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"TEACHING A CHILD NOT TO STEP ON A CATERPILLAR IS AS VALUABLE TO THE CHILD AS IT IS TO THE CATERPILLAR." Bradley Miller

As long as there have been children, there have been pets! Dogs, cats, frogs, baby birds, injured squirrels, turtles, and yes, even the occasional snake or spider. Undoubtedly, those immortal words, "can we keep 'em", have been uttered in one form or another by children since the time of Cro-magnon man. The lessons, experiences and love taught and instilled in us as children by our parents, care givers and animal companions themselves, are carried with us into adulthood. The New York State Bar Association's Committee on Animals and the Law, although made up of a diverse group of professionals from many different backgrounds and practice areas as adults, are united by our common experiences and relationships with animals from an early age and the lessons of respect and appreciation we learned as children that we have carried with us into adulthood. The Committee on Animals and the Law is dedicated to educating our fellow lawyers, the public, and educators on animal related laws and welfare issues, and to assisting in promoting animal protection through education and the law.

Laws & Paws, the official Publication of the New York Bar Association's Committee on Animals and the Law, is just one of the many projects undertaken throughout the year by the Committee's dedicated contributing professionals and student volunteers. In this issue of *Laws & Paws,* the following topics are explored and discussed: water quality, puppy mill reform, animal welfare and government labeling, courtroom dogs used to aid victims of abuse, and updates on animal related case law arising in New York State.

The Committee would like to give a very special thank you to the Committee's Publications Subcommittee, its editors, and most importantly, the contributors and authors who have made this publication possible. This newsletter, as well as many other informative animal related resources can be viewed on the Committee's official website at www.nysba.org/animals.

Thank you in advance for taking the time to read this edition of *Laws & Paws*, and for making a difference for animals and the people who love and care for them.

Amy L. Chaitoff, Esq.
Chair

WILDLIFE, WATER QUALITY, AND THE PUBLIC TRUST DOCTRINE: A MEANS OF ENFORCING AGRICULTURAL NONPOINT SOURCE POLLUTION MANAGEMENT PLANS[*]

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I. INTRODUCTION

Throughout the nation, entire amphibian populations are experiencing reproductive and developmental defects that threaten their survival.[1] This damage is attributable to the runoff of herbicides, such as atrazine, from agricultural fields, which have managed to successfully evade regulation under the Clean Water Act (CWA).[2] Agricultural nonpoint source pollution in the nation's waterways not only affects amphibians, but also other wildlife species residing in the waters.[3] This, in turn, impacts humans and other species reliant upon the affected wildlife as a source of food.[4] Thus, in response to the CWA's failure to adequately regulate agricultural nonpoint source pollution, citizens should look to the public trust doctrine as a means of requiring state agencies to more effectively address nonpoint source pollution and reduce its detrimental effects on wildlife.

The public trust doctrine provides members of the public with a means of ensuring the government protects the public's interest in common resources—resources held in a trust by the government for the people.[5] One of the greatest strengths of the public trust doctrine is it "can sometimes give greater recognition to public interests at times when legislatures are under excessive pressure by special interest lobbyists."[6] Because agricultural interest groups have developed

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[*] Véronique Jarrell-King, *Wildlife, Water Quality, and the Public Trust Doctrine: A Means of Enforcing Agricultural Nonpoint Source Pollution Management Plans*, 23 VILL. ENVTL. L.J. 1, 1 (2012) (original publication).

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1. Tyrone B. Hayes et al., *Hermaphroditic, Demasculinized Frogs After Exposure to the Herbicide Atrazine at Low Ecologically Relevant Doses*, 99 PROC. OF THE NAT'L ACAD. OF SCIS. OF THE U.S. 5476, 5479 (2002) (discussing how current levels of atrazine application to agricultural areas could impair reproductive function in amphibians and lead to population decline and extinction).

