc/6LWG-379S] (accessed Jan. 25, 2019).

<sup>50</sup> See Rulemaking Petition, *supra* note 25, at 29–34 (showing restrictions proposed to allow female dogs more adequate rest between litters).

<sup>51</sup> 9 C.F.R. § 2.40(b)(2).

<sup>52</sup> See Rulemaking Petition, *supra* note 25, at 43–44 (giving reasons for the proposal of more frequent veterinary care for dogs in these conditions).

<sup>53</sup> *Id.* at 37–38.

<sup>54</sup> *Id.* at 43–44. HSUS also had a few other miscellaneous items that were asked for which were also very important, but the ones already discussed were the key asks.

\*\*\*\* © Naomi A. Rose is Marine Mammal Scientist with the Animal Welfare Institute. Dr. Rose works on issues addressing cetacean capture, trade, and captivity. Georgia Hancock Snusz is now Of Counsel for the Animal Welfare Institute.

captive marine mammals. We're going to change up the pace a little bit here with regard to the Animal Welfare Act (AWA). These are the marine mammal species that are covered under the AWA: Obviously, whales and dolphins, seals, sea lions, and walrus are the ones you might expect, but also polar bears, sea otters, and manatees.<sup>55</sup>

Polar bears, of course, are just bears and sea otters are very closely related to river otters and other otters and weasels, but they are considered marine mammals because ecologically they are tied to the marine environment.<sup>56</sup> They cannot leave the marine environment and survive. Under the Marine Mammal Protection Act (MMPA),<sup>57</sup> they are considered marine mammals and therefore, the AWA also agrees that they are marine mammals. Now, the one good thing we can say about the AWA, when it comes to marine mammals, is that they have their own subpart, their own section of regulations.<sup>58</sup>

There are eighteen sections that are specific to marine mammals, so the AWA does recognize that they have special needs. That's about the extent of what's good in the Act, when it comes to these species. These eighteen sections were first promulgated back in the '70s<sup>59</sup> and there was a cooperative agreement with the National Marine Fisheries Service<sup>60</sup> under the MMPA to co-govern the care and handling of marine mammals in captivity.

Twenty years ago, the Animal and Plant Health Inspection Service (APHIS) actually recognized that those standards were out of date. In fact, they convened a negotiated rulemaking panel,<sup>61</sup> which I

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<sup>55</sup> This presentation was accompanied by a PowerPoint presentation which can be viewed at [https://law.lclark.edu/law\\_reviews/animal\\_law\\_review/](https://law.lclark.edu/law_reviews/animal_law_review/). The first slide showed several photographs of various marine mammals.

<sup>56</sup> See Marine Mammal Protection Act 16 U.S.C. § 1362(6) (2003) (providing a definition of marine mammal).

<sup>57</sup> *Id.*; *Public Display of Marine Mammals*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/public-display-marine-mammals> [<https://perma.cc/CPF7-5SDJ>] (accessed Jan. 25, 2019) (providing an overview of some of the key points from the MMPA); see also *Marine Mammals*, U.S. FISH AND WILDLIFE SERV.: INTERNAL AFF., <https://www.fws.gov/international/animals/marine-mammals.html> [<https://perma.cc/3QRF-MD92>] (accessed Jan. 25, 2019) (providing a list of the animals covered by the MMPA).

<sup>58</sup> 9 C.F.R. § 1.1 (2013); 9 C.F.R. §§ 3.100–3.118 (2012).

<sup>59</sup> Marine Mammals: Humane Handling, Care, Treatment, and Transportation, 44 Fed. Reg. 36,868 (June 22, 1979).

<sup>60</sup> This interagency agreement was signed on August 10, 1979, also with the U.S. Fish and Wildlife Service. See DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, ADMINISTRATION OF THE MARINE MAMMAL PROTECTION ACT OF 1972 (Apr. 1, 1971 to Mar. 31, 1980) at 14, <https://www.fws.gov/ecological-services/es-library/pdfs/Marine%20Mammal%20AR%201-979-1980.pdf> [<https://perma.cc/6G8R-FCSU>] (accessed Jan. 25, 2019); see also DEPARTMENT OF COMMERCE NATIONAL MARINE FISHERIES SERVICE, MARINE MAMMAL PROTECTION ACT OF 1972 ANNUAL REPORT (Jan. 1, 1997 to Dec. 31, 1997) at 121, [http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa\\_annual\\_1997.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa_annual_1997.pdf) [<https://perma.cc/47U7-2V7E>] (accessed Jan. 25, 2019).

<sup>61</sup> Marine Mammal Negotiated Rulemaking Advisory Committee; Establishment, 60 Fed. Reg. 27,049 (May 22, 1995); Animal Welfare; Marine Mammals, Notice of Meeting, 61 Fed. Reg. 9371 (Mar. 8, 1996). See USDA AGRICULTURAL MARKETING SERVICE, WHAT

was a member of. This negotiating rulemaking panel was probably one of the first and only times that APHIS tried this method, as far as I am aware. It was an effort to get all of the controversy and all the adversarial positions hashed out, in advance of doing the rulemaking. That, theoretically, would allow the rulemaking to go ahead smoothly with minimal controversy and then be finalized in an expeditious manner.

They got together, and convened stakeholders from the federal agencies, from the zoo and aquarium community, and from the animal Non-Governmental Organizations (NGO), which is where I came in.<sup>62</sup> Also, a neutral arbitrator, Dr. Joseph Geraci,<sup>63</sup> whose job was to try to control the animus at the table and who had the confidence and trust of both sides of this debate. The Committee met several times over the course of these two years<sup>64</sup> and it was a very interesting process, as you might imagine. Believe it or not, we came to a consensus on thirteen of eighteen provisions.<sup>65</sup>

Now, that sounds really good but these sections were the low hanging fruit—the easy ones. Things like record keeping, staffing requirements, and so on. There were five sections we could not come to

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IS NEGOTIATED RULEMAKING? <https://www.ams.usda.gov/sites/default/files/media/Feb82011IntrotoNR.pdf> [<https://perma.cc/6RN4-8P8Y>] (accessed Jan. 25, 2019) (defining the term “negotiated rulemaking”).

<sup>62</sup> The following organizations were included on the Committee as voting members: American Zoo and Aquarium Association, Alliance of Marine Mammal Parks and Aquariums, International Association of Amusement Parks and Attractions, Marine Mammal Coalition, United States Navy, Center for Marine Conservation, The Humane Society of the United States, Animal Welfare Institute (representing a broad coalition of animal concern groups), American Association of Zoo Veterinarians, International Association for Aquatic Animal Medicine, International Marine Animal Trainers Association, and the Animal and Plant Health Inspection Service. The following organizations or individuals were included on the Committee as observers or consultants and did not vote on the final consensus reached by the Committee: Marine Mammal Commission, National Marine Fisheries Service, Fish and Wildlife Service, and Dr. Joseph Geraci, independent consultant to the Committee. Animal Welfare; Marine Mammals, 64 Fed. Reg. 8735 (Feb. 23, 1999) (to be codified at 9 C.F.R. pt. 3).

<sup>63</sup> Jacques Kelly, *Joseph R. Geraci, Expert in Marine Mammal Medicine and National Aquarium Official, Dies*, BALT. SUN (Sept. 15, 2015) <http://www.baltimore.com/news/obituaries/bs-md-ob-jospeh-geraci-20150915-story.html> (accessed Jan. 3, 2019).

<sup>64</sup> Animal Welfare; Marine Mammals, 66 Fed. Reg. 239 (Jan. 3, 2001) (to be codified at 9 C.F.R. pt. 3) (“The Committee conducted three sessions, on September 25 and 26, 1995, in College Park, MD; on April 1, 2, and 3, 1996, in Riverdale, MD; and on July 8, 9, and 10, 1996, in Riverdale, MD.”).

<sup>65</sup> *Id.* at 239–57. APHIS published regulations for those thirteen consensus-based sections (and on one paragraph in a 14th section). § 3.101 on general requirements for facilities housing marine mammals, including construction, water and power supply, drainage, storage, waste disposal, and washroom facilities; § 3.104(a) on general space requirements for primary enclosures; §§ 3.105, 3.107–3.110 on animal health and husbandry; § 3.105 on feeding requirements; § 3.107 on sanitation and pest control; § 3.108 on standards for employees and attendants; § 3.109 on separation of marine mammals; and § 3.110 on veterinary care. §§ 3.112–3.118 concern transportation of marine mammals.

consensus on.<sup>66</sup> Four were the conditions under which these animals are held, the meat of the matter as it were, no offense. This was where the panel could not come to a consensus. Those conditions include space requirements, indoor and outdoor facilities, which include temperatures, salinity, things like that. Then also water quality, what the bacterial levels and chemical levels in the water could be, how clear the water needed to be, etcetera. We could not come to consensus on those. Then there was the fifth section, which I will turn over to Georgia to discuss.

**Georgia Hancock Snusz:** The fifth section, section 3.111 covering swim-with-dolphin programs, was not part of the negotiated rulemaking process. It underwent its own traditional rulemaking, which began in 1994 after APHIS assumed full jurisdiction over swim-with programs.<sup>67</sup> They previously shared that jurisdiction with the National Oceanic and Atmospheric Administration (NOAA),<sup>68</sup> because NOAA administers the MMPA, but when the MMPA was reauthorized in 1994, this removed most of NOAA's jurisdiction over captive marine mammals and turned it over to APHIS.<sup>69</sup>

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<sup>66</sup> *Id.* at 248. No consensus was reached at all on four sections of the standards: § 3.100 on variances and implementation dates, § 3.102 on indoor facilities, § 3.103 on outdoor facilities, and § 3.106 on water quality. Consensus language was developed for general space requirements under § 3.104, but not on the specific space requirements for particular marine mammal species. *Id.*

<sup>67</sup> Animal Welfare; Marine Mammals, 60 Fed. Reg. 4383, 4383 (Jan. 23, 1995) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>68</sup> 16 U.S.C. § 1362(12)(A); see also *Laws & Policies*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/laws/mmpa/> [<https://perma.cc/2ZRV-HFVX>] (accessed Jan. 25, 2019) (identifying the three federal entities that share responsibility for implementing the Marine Mammal Protection Act).

<sup>69</sup> In 1993, NMFS published proposed MMPA regulations detailing the care and maintenance of marine mammals that were the subject of public display permits. Marine Mammals; Protected Species Special Exception Permits 58 Fed. Reg. 53,320 (Oct. 14, 1993). The regulations would have required, among other things, a certain level of content for the public display facilities' education and conservation programs. *Id.* at 53,361. The regulations also would have prohibited transfer of marine mammals without prior approval by NMFS, *id.* at 53,348, and would have required public and agency review and renewal of public display permits at least every six years, allowing amendments to take account of "changing circumstances." *Id.* at 53,344; see also *id.* at 53,328–29 (explaining the provisions limiting the period of permits). The public display industry objected to the proposed regulations, countering that the MMPA did not confer jurisdiction over marine mammals after they had been removed from the wild, and that the NMFS permit requirements and proposed rules conflicted with many of the standards established under the AWA. See Heather D. Rally et al., *Looking Behind the SeaWorld Curtain: Achieving Disclosure of Medical and Scientific Information for Cetaceans in Captivity Through Voluntary Compliance and Federal Enforcement*, 24 ANIMAL L. 303 (2018) (discussing how the 1994 amendments to the MMPA did not relieve NMFS from enforcement of permits issued prior to the amendments, including the progeny of those animals). The MMPA was written to be reauthorized approximately every four years or so, which led to periodic battles over various amendments to the law. A bill to reauthorize the MMPA, focused primarily on amendments to the provisions dealing with fisheries interactions, had been negotiated with various stakeholders starting in late 1992 and moved forward toward a vote through 1993, the same year as

In September 1998, APHIS published the final rule for the swim-with-dolphin programs.<sup>70</sup> While the NGO community would have preferred that swim-with programs be banned altogether, if swim-with was to be allowed, then the regulations agreed to weren't actually that bad. They were quite strict in that they required refuges or freely accessible places where the animals could go if they didn't feel like interacting with people.

They were also strict with regard to medical treatment required for the animals because they were exposed to additional risks from being in close contact with the public all the time. However, this swim-with rule was short-lived. Within six months, APHIS suspended enforcement when a few facilities that had only wading programs—meaning that participants were only in the water up to about their thighs—complained that it was unfair that they were included in the rule.<sup>71</sup> Instead of suspending the rule just for the wading programs, APHIS suspended it for everyone.

That was in April 1999. There still are no specific swim-with-dolphin regulations. The number of swim-with programs has probably increased three to five-fold since then,<sup>72</sup> and yet, except for that brief six-month window in 1999, these programs have only been covered by the general regulations. Please keep in mind that these animals are exposed to a constant stream of strange people and they're under increased stress because of that. Yet, they receive no special regulatory treatment.