2. F. Orton et al., *Effects of Nitrate and Atrazine on Larval Development and Sexual Differentiation in the Northern Leopard Frog Rana Pipiens*, 25 ENVTL. TOXICOLOGY & CHEMISTRY 65, 65 (2006) (discussing possible link between amphibian population decline and agricultural pollutants, such as atrazine); *see also* Clean Water Act, 33 U.S.C. § 1251 (1994) (providing goals and policy of Clean Water Act).

3. *See, e.g.*, B. Lal, *Pesticide—Induced Reproductive Dysfunction in Indian Fishes*, 33 FISH PHYSIOLOGY & BIOCHEMISTRY 455, 455 (2007) (noting studies have shown pesticides to effect or damage gonadal development, fertilization, fecundity, and lower hormonal levels in Indian fishes); Santi Mañosa et al., *A Review of the Effects of Agricultural and Industrial Contamination on the Ebro Delta Biota and Wildlife*, 71 ENVTL. MONITORING & ASSESSMENT 187, 191 (2001) (finding massive use of herbicides has caused loss in biodiversity, greatly damaging diving ducks and coot populations); Jeremy David Rouse et al., *Nitrogen Pollution: An Assessment of its Threat to Amphibian Survival*, 107 ENVTL. HEALTH PERSP. 799, 799 (1999) (finding nitrogen concentrations near Great Lakes sufficient to cause death and developmental abnormalities in amphibians in addition to adversely affecting other animals in aquatic ecosystems).

4. *See* Lal, *supra* note 3, at 455 (discussing impacts on Indian Fishes); Mañosa, *supra* note 3, 187 (discussing impacts on diving ducks and coot populations; Rouse, *supra* note 3, at 799 (discussing impacts on amphibians).

5. Anna R.C. Caspersen, *The Public Trust Doctrine and the Impossibility of "Takings" by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357, 358 (1996) (indicating public trust doctrine stresses duty to protect and preserve natural resources).

6. Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485, 511 (1989) (explaining advantages and

into such a powerful force, they have the potential to sway state agencies and effectively avoid the voluntary nonpoint source pollution regulations set forth in the CWA.[7] As a result, many legislatures and agencies face excessive pressure when attempting to implement agricultural nonpoint source pollution control plans under § 319 of the CWA.[8] Through the public trust doctrine, however, citizens have the potential to challenge an agency's failure to consider the public's interest in wildlife when the agency develops and reviews nonpoint source pollution control plans, even in the face of strong political pressure from agricultural lobbyists.[9]

This article examines the potential use of the public trust doctrine by members of the public to require state and local agencies to consider the public's interest in wildlife protection and water quality dependent public trust uses when the agency determines whether to implement the § 319 nonpoint source regulation.[10] Specifically, the article explores whether the public can use the public trust doctrine as a means to require state agencies to better regulate agricultural nonpoint source pollution that damages the public's interest in protecting its wildlife.[11] The public trust doctrine varies in each state depending on the extent its common law evolved to address water quality and wildlife protection; therefore, California has the greatest potential to use the public trust doctrine to urge the enforcement of nonpoint source pollution regulation.[12] There is no reason, however, the public trust doctrine could not be utilized in other states in the future if the common law foundations allow for it.[13]

Part II of this article provides background on the public trust doctrine, and focuses on the public's interest in wildlife and public trust uses that depend on water quality protection.[14] Part III addresses the detrimental effects of agricultural pollution on wildlife and water quality; specifically, the potential fatal effects of the herbicide atrazine on amphibian development and reproduction.[15] In Part IV, this article provides the background and shortcomings of §§ 208 and 319 of the CWA and explains how those sections have led to ineffective regulatory controls over nonpoint source pollution in the United States.[16] Lastly, Part V discusses the potential to use the public trust doctrine as a means of ensuring state and local government agencies fulfill their duties in considering the public's interests when developing and implementing § 319 nonpoint source pollution control plans.[17]

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disadvantages of public trust doctrine).

7. *See* David Zaring, *Agriculture, Nonpoint Source Pollution, and Regulatory Control: The Clean Water Act's Bleak Present and Future*, 20 HARV. ENVTL. L. REV. 515, 542-43 (1996) (suggesting outside influences affecting implementation of CWA).