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the NMFS proposed rule. In order to circumvent the proposed NMFS regulations, industry lobbyists worked behind the scenes to draft pro-captivity amendments to the MMPA, basically removing NMFS jurisdiction over captive marine mammals, and snuck them in (to a bill painstakingly negotiated by fisheries interests for well over a year) for approval just weeks before the final vote in April 1994. See David Kirby, *Death at SeaWorld: Shamu and the Dark Side of Killer Whales in Captivity*, 210–16 (2013) (detailing the timeline of events between industry lobbyists and animal activists in trying to convince Congress of their preferences). NMFS, the MMC, and environmental and animal welfare organizations fought back, vigorously opposing the public display industry amendments. See, e.g., *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env't & Nat. Res. of the Comm. on Merch. Marine & Fisheries*, 103d Cong. 20–22 (1994) (urging Congress to impose stronger restrictions on capturing marine mammals) (statement of John Grandy, HSUS). After the 1994 MMPA amendments, APHIS realized it had to consider whether its standards were sufficient to stand alone without any additional permit conditions from NMFS, which is why it undertook the process to “update” the regulations vis-à-vis the neg-reg panel, commencing one year later.

<sup>70</sup> Animal Welfare; Marine Mammals, Swim-With-Dolphin Programs, 63 Fed. Reg. 47,128 (Sept. 4, 1998) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>71</sup> Animal Welfare; Marine Mammals; Swim-With-Dolphins Programs, 64 Fed. Reg. 15,918, 15,918 (Apr. 2, 1999) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>72</sup> The actual number of swim-with programs in the United States is difficult to determine, as there is currently no requirement under the APHIS regulations or the MMPA for facilities to report that this activity is occurring. Some public display facilities allow the public to swim with their dolphins in addition to presenting standard performances, while others are swim-with programs only.



In 1996, the parties participated in negotiated rulemaking and came to consensus on many sections, and yet the agency didn't publish the regulations for those consensus sections until 2001.<sup>73</sup> Even the industry was getting anxious for the agency to publish the regulations because they wanted to know where they stood. If they were going to construct new facilities, for example, they wanted to know how big they needed to be. They were just as annoyed as the NGO community by the agency's five-year delay.<sup>74</sup>

For the remaining five sections on which the parties did not reach consensus, APHIS pursued a traditional rulemaking. It published an Advanced Notice of Proposed Rulemaking (ANPR) in 2002, one year after the consensus regulations were finalized.<sup>75</sup> Fourteen years after the ANPR, APHIS finally issued a proposed rule on the five sections for which consensus was not reached; that was in February of 2016.<sup>76</sup> In essence, we waited for virtually nothing, because one of the most important sections, on space requirements, remained unchanged. Dr. Rose will explain further.

**Naomi A. Rose:** In the past thirty-two years, since 1984, when the space requirements were last updated,<sup>77</sup> there's been an enormous amount of field science on these species. I know this because that's when I started my career as a marine mammal scientist. There were a lot of things we still didn't know about these animals in the wild then. Tags at that time for these animals were the size of toasters. It was really very difficult to put them on a lot of these animals.

In the last fifteen years alone, there has been an enormous amount of progress on learning how these animals actually live their lives in the wild.<sup>78</sup> Tags are now the size of half-dollars. They can go to great depths with the animals. We know how deep they dive. We know

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<sup>73</sup> Animal Welfare; Marine Mammals, 66 Fed. Reg. at 239.

<sup>74</sup> Advocates, including Dr. Rose, were aware, from contemporaneous personal observation made during interactions with public display representatives, that they were also waiting to see the final regulations.

<sup>75</sup> Animal Welfare; Marine Mammals, 67 Fed. Reg. 37,731 (May 20, 2002) (to be codified at 9 C.F.R. pt. 1 & 3). An Advance Notice of Proposed Rulemaking is a preliminary notice an agency publishes in the Federal Register to announce when it is considering regulatory action. Agencies typically use ANPRs to gather more information prior to making a decision on whether to conduct a formal rulemaking. The Federal Register notice would describe the area under regulatory consideration and seek public comments on the issues and options discussed. OFFICE OF THE FED. REGISTER, *A Guide to the Rulemaking Process*, [https://www.federalregister.gov/uploads/-2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/-2011/01/the_rulemaking_process.pdf) [<https://perma.cc/CJ5Q-V9TE>] (accessed Jan. 25, 2018).

<sup>76</sup> Animal Welfare; Marine Mammals, 81 Fed. Reg. 5629 (Feb. 3, 2016) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>77</sup> See *id.* at 5630 (referencing the space requirement as one of the sections of regulation that has not been amended since 1984).

<sup>78</sup> See Naomi A. Rose et al., *Improving Captive Marine Mammal Welfare in the United States: Science-based Recommendations for Improved Regulatory Requirements for Captive Marine Mammal Care*, 20 J. INT'L WILDLIFE L. & POL'Y 1, 38–72 (2017), <https://doi-org.library.lproxy.org/10.1080/13880292.2017.1309858> (“[M]arine field biologists have been prolific in the past 15–20 years.”).

how far they travel in a twenty-four-hour period. We know what their home range sizes are. These are things we didn't know thirty-two years ago. These are things we didn't know fifteen years ago.

For APHIS to say in their proposed rule that they are unaware of any science that justifies changing the current standards for space<sup>79</sup>—which are minimum standards from thirty-two years ago—is simply inexplicable. These are large animals in small enclosures, but even more important than that, these are wide-ranging animals in small enclosures. A lot of metadata were analyzed by Clubb and Mason,<sup>80</sup> for example. In this paper, they looked at polar bears, big cats, other animals that are wide-ranging in nature. Marine mammals are wide-ranging animals.

This is a typical dive of an orca:

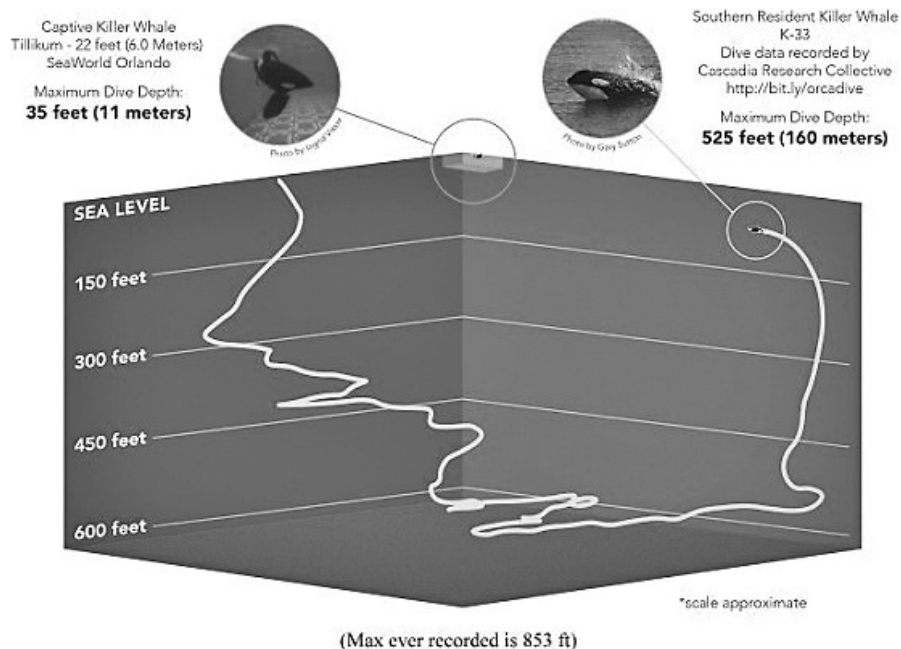


Figure 1. A graphic of a typical dive by a male orca in the Pacific Northwest. Based on data and tagging tracks from Cascadia Research Collective, Oregon. Graphic by Wild Orca.

He'll make that dive multiple times in a day. From left to right is about five minutes, meaning this is a five minute dive. He'll make this dive several times a day, which is not unusual. He goes down to 525 feet. He does something down there. He's not just sitting down there. He's foraging. He's doing something. He comes back up. The little box, in the middle of the graph up at the top, is Shamu Stadium at

<sup>79</sup> Animal Welfare; Marine Mammals, 81 Fed. Reg. at 5635.

<sup>80</sup> Ros Clubb & Georgia Mason, *Captivity Effects on Wide-Ranging Carnivores*, NATURE 425, 473–74 (Oct. 2, 2003), [https://www.researchgate.net/publication/9069205\\_Animal\\_Welfare\\_Captivity\\_effects\\_on\\_wide-ranging\\_carnivores](https://www.researchgate.net/publication/9069205_Animal_Welfare_Captivity_effects_on_wide-ranging_carnivores) [<https://perma.cc/7GRH-JGUK>] (accessed Jan. 3, 2019).

SeaWorld. In San Diego, ten animals live in that space. In San Antonio, five. In Orlando, six. That's as big as it is. That box is the largest enclosure in the United States, and it is far in excess of the minimum standards that APHIS establishes. Far in excess of what the minimum standards are. Yet this [Fig. 1] is a typical dive for an orca. There has to be an agreement that there's something wrong with this. Common sense says when a typical tank is only one ten thousandths of 1% the size of natural home range, the animal is not being adequately provided for. The graph of that dive comes from this new tagging technology mentioned earlier.<sup>81</sup>

Here's some more new technology. This is from drones.<sup>82</sup>



Figure 2. A drone's view of a family of orcas in the Pacific Northwest. NOAA Fisheries.

We now get a bird's eye view of the way these animals live in the wild. So, this is a group of belugas [indicating photo showing group of several dozen beluga whales from an aerial view]; thousands of animals can congregate in the same space. This is a group of bottlenose dolphins [indicating another photo of a large group of dolphins from aerial view]; they live in fission-fusion societies, get together, break apart, get together, break apart, with up to 100 to 120 animals. You can think of it as a village. This is a family of orcas [Fig. 2]. This is a mother and all of her children and all of her children's children. They are extremely strongly bonded with family. This is a group of Pacific

<sup>81</sup> Eve Jourdain, *Norwegian Orca Survey, Using New Technology for Studying Orca*, BBC ONE BLUE PLANET II, <http://www.bbc.co.uk/programmes/articles/1YsRmhsRSfPbL5m5rhgRb4T/using-new-technology-for-studying-orca> [<https://perma.cc/4XPU-HTH9>] (accessed Jan. 25, 2019).

<sup>82</sup> The slide accompanying this comment showed four drone photographs of belugas, bottlenose dolphins, Pacific white-sided dolphins, and orcas.

white-sided dolphins [indicating photo of a large group of these dolphins]. Again, hundreds of them can congregate out in the open ocean.<sup>83</sup>

When they are put into captivity, they do not even need to be held with conspecifics; that is, the same species. It is legal under the regulations for these animals to be held with “compatible” species.<sup>84</sup> So they do not even have to be held with the same species, and yet these are animals that live in large groups and complex societies. Again, common sense says there has to be something wrong with that. Now I’m going to turn it back over to Georgia to talk about enforcement.

**Georgia Hancock Snusz:** We can, in various inspection reports, see that the enforcement APHIS provides over marine mammal facilities tends to be limited to cosmetic citations rather than major substantive violations. For example, in 2015, an inspection report cited the Mirage Hotel and Casino in Las Vegas, which displays dolphins, for an unsanitary food prep kitchen.<sup>85</sup> These citations are essentially fix-it tickets, typically with thirty days to correct.<sup>86</sup> However, according to the group, Mojave Dolphins, despite the order for the Mirage to address the sanitation violation by mid-July of 2015, there had been no follow-up from USDA as of late September of that year.

A 2012 inspection called out SeaWorld of Florida for various infractions.<sup>87</sup> APHIS told SeaWorld to put a protocol in place to prevent these sorts of things from recurring. But how alarming is it that in this facility’s thirty-year history, such protocols were not already in place?

Lolita is a killer whale who is famous for her tiny tank [Fig. 3], which is not in compliance with the AWA.<sup>88</sup> Lolita, who has been in this small tank since 1970, is the prime example of why the AWA is not

<sup>83</sup> See, e.g., entries for these species in William F. Perrin et al., *ENCYCLOPEDIA OF MARINE MAMMALS* (Elsevier 2d ed. 2009) (providing the behavior, distribution, ecology, and physiology of these cetaceans in different parts of the world).

<sup>84</sup> 9 C.F.R. § 3.109.

<sup>85</sup> *Mirage Resorts Inc., Citation: Violation Found at Mirage, Needs Reinspection, #MOJAVEDOLPHINS* (Sept. 22, 2015) <http://mojavedolphins.com/violation62015> [<https://perma.cc/DR8C-QU5N>] (accessed Jan. 25, 2019).

<sup>86</sup> *Id.*

<sup>87</sup> See USDA, APHIS, Inspection Report, SeaWorld of Florida (Dec. 3, 2012).