8. Johnson, *supra* note 6, at 511 (describing pressures asserted on legislative process).

9. For further discussion, see *infra* Part V and notes 144-157.

10. For further discussion, see *infra* Part V and notes 144-157.

11. For further discussion, see *infra* Part V and notes 144-157.

12. *See* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 719 (Cal. 1983) (describing evolution of public trust in California in tandem with public values); Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 595-96 (Cal. Ct. App. 2008) (describing scope of public trust in California).

13. See *infra* note 156 for an overview of states with common law foundations for wildlife and water quality protection.

14. For further exploration of the origin of the public trust doctrine, see *infra* Part II and notes 18-80.

15. For further discussion of the damage pollutants caused to the environment, see *infra* Part III and notes 81-107.

16. For further discourse of how some sections of the CWA have not achieved their desired effects, see *infra* Part IV and notes 108-143.

17. For further examination of the public trust doctrine's potential, see *infra* Part V and notes 144-157.

II. PUBLIC TRUST DOCTRINE

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[18]

The public trust doctrine creates a legal duty in the states to hold natural resources in a trust for the benefit of the public, and protect and preserve the resources for future generations.[19] The strength of the doctrine stems from the fact that private citizens can sue a government agency and demand the agency recognize the public's interests as a whole when making decisions that impact those interests.[20] The doctrine has been recognized as encompassing a diverse breadth of interests, such as the submerged lands of navigable waterways, the value of entire ecological systems, and the water quality impacting public trust uses.[21]

The concept of the public trust arose under Roman law, where natural resources, "such as air, water, and wildlife," were viewed as commonly owned by the public, as they were items no individual could own in their entirety.[22] The public trust notion was subsequently recognized under the common law of England, whereby the king retained ownership of the lands and granted access to the public for the purpose of grazing, hunting, foraging, and fishing.[23] In essence, the king held and protected the resources for the public to use.[24]

The public trust doctrine resurfaced in the United States when Americans began to realize the nation's resources were finite and public access to such resources needed to be preserved.[25] In the seminal case on the public trust doctrine, *Illinois Central Railroad Co. v. Illinois* (*Illinois Central*),[26] the Supreme Court of the United States determined Illinois held the shore of Lake Michigan in public trust, and thus could transfer the shore land to a private owner only if Illinois

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18. Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 724 (Cal. 1983) (describing duties of state as trustee of public trust).

19. Caspersen, *supra* note 5, at 358 (discussing public trust doctrine's influence on society at large).

20. *See* Deborah G. Musiker et al., *The Public Trust and Parens Patriae Doctrines: Protecting Wildlife in Uncertain Political Times*, 16 PUB. LAND L. REV. 87, 95 (1995) (noting citizens may seek relief in court when agencies fail to consider public trust interests). California is a prime example of a state that allows citizens to bring an independent action against an agency under the public trust doctrine when an agency fails to recognize the public trust when performing their duties. *See* Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 601 (Cal. Ct. App. 2008). In other states, however, public trust enforcement claims are raised as part of another proceeding, not as their own cause of action. *See* In re Steuart Transp. Co., 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (bringing case for damages and cleanup costs and subsequently raising public trust doctrine claim).

21. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 455 (1892) (noting navigable waters and soil below are held in public trust); *Nat'l Audubon Soc'y*, 658 P.2d at 719 (recognizing importance of water quality in protecting public interest in scenic and ecological value of Mono Lake).

22. Caspersen, *supra* note 5, at 363 (illustrating Roman law's influence on idea of common ownership under public trust doctrine); *see also* Greer v. Connecticut, 161 U.S. 519, 522 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979) (discussing commonly owned property could include animals and ferae naturae which were believed to belong to all citizens of state).

23. Caspersen, *supra* note 5, at 364-65 (documenting origins of public trust doctrine).

24. *Id.* (describing how states inherited notion of public trust from king).