<sup>88</sup> See, e.g., USDA OFFICE OF THE INSPECTOR GENERAL, Audit Report 33601-0001-31, APHIS: ANIMAL WELFARE ACT – MARINE MAMMALS (CETACEANS) (May 2017), <https://www.usda.gov/oig/webdocs/33601-0001-31.pdf> [<https://perma.cc/KR4W-H8SU>] (accessed Jan. 25, 2019) (finding that an inspected Orca exhibit may not meet regulations under the AWA due to the configuration of the pool); see also Jonathan Kendall, *Lolita’s Tank Is Substandard, Marine Mammal Commission Rules*, BROWARD PALM BEACH NEW TIMES (Aug. 22, 2016), <http://www.browardpalmbeach.com/news/lolitas-tank-is-substandard-marine-mammal-commission-rules-8019582> [<https://perma.cc/AT7J-RBD8>] (accessed Jan. 25, 2019) (showing the Marine Mammal Commission’s assessment that tank distances are to be unobstructed measurements); see generally Comment Letter from Rebecca J. Lent, Ph.D., Executive Director of the Marine Mammal Commission, to APHIS (May 4, 2016), <https://www.mmc.gov/wp-content/uploads/16-05-04-Regulatory-Analysis-and-Development-APHIS-proposed-rule.pdf> [<https://perma.cc/7L7M-Q68G>] (accessed Jan. 25, 2019) (providing commentary on standard size regulations).

working for captive marine mammals. In any given tank, the existing APHIS regulations require a minimum horizontal dimension of only 48 feet for orcas, which is just over twice Lolita's length. The work island, which goes all the way to the floor of the tank, creates an obstruction. APHIS claims this is a partial obstruction and, therefore, it's okay. The agency claims the minimum horizontal dimension requirement is met by virtue of the fact that when the gates are open, [to either side of the work island], Lolita can swim the circumference of the tank. However, based purely on geometry, a circumference is not a minimum horizontal dimension. It's only 35 feet from the work island to the top end of the pool, which is clearly less than 48 feet.

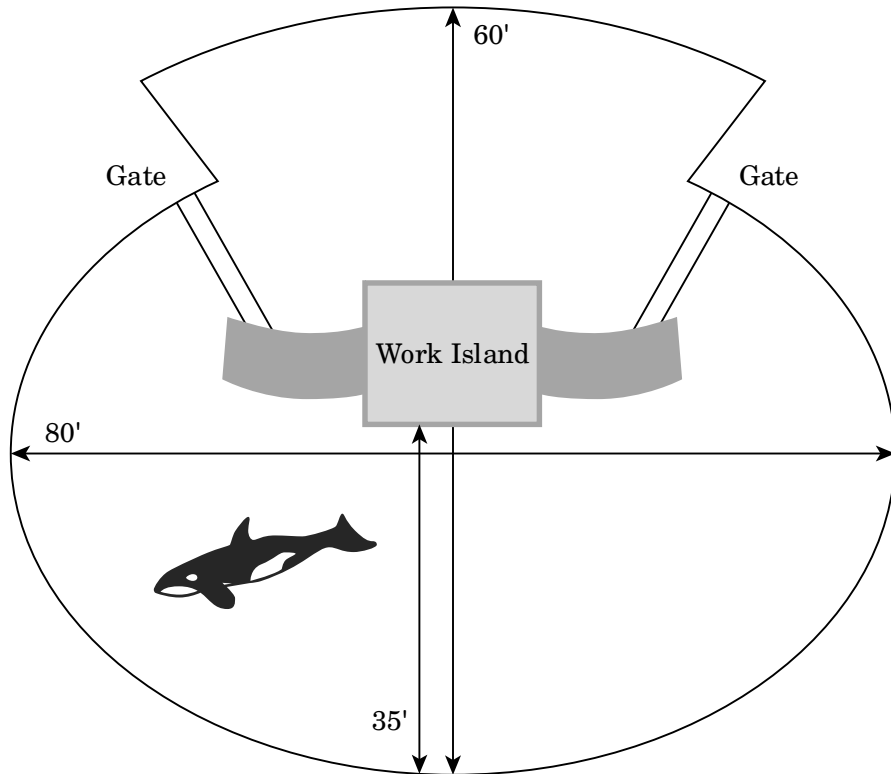


Figure 3. Illustration of Lolita's Tank based on FOIA records. Graphic by Gale Silverman-Feld.

A letter excerpt<sup>89</sup> from APHIS shows that it claims that there are two minimum horizontal dimensions, but by definition, you can't have two minimums, because a minimum is a minimum. Lolita's situation has been litigated by groups such as People for the Ethical Treatment

<sup>89</sup> See *It's Time To Go Above & Beyond for Lolita*, WITHOUT ME THERE IS NO YOU (June 8, 2011), <https://withoutmethereisnou.wordpress.com/2011/06/08/its-time-to-go-above-beyond-for-lolita/> [https://perma.cc/7L7M-Q68G] (accessed Jan. 25, 2019) (discussing how APHIS adds the two distances on either side of the island to get to the required minimum distance, even though Lolita cannot freely swim under the island).

of Animals (PETA) and the Animal Legal Defense Fund (ALDF),<sup>90</sup> unfortunately without much success to date.

In closing, Lolita is the poster child for everything that is wrong with the AWA's treatment of captive marine mammals. A law that is supposed to ensure the humane care and treatment of marine mammals in captivity has singularly failed to do so. As Dr. Rose has attested, marine mammal science has progressed tremendously in recent years but the science was ignored by the agency in its proposed rule.<sup>91</sup>

#### IV. HANDLING INFANT EXOTIC ANIMALS UNDER THE ANIMAL WELFARE ACT

By  
Anna Frostic\*\*\*\*

Good morning everyone. My name is Anna Frostic and I am the senior attorney for wildlife and animal research issues for The Humane Society United States (HSUS). It is a pleasure to be here with so many esteemed colleagues and wonderful to see the breadth of interest in these issues that affect countless animals including critically endangered species.

I am going to talk today about the commercial use of exotic animals, and infant exotic animals in particular. These are animals maintained at licensed exhibition facilities that have to comply with the Animal Welfare Act (AWA) and I am going to talk specifically about the AWA animal handling regulations.<sup>92</sup> This issue implicates animal welfare, public safety, and conservation concerns.

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<sup>90</sup> *Proie v. Nat'l Marine Fisheries Serv.*, No. C11-5955BHS, 2012 WL 1536756 at 1 (W.D. Wash. May 1, 2012); *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1332 (S.D. Fla. 2016); *PETA v. Miami Seaquarium*, 879 F.3d 1142, 1144 (11th Cir. 2018); *Animal Legal Def. Fund v. USDA*, No. 13-20076-CIV, 2014 WL 11444100 at 1 (S.D. Fla. Mar. 25, 2014); *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1210 (11th Cir. 2015).

<sup>91</sup> Comment Letter from Naomi A. Rose, Ph.D., Marine Mammal Scientist, Animal Welfare Institute, to APHIS, re: 81 FR 5629, Docket No. APHIS-2006-0085 (May 3, 2016), <https://awionline.org/sites/default/files/uploads/documents/AWI-APHIS-proposed-rule-comments-FINAL-03May16.pdf> [<https://perma.cc/L55T-P3JW>] (accessed Jan. 25, 2019).

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<sup>92</sup> The AWA requires facilities that exhibit animals to the public or breed animals for sale in interstate commerce to obtain a license from USDA/APHIS, and requires the agency to adopt regulations "to govern the humane handling, care, treatment, and transportation" of animals possessed by licensees, including minimum requirements "for handling, housing, feeding, water, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals. . . ." 7 U.S.C. §§ 2143(a)(1), 2143(a)(2).

First, I will provide some factual background and then discuss what HSUS is doing to try to eliminate these problems. Around the country there are approximately eighty facilities that HSUS has identified, primarily what we call “roadside zoos” or “pseudo sanctuaries,” that use exotic animals for what we call “public contact exhibition.”<sup>93</sup> These are not progressive institutions accredited by the Association of Zoos and Aquariums (AZA)—for example, like the Detroit Zoo, which is represented here at the conference and has worked with us to address this issue.

These exhibition facilities breed animals specifically for commercial use, just like puppy mills. I will discuss the negative impacts of using exotic animals for direct physical interaction between paying members of the public and often infant animals, particularly big cats, bears, and nonhuman primates. There are certainly other animals that are used in this industry, but these three taxa are the ones that HSUS has focused on because of their popularity for this use and also because of the demonstrated negative impacts this activity has on these animals’ lives in captivity and in the wild.

It is estimated that there are hundreds of tigers, lions, bears, apes, and monkeys that are used by these facilities, causing negative animal welfare impacts throughout the life cycle of a particular animal. Such infant animals are often separated from their mothers immediately after birth to be hand reared by the exhibitor, in an attempt to tame this wild animal to be compliant with direct handling by the public.<sup>94</sup>

Examples include infant chimpanzees being held by zoo patrons, a human infant interacting with an infant bear, and neonatal tigers being held by another member of the public. It is very well established, especially with respect to primates—and ironically much of this data comes from research on primates in laboratories subjected to inhumane conditions to investigate the need for mother-infant bonds in humans—that there are negative long term behavioral and physiological impacts of severing the mother infant bond in mammalian species.<sup>95</sup>

Soon after infants bred for public contact are pulled away from their moms, they are put into use by exhibitors charging members of the public fees ranging from \$50 to \$500, depending on the scenario, to interact with these babies. For example, a facility in Florida has allowed people to swim with baby tigers, forcing baby tigers to paddle to

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<sup>93</sup> For a list of these exhibition facilities, *see* HSUS, Amended Petition for Rulemaking to Prohibit Public Contact with Big Cats, Bears, and Nonhuman Primates (amended Jan. 7, 2013), at 10–12, <https://www.regulations.gov/document?D=APHIS-2012-0107-0001> [hereinafter Amended Petition for Rulemaking] (listing seventy-five exhibition facilities).

<sup>94</sup> For examples of this premature mother-infant separation, *see id.* at 27–34 (discussing the natural weaning process of these animals and how they are ultimately weaned too early in attempts to make the animals able to be safely handled by humans).

<sup>95</sup> *Id.* at 29–34.

a point of exhaustion to satisfy long lines of paying customers.<sup>96</sup> In 2014, HSUS conducted an undercover investigation at a facility in Oklahoma, where tiger cubs were being used for public contact exhibition. One of the cubs at the facility was driven from a breeder in South Carolina to Oklahoma and immediately upon getting out of the car, she was handled by twenty-seven people even though she was only 3 weeks old and was diagnosed with ringworm at the time.<sup>97</sup>

One negative impact of this activity is that severing of the mother-infant bond results in an inadequate diet for these babies. In mammalian species, there's a very wide range of the length of time that juveniles in the wild remain with their moms. On one end of the spectrum are orangutans, who live with their moms for up to eight years, usually nursing for at least five years. Tigers usually are not weaned until three to six months of age.<sup>98</sup>

When an infant is removed from its mother's care minutes, days, or weeks after birth, they are deprived of their natural diet, which is often replaced by public feeding, making it exceedingly difficult to ensure the infant receives the appropriate amount of food and adequate nutrition.<sup>99</sup> For example, exhibitors may promote an over-dependency on bottle feeding, keeping juveniles reliant on milk for far longer than they would be in comparison to the species in the wild, instead of switching the cub to solid foods and meat replacements that the animal biologically requires, as documented by HSUS undercover investigations.<sup>100</sup> Keeping these cubs dependent on bottles is a tactic deployed so that when they are used for photo opportunities and interactive experiences with the public they are distracted, they are less likely, in theory, to get playful and bite or scratch an individual.

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<sup>96</sup> *Id.* at 35. This operation has since been shut down after successful litigation. Tracey McManus, *Judge Bans Dade City's Wild Things from Owning Tigers*, TAMPA BAY TIMES (March 2, 2018) [https://www.tampabay.com/news/courts/civil/Judge-bans-Dade-City-s-Wild-Things-from-owning-tigers\\_166004115](https://www.tampabay.com/news/courts/civil/Judge-bans-Dade-City-s-Wild-Things-from-owning-tigers_166004115) [https://perma.cc/92K3-EL4S] (accessed Jan. 25, 2019).

<sup>97</sup> HUMANE SOCIETY OF THE U.S., THE HSUS INVESTIGATES: TIGER SAFARI IN TUTTLE, OKLAHOMA, <http://www.humanesociety.org/assets/pdfs/wildlife/exotics/roadside-zoo-tiger-safari.pdf> [https://perma.cc/57P3-253S] (accessed Jan. 25, 2019).

<sup>98</sup> See Amended Petition for Rulemaking, *supra* note 93, at 28 (citing M. & F. SUNQUIST, WILD CATS OF THE WORLD (2002), which states the natural age of weaning for tigers is about six months).

<sup>99</sup> See, e.g., HANDLING AND HUSBANDRY OF NEONATAL NONDOMESTIC CATS, APHIS, USDA (Mar. 2016), [https://www.aphis.usda.gov/publications/animal\\_welfare/2016/technical-neonatal-nondo-mestic-cats.pdf](https://www.aphis.usda.gov/publications/animal_welfare/2016/technical-neonatal-nondo-mestic-cats.pdf) [https://perma.cc/4DNK-3WEN] (accessed Jan. 25, 2019) (explaining in a "Technical Note" that the USDA has "determined that newborn and infant nondomestic cats . . . have special handling and husbandry needs").