25. *Id.* at 365-66 (discussing eventual progression of public trust doctrine from public access focus to role of preservation).

26. 146 U.S. 387 (1892).

retained discretion and control over the land.[27] By virtue of its sovereignty, the Court deemed the State to hold both the navigable waters and the soils below in a trust for the people of the State.[28]

Following *Illinois Central*, courts have extended the public trust doctrine to other uses such as boating, rafting, and hunting, and to other resources such as wildlife habit, water, groundwater, wetlands, and areas of dry sand.[29] Most importantly, the public trust doctrine continues to evolve; it constantly expands and reshapes based on the values and needs of the citizens of each state.[30]

A. Enforcement of the Public Trust Doctrine

"The heart of the public trust doctrine, however it may be articulated, is that it imposes limits and obligations on governments."[31] Each branch of the government is allocated specific duties in order to ensure the public's interests are recognized and protected.[32] In a sense, the legislature is the trustee of the trust because it enacts the laws of the state that will best protect the public trust, and the executive branch is the agent.[33] As the agent, the executive branch, through its state and federal agencies, has the duty to enforce the trust obligations set forth by each state legislature.[34] A state agency has "an affirmative duty to take the public trust into account in the planning and allocat[ing] of... resources, and to protect public trust uses whenever feasible" to minimize harm.[35] In addition, once a state agency approves a plan affecting a public trust resource, the agency has a duty to continue supervising the use of the resource and the power to reconsider any past decisions inconsistent or contrary to the needs of the public.[36]

The judicial branch, however, is the "ultimate guardian of the trust," protecting the public's rights in public trust resources.[37] When using the judicial branch to protect their rights, citizens

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27. *Ill. Cent. R.R.*, 146 U.S. at 453 (noting only time state could relinquish duty to exercise management and control over public trust property was when doing so was in public's best interest or when disposing of property did not impair public's remaining trust interests).

28. *Id.* at 455 (explaining common public interest in maintaining ownership of navigable waters).

29. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365-66 (N.J. 1984) (recognizing public interest in dry sand areas); Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 595-600 (Cal. Ct. App. 2008) (recognizing interests in tidelands, navigable waters, and more); *see also* Musiker, *supra* note 20, at 92 (noting courts' broad interpretation of public trust doctrine).

30. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 80 (2009) (questioning elasticity of public trust doctrine to effectuate needs of ever-changing society).

31. Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 284 (1980-1981) (discussing public trust doctrine in limiting federal power); *see also Ill. Cent. R.R.*, 146 U.S. at 454 (opining state was restricted from turning land held in public trust over to private company because it was required to hold for public); In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (finding because no individual citizen could recover for loss of waterfowl, it was "right and the duty" of state to protect and preserve public's interest in wildlife resources for them).

32. Wood, *supra* note 30, at 75-77 (explaining duties of government branches).

33. *Id.* at 75 (illustrating role of government branches in public trust); *see also* Greer v. Connecticut, 161 U.S. 519, 533-34 (1896)), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979) (describing role of legislature).

34. Wood, *supra* note 30, at 75 (explaining duty of executive branch to enforce legislature).

35. Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 728 (Cal. 1983) (illustrating role of state agency in protecting public interest).

36. *Id.* (describing supervising power of state agency over public trust resource).

37. Wood, *supra* note 30, at 75 (explaining role of judiciary in protecting public rights); Gary D. Meyers, *Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 ENVTL. L. 723, 731 (1989) (describing impact of judicial

must overcome two primary hurdles: a valid cause of action and standing.[38] In California, if an agency fails to perform its duties or consider the public interest in making a decision, the public may bring an action to enforce the trust and compel that agency to perform its duties.[39] Though many states do not offer a public trust enforcement cause of action, the public may raise the claim as part of a proceeding.[40] Once there is a valid cause of action, some courts, such as those in Hawaii, Illinois, and California, have granted citizens standing to enforce the doctrine in certain instances, while other refuse to do the same.[41] Once these barriers are surmounted, members of the public benefit when courts perceive agency actions–actions which restrict public uses or place them in the hands of a private party's self interest–with "considerable skepticism."[42] The public trust places a fiduciary obligation on the agency to protect the public trust resources, and when the agency fails to do so, courts will review public trust cases with "meaningful judicial scrutiny."[43]