<sup>100</sup> *Id.* at 32. See *Undercover Investigations Reveal Abuse of Tiger Cubs at Roadside Zoos*, HSUS (Jan. 22, 2015) [http://www.humanesociety.org/news/press\\_releases/2015/01/ok-va-exotics-investigation-012215.html](http://www.humanesociety.org/news/press_releases/2015/01/ok-va-exotics-investigation-012215.html) [https://perma.cc/CKM3-Q3UX] (accessed Jan. 25, 2019) (announcing investigations of Natural Bridge Zoo and Tiger Safari); see Wayne Pacelle, *A HSUS Breaks Investigation Today of Nation's Largest Exotic Animal Owner*, A HUMANE NATION: HSUS, (May 16, 2012), <https://blog.humanesociety.org/2012/05/gw-exotic-investigation.html> [https://perma.cc/8T5V-YFMC] (accessed Jan. 25, 2019) (announcing investigation of G.W. Exotic Animal Park).



HSUS investigations have also documented a significant amount of abusive “training” or “discipline” of animals used in public contact exhibition. For example, at Tiger Safari in Oklahoma, HSUS witnessed the owner using a technique he called the “sleeper hold” to try to subdue a tiger cub by repeatedly turning the infant animal upside down.<sup>101</sup> HSUS has also documented public contact exhibitors punching and slapping and dragging of juvenile animals used in these commercial operations.<sup>102</sup> Infant exotic animals are often very rambunctious and powerful, yet exhibitors attempt, through physical means, to tame them so that they can interact “safely” with members of the public.<sup>103</sup>

In addition to animal welfare concerns, there are also human safety concerns affiliated with public contact exhibition. Infants are highly desirable in this industry but the length of time that an animal can be used is pushed to the limit so that the maximum profit can be derived from each individual animal. HSUS has documented numerous examples where large juvenile big cats capable of inflicting bodily harm are posing next to individuals to take photos.<sup>104</sup> In another example, a fully grown black bear was exhibited with only a little piece of plexiglass separating a mother and her toddler from the bear. In another example, a teenage orangutan at a public contact facility gives a “hug” to a teenage boy. These scenarios clearly pose a risk of severe bodily injury for the members of the public that are interacting with these animals.

In addition, public contact exhibition raises significant concerns about zoonotic disease transfer. For example, HSUS has documented a baby macaque monkey wearing a dress and interacting with a group of schoolgirls—macaque monkeys routinely carry herpes B virus, which is known to be fatal to humans.<sup>105</sup> When there is interaction between exotic animals and members of the public, there is a clear risk to the health of the individual person as well as to the animal.<sup>106</sup> For example, big cats are very susceptible to canine distemper.<sup>107</sup> It is entirely

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<sup>101</sup> See THE HSUS INVESTIGATES, *supra* note 97 (providing a description and photo of the “sleeper hold” technique).

<sup>102</sup> See *supra* note 100 (documenting abusive training at three tiger cub exhibition facilities).

<sup>103</sup> See *e.g.* HSUS, *supra* note 100 (detailing results of two undercover investigations done by HSUS); THE HSUS INVESTIGATES, *supra* note 97 (detailing abuse at facility in Oklahoma).

<sup>104</sup> See Amended Petition for Rulemaking *supra* note 93, at 42.

<sup>105</sup> Amended Petition for Rulemaking, *supra* note 93, at 40; Mindy Weisberger, *Don't Touch the Monkeys! Florida Macaques Carry Virus Lethal to Humans*, LIVE SCI. (Jan. 11, 2018), <https://www.livescience.com/61407-macaque-herpes-lethal-to-humans.html> [<https://perma.cc/H866-JQ4F>] (accessed Jan. 25, 2019).

<sup>106</sup> *Id.*

<sup>107</sup> See, *e.g.*, He Zhang et al., *Outbreak and Genotyping of Canine Distemper Virus in Captive Siberian Tigers and Red Pandas*, 7 SCIENTIFIC REPORTS (2017), <https://www.nature.com/articles/s41598-017-08462-4> [<https://perma.cc/MR8V-GWJM>] (accessed Jan. 25, 2019).

possible that an individual person who is interacting with a big cat could carry the canine distemper virus from a family dog to the facility and expose a tiger or lion to the disease, potentially leading to the death of that animal.

In addition, once these animals get too big and are no longer profitable for the public contact industry they put a significant burden on the animal protection community, which is often called to rescue these animals and provide them with appropriate and safe enclosures.<sup>108</sup>

Exotic animals bred for use in public contact exhibition may also be sold into the exotic pet trade, as demonstrated by a sample advertisement from the Animal Finders Guide that shows that there is such a surplus of such animals in the U.S. that they can't be sold, and are advertised for free.<sup>109</sup>

Public contact exhibition is regulated under the AWA,<sup>110</sup> yet there continue to be copious examples of negative impacts from such commercial activity, demonstrating that the implementation of current AWA standards is insufficient to protect animal welfare.

The particular regulatory provisions that apply to this activity are derived from the statutory authority for USDA to develop regulations pertaining to the humane handling of animals.<sup>111</sup> There is a generic animal handling regulation in 9 C.F.R. § 2.131 and then there are primate-specific regulations.<sup>112</sup> These regulations are stereotypical performance standards, including concepts such as “sufficient distance and/or barriers,” no “unnecessary discomfort,” and “no rough or excessive public handling.”<sup>113</sup> Dangerous animals have to be under the “direct control of a knowledgeable handler.”<sup>114</sup> For primates, if the primate is “trained,” it's permitted by the regulations for the public to have contact with that primate.<sup>115</sup>

In order to address the animal welfare, public safety, and conservation concerns raised by public contact exhibition, HSUS, World Wildlife Fund, Detroit Zoo, Fund for Animals, International Fund for Animal Welfare, Born Free USA, Global Federation of Animal Sanc-

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<sup>108</sup> *Big Cats in Captivity*, INT'L FUND FOR ANIMAL WELFARE, <https://www.ifaw.org/united-states/our-work/tigers/big-cats-captivity> [<https://perma.cc/J7MK-WRS8>] (accessed Jan. 25, 2019); *How is Big Cat Rescue Different Than a Zoo?*, BIG CAT RESCUE (Aug. 31, 2018) <https://bigcatrescue.org/big-cat-rescue-different-than-zoo/> [<https://perma.cc/Z4DE-JA3G>] (accessed Jan. 25, 2019); *Cleveland Amory Black Beauty Ranch*, FUND FOR ANIMALS, [www.fundforanimals.org/blackbeauty](http://www.fundforanimals.org/blackbeauty) [<https://perma.cc/T7LZ-R8D3>] (accessed Jan. 25, 2019) (examples of facilities that appropriately house big cats).