B. The Public Trust in Wildlife

The public trust doctrine has long recognized wildlife as a protected resource, an interest that has expanded as public needs and perceptions shifted.[44] Recently, the California Court of Appeals recognized wildlife as a "natural resource[] of inestimable value to the community as a

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branch on public trust resources).

38. *See* discussion *infra* notes 41-42 and accompanying text.

39. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 602-03 (Cal. Ct. App. 2008) (explaining rights of citizens to bring action in California); Musiker, *supra* note 20, at 96 (describing process for citizens bringing action in California).

40. In re Steuart Transp. Co., 495 F. Supp. 38, 39-40 (E.D. Va. 1980) (allowing public trust enforcement as part of proceeding); Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 491 (Alaska 1988) (permitting public trust claim); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094-95 (Idaho 1983) (permitting public trust cause of action). In these states, the public trust doctrine is often raised in cases brought before the court for permit compliance and validity, tort damages, and questions on the constitutionality of a statute. *See supra*.

41. Sierra Club v. Dep't of Transp., 167 P.3d 292, 313 (Haw. 2007) (finding even though member of public must still meet three-part standing test, as environmental plaintiff their injury need not be particularized because harm to plaintiff's environmental interests may be sufficient for standing). This court also noted a less rigorous standing requirement was available for environmental plaintiffs under the Hawai'i Constitution Article XI, § 9. *Id.* Similarly, the Supreme Court of Illinois reasoned that to ensure the public trust doctrine's validity, members of the public must be granted standing, noting "[t]o tell them that they must wait upon governmental action is often an effectual denial of the right for all time." Paepcke v. Pub. Bldg. Comm'n of Chicago, 263 N.E.2d 11, 18 (Ill. 1970); *see also* Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 716 n.11 (Cal. 1983) (concluding plaintiffs have standing to sue for violations of public trust); *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 600 (explaining there is no reason in principle why members of public should be denied standing to maintain appropriate action in enforcing public trust in wildlife).

42. Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970) (explaining courts' skepticism toward agency actions).

43. Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Instilling a Fiduciary Obligation in Governance*, 39 ENVTL. L. 91, 112 (2009) (explaining major difference between agency's statutory duty and trust duty is courts give greater deference to agency's decision in statutory context). In a trust context, however, courts scrutinize the agency's decision to determine if the agency acted appropriately as trustee. *Id.*

44. Musiker, *supra* note 20, at 92 (explaining shift in perceptions toward public trust doctrine); *see, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (clarifying traditional public trust rights were related to navigation, commerce, and fishing before court extended rights to tidelands); *Nat'l Audubon Soc'y*, 658 P.2d at 719 (recognizing evolution of public trust based on shifts in public values, which are now focused on preserving tidelands in their natural state as public use); *see also Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 597 (explaining elements of public trust doctrine); Meyers, *supra* note 37, at 729 (citing M. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 12 (1983)) (noting ownership of wildlife, like water, historically has been treated as aspect of sovereignty); Musiker, *supra* note 20, at 91 (noting even though *Illinois Central* reviewed public trust in light of waterways, "the core of the public trust doctrine applies more generally to wildlife").

whole."[45] With the expansion of the public's interest in wildlife, the public trust doctrine can be used to protect wildlife resources from the state legislatures, agencies, and administrative personnel who fail to perform their duties in protecting the public's interest in preserving wildlife.[46] Specifically, states have the duty to regulate and conserve wildlife, in their sovereign capacity, as trustees of wildlife for the benefit of the people.[47]

In *Greer v. Connecticut* (*Greer*),[48] the Supreme Court held the citizens in their "collective sovereign capacity" owned the wildlife within a state's borders, and the state has the responsibility to control the wildlife "as a trust for the benefit of the people."[49] In essence, the Court adopted the public trust doctrine by placing a duty on the state to protect the public's interest in wildlife under the sovereign ownership theory.[50] Even though *Hughes v. Oklahoma* (*Hughes*)[51] overruled Greer on the constitutionality of interstate wildlife shipping, *Hughes* made "ample allowance for preserving... the legitimate state concerns for conservation and protection of wild animals underlying the 19th-century legal fiction of state ownership."[52]

This concept of the public trust in wildlife was further developed when the Commonwealth of Virginia sued the ship owner responsible for an oil spill in the Chesapeake Bay which killed approximately 30,000 migratory birds in *In re Steuart Transportation Co.*.[53] The United States District Court for the Eastern District of Virginia found that even though Virginia did not own the birds in question, the State was still able to bring a claim against the ship owner under the public trust doctrine.[54] The court stated that under the public trust doctrine, Virginia and the United States had "the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people."[55] Essentially, Virginia acted on behalf of its citizens as the trustee of the public trust.[56]

The California Court of Appeals arrived at a similar conclusion in *Center for Biological Diversity, Inc. v. FPL Group, Inc.*,[57] when a wildlife protection group sued the owners and opera-

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45. *Ctr. for Biological Diversity*, 83 Cal. Rptr. 3d at 599 (recognizing public trust doctrine encompasses protection of undomesticated birds and wildlife).

46. Musiker, *supra* note 20, at 109 (explaining public trust doctrine can protect wildlife resources from state legislatures, agencies, and administrative personnel who fail to perform duties).

47. *Id.* at 88, 91-92 ("Like their ownership of the beds beneath navigable waterways, states own wildlife in their sovereign capacity and thereby have a public trust duty to prevent impairment of this common resource").

48. 161 U.S. 519 (1896), *overruled by* Hughes v. Oklahoma, 441 U.S. 322 (1979).

49. *Id.* at 529 (holding wildlife within state's borders was owned by citizens in their "collective sovereign capacity" to be exercised by state as trust for public benefit).

50. Musiker, *supra* note 20, at 93 (adopting public trust doctrine by placing duty on state to protect public's interest in wildlife under sovereign ownership theory).

51. 441 U.S. 322 (1979)

52. *Hughes*, 441 U.S. at 335-36 (explaining case made ample allowance for preserving legitimate state concerns for conservation and protection of wild animals). To find a state interest in protecting wildlife, states have used theories such as state ownership and their public trust duties, the public trust itself, or they simply adopt the concept of the public trust through a state's role as a trustee over wildlife. *See* Musiker, *supra* note 20, at 94.

53. In re Steuart Transp. Co., 495 F. Supp. 38, 39 (E.D. Va. 1980) (finding even though Virginia did not own birds in question, it was able to bring claim against ship owner).

54. *Id.* at 39-40 (explaining reasoning behind Virginia's action).

55. *Id.* at 40 (explaining why public trust doctrine applies).

56. *Id.* (explaining Virginia's duty to protect public's interests).

57. 83 Cal. Rptr. 3d 588 (Cal. Ct. App. 2008).

tors of wind turbine electric generators for the destruction of thousands of birds in violation of the public trust doctrine.[58] The fatalities included "between 17,000 and 26,000 raptors—more than a thousand Golden Eagles, thousands of hawks, and thousands of other raptors."[59] The California court resolved private parties have the right to insist state agencies protect and preserve birds and other wildlife in their state because they are public trust resources.[60] Moreover, as members of the public, the court recognized private parties are entitled to bring a public trust action to enforce the trust when an agency fails to perform its duties under the trust.[61]

C. Water Quality as an Essential Component of the Public Trust

Since its origin, the public trust doctrine has included the public's interest in navigable waterways.[62] Recent cases have further expanded this coverage to include non-navigable waterways as well as tidelands and water bodies for their ecological significance in their natural states.[63] Additionally, courts have long recognized the public trust doctrine as a tool to protect the public's interests in "fish, wildlife, recreational, and environmental values"—uses that are greatly impacted by the quality of the water.[64] In effect, by protecting these various uses of the water, water quality has become an essential component of many public trust uses.[65] Such uses have even expanded to encompass the preservation of public trust lands for nontraditional recreational and ecological purposes, such as scientific study, scenic values, to maintain air purity, and to protect wildlife nesting and feeding sites.[66]

In one of the earliest water pollution cases, *People v. Gold Run Ditch & Mining Co.*,[67] the Supreme Court of California recognized that polluting public waters was "an unauthorized invasion of the rights of the public to its navigation."[68] The case arose when Gold Run Ditch and Mining Company discharged large amounts of rock and sand from its mining operations into the river and bay, effectively filling the waters to the extent it hindered navigation.[69] As a result, the

58. *Id.* at 592 (illustrating application of public trust regarding wildlife).

59. *Id.* (explaining devastation caused by turbine electric generators).

60. *Id.* at 603 (asserting individual right to compel agency action).

61. *Id.* at 601 (describing details of private right of action).

62. Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892) (noting lands under navigable waters are held in trust for people of state for navigation, commerce, and fishing).

63. *See, e.g.*, Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (noting preservation of tidelands is important in protecting public's interest in ecological preservation); Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 711, 715, 720 (Cal. 1983) (recognizing scenic and ecological value of Mono Lake to be in public interest, application of doctrine to non-navigable source streams, and importance of water quality to system).

64. Johnson, *supra* note 6, at 498 (explaining how public trust encompasses water quality); *see* Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1095 (Idaho 1983) (holding state agencies could consider effect of encroachments in water on "navigation, fish and wildlife habitat, aquatic life, recreation, aesthetic beauty and water quality," in relation to public trust doctrine); United States v. State Water Res. Control Bd., 227 Cal. Rptr. 161, 150-52 (Cal. Ct. App. 1986) (finding board was within its powers when it evaluated appropriation permits by considering impact of water quality in protecting public's interest in fish and wildlife resources).

65. Johnson, *supra* note 6, at 498 (noting essential nature of water quality element).

66. *Marks*, 491 P.2d at 380 (explaining flexibility in notion of public uses to incorporate public's changing needs); *Nat'l Audubon Soc'y*, 658 P.2d at 719 (describing expanding definition of water quality dependent uses).

67. People v. Gold Run Ditch & Mining Co., 4 P. 1152 (Cal. 1884) (finding discharge violated public trust doctrine).

68. *Id. at* 1155 (describing specific circumstances that led to finding infringement of public rights).

69. *Id.* at 144-45 (describing background to litigation).

court held the discharge was an encroachment on the public's interest in navigable waters and the soil under the water, which the state held as trustee for the benefit of the public in the public trust.[70]

In 1971, the Supreme Court of California further recognized the public trust doctrine covered the preservation of tidelands in their natural state in *Marks v. Whitney* (*Marks*).[71] The court stated there is a public recognition of the importance of the "preservation of [tidelands]... in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area."[72] This tremendous expansion of public trust uses placed a great emphasis on preserving the water quality on which these uses rely.[73]

Twelve years later, in the en banc decision of *National Audubon Society v. Superior Court*,[74] the Supreme Court of California not only held the public trust doctrine extended to non-navigable tributaries, but the court focused on the detrimental impact of low water quality on public trust uses.[75] The Department of Power of the City of Los Angeles was granted a permit to divert water from four of the five non-navigable streams feeding Mono Lake; this diversion began to significantly disrupt the ecological balance of the lake.[76] Observing there was "little doubt that both the scenic beauty and the ecological values of Mono Lake [were] imperiled" by the City's permit, the court found that approving the diversion without considering the public trust values would lead to the "needless destruction of those values."[77] By increasing the salinity of the lake, the diversions threatened to imperil the ecological value of the lake and destroy the food sources and nesting sites for millions of local and migratory birds.[78] The court also noted the decrease in the water level of Mono Lake exposed gull rookeries to predators, forcing California gulls to abandon their nesting sites.[79] In effect, this decision revolved around an issue of water quality that caused substantial damage to the surrounding environment, and effectively injured the public's interest in using the lake for recreation, scenic beauty, and its ecological value.[80]

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70. *Id.* at 151-52 (holding that by allowing debris from hydraulic mining operation to discharge into stream, mining operation was infringing on public and private rights despite longstanding custom).

71. *Marks*, 491 P.2d at 380 (holding legislation, patent, and public trust doctrine, covered tidelands at issue).

72. *Id.* (describing various uses of public trust waterways and myriad reasoning for holding such).

73. Johnson, *supra* note 6, at 496 (describing that while *Marks* did not specifically include water quality as public interest, it was included in public uses).

74. 658 P.2d 709 (Cal. 1983).

75. *Id.* at 719, 721 (describing purpose and scope of public trust doctrine).

76. *Id.* at 711 (describing background to dispute).

77. *Id.* at 711-12 (supporting contention that public trust be considered in case).

78. *Id.* at 715 (describing background and history of litigation).

79. *Id.* at 716 (noting severe environmental impact issues presented by case).

80. *Nat'l Audubon Soc'y*, 658 P.2d at 716 (describing in particular, grave toll taken on California gull and water levels).

III. CURRENT WATER QUALITY AND WILDLIFE ISSUES ARISING FROM THE AGRICULTURAL POLLUTANT ATRAZINE

A. Agricultural Pollution and its Effects on Water Quality

In recent decades, agricultural pollution has been recognized for its tremendous detrimental impact on the water quality of our nation's waters.[81] There are more than 330 million acres of land in the United States used for agriculture.[82] Agricultural pollutants such as pesticides, nutrients, sediment, and soluble salts commonly end up in streams, rivers, and lakes due to leaching and runoff from agricultural fields.[83] The U.S. Department of Agriculture determined seventy-five percent of all pesticides used in the United States are for agricultural purposes, seventy percent of which are herbicides.[84] Sometimes these pesticides turn up in surface and ground water at rates exceeding United States health standards.[85] Current farming practices amplify these problems by encouraging farmers to use excessive amounts of agricultural chemicals and farm in "environmentally-sensitive areas" in an effort to increase the output of each farm.[86]

B. Agricultural Pollution and its Effects on Wildlife

Agricultural pollution affects not only the quality of the nation's water, but also the wildlife that depend on the water, which makes agriculture a "leading cause of species endangerment and extinction."[87] Between 1992 and 2001, a United States Geological Survey found pesticide concentrations exceeded the water-quality benchmarks necessary to sustain "aquatic life and... fish-eating wildlife in more than half of the streams with substantial agricultural and urban areas in their watersheds."[88] Furthermore, "[a]gricultural streams had concentrations that exceeded one or more benchmarks at 57 percent of sites" that frequently contained several herbicides, including atrazine.[89] To top this off, agricultural pollutants have adversely affected the water quality in the United States to the point that many species of wildlife are suffering potentially fatal ail-

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81. Robert W. Adler, *Water Quality and Agriculture: Assessing Alternative Futures*, 25 ENVIRONS ENVTL. L. & POL'Y J. 77, 77-78 (2002) (discussing history of modern water pollution with regards to agricultural pollution).

82. *Agriculture*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/owow_keep/NPS/agriculture.html (last updated Feb. 10, 2010) (providing background for fact sheets and reports).

83. JOHN D. SUTTON, U.S. DEP'T OF AGRIC., WATER QUALITY AND AGRICULTURE STATUS, CONDITIONS, AND TRENDS 7 (July 1997), *available at* http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_012448.pdf (describing background to detailed report).

84. *Id.* at 5 (describing conclusions and findings of report).

85. *Id.* at 8 (showing strong need for concerted action in this area).

86. Adler, *supra* note 81, at 90 (discussing increase of chemicals for agricultural purposes