<sup>109</sup> Example of advertisement on file with author. Animal Finders Guide has gone out of business, but websites exist where exotic animals are advertised for exchange, free of charge, see USZA ANIMAL NETWORK, <http://usza.us/animal-network/> (site no longer available) (advertising “surplus” animals which are given away free of charge).

<sup>110</sup> 9 C.F.R. § 2.131 (2018).

<sup>111</sup> 7 U.S.C. § 2143 (2018).

<sup>112</sup> 9 C.F.R. §§ 3.77(g), 3.78(e), 3.79(d).

<sup>113</sup> *Id.* § 2.131.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* §§ 3.77(g), 3.78(e), 3.79(d).

tuaries, and Big Cat Rescue, petitioned the USDA for an explicit regulation that prohibits direct contact and unsafe close contact between members of the public and big cats, bears, and nonhuman primates, regardless of the age of the animal.<sup>116</sup>

That petition was submitted in 2012. In 2013, the agency opened a public comment period on it and thankfully in 2016, the agency responded with a step in the right direction. In April 2016, USDA, instead of changing its regulations, decided that their existing regulations were broad enough to support the legal interpretation that allowing members of the public to have direct contact with neonatal cats under four weeks of age is prohibited under the existing animal handling regulations and the veterinary care regulations.<sup>117</sup>

Shortly after this “technical note” was issued, in June 2016, the agency opened another comment period on the issue, signaling that it was considering taking additional action to address this problem.<sup>118</sup> HSUS continues to work to change federal policy and increase protections for exotic animals used in public contact exhibition.

In addition to public safety and animal welfare concerns, there are enormous conservation concerns with this industry. This industry breeds critically endangered species without regard to genetic integrity, hybridization of species (such as tigers and lions), and inappropriate social grouping. There is a growing body of scientific literature that shows the use of endangered animals in commercial entertainment industries has negative impacts on wild populations, skewing people’s perception of the species’ basic biology and conservation status, which decreases a person’s likelihood of contributing to conservation efforts to save those species and increases the demand for these species in the exotic pet trade.<sup>119</sup>

This is an enormous concern with tigers in particular. The World Wildlife Fund has also sounded alarm bells over the fact that it is esti-

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<sup>116</sup> Amended Petition for Rulemaking, *supra* note 93, at 1.

<sup>117</sup> Handling and Husbandry of Neonatal Nondomestic Cats, *supra* note 99, at 1.

<sup>118</sup> Petition to Amend Animal Welfare Act Regulations to Prohibit Public Contact With Big Cats, Bears, and Nonhuman Primates, 81 Fed. Reg. 41,257 (June 24, 2016).

<sup>119</sup> See K. Anne-Isola Nekaris et al., *Tickled to Death: Analysing Public Perception of ‘Cute’ Videos of Threatened Species (Slow Lorises – Nycticebus spp.) on Web 2.0 Sites*, PLoS ONE, July 2013 (examining how viral videos of slow lorises have increased interest in the species without correlating increase of awareness of conservation issues); Steve R. Ross et al., *Inappropriate Use and Portrayal of Chimpanzees*, 319 SCIENCE 1487, 1487 (2008) (arguing that the “inappropriate portrayal of great apes in advertisements undermines the scientific, welfare, and conservation goals”); Stephen R. Ross et al., *Specific Image Characteristics Influence Attitudes about Chimpanzee Conservation and Use as Pets*, PLoS ONE, July 2011 (demonstrating that images of chimpanzees in typically human settings are more likely to lead viewers to “perceive wild populations as being stable and healthy compared to those seeing chimpanzees in other contexts”); Kara K. Schroepfer et al., *Use of “Entertainment” Chimpanzees in Commercials Distorts Public Perception Regarding Their Conservation Status*, PLoS ONE, Oct. 2011 (demonstrating that “the use of entertainment chimpanzees in the popular media negatively distorts the public’s perception and hinders chimpanzee conservation efforts”).

mated that there are more tigers in the U.S. than are left in the wild. There are about 3,200 tigers left in the wild and there are an estimated 5,000 tigers in the U.S.—yet only approximately 300 tigers in the U.S. are housed in facilities accredited by AZA where they are required to be strictly managed to promote genetic integrity and animal welfare,<sup>120</sup> and several dozen more are held in ten wildlife sanctuaries accredited by the Global Federation of Animal Sanctuaries.<sup>121</sup> This means that the vast majority of the tigers in the U.S. are living in roadside zoos, pseudo-sanctuaries, backyards, basements, and other unaccredited and unqualified facilities.<sup>122</sup> It is a sad truth that tigers are worth more money dead than alive and without sufficient federal and state oversight of this captive population parts could be diverted into international trafficking.<sup>123</sup>

In summary, public contact exhibition of exotic animals raises enormous conservation concerns in addition to animal welfare and public safety concerns, and it is essential that USDA take additional action to address these problems.

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<sup>120</sup> *Tiger Species Survival Plan*, ASS'N OF ZOOS & AQUARIUMS, <http://support.mnzoos.org/tigercampaign/tiger-ssp/> [<https://perma.cc/FDW6-MCRB>] (accessed Jan. 2, 2019); ASSOCIATION OF ZOOS & AQUARIUMS, TIGER (*PANTHERA TIGRIS*) CARE MANUAL 64 (2016) [https://www.speakcdn.com/assets/2332/tiger\\_care\\_manual\\_2016.pdf](https://www.speakcdn.com/assets/2332/tiger_care_manual_2016.pdf) [<https://perma.cc/78WR-G3UT>] (accessed Jan. 25, 2019).

<sup>121</sup> *Find a Sanctuary*, GLOBAL FED'N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/find-a-sanctuary/?animal=exotic-big-cats&region=any&state=any> [<https://perma.cc/ME2A-8GD8>] (accessed Jan. 25, 2019).

<sup>122</sup> *More Tigers in American Backyards than in the Wild*, WORLD WILDLIFE FUND (July 29, 2014), <https://www.worldwildlife.org/stories/more-tigers-in-american-backyards-than-in-the-wild> [<https://perma.cc/HLG4-MYFQ>] (accessed Jan. 25, 2019).

<sup>123</sup> Douglas F. Williamson & Leigh A. Henry, Traffic North America, Paper Tigers? The Role of the U.S. Captive Tiger Population in the Trade in Tiger Parts (2008); see also CITES, Res. Conf. 12.3 (Rev. CoP17), *Conservation of and Trade in Tigers and Other Appendix-I Asian Big Cat Species* (2017) <https://cites.org/sites/default/files/document/E-Res-12-05-R17.pdf> [<https://perma.cc/P7LK-HWCU>] (accessed Jan. 25, 2019) (discussing the status of international trade in tigers and their parts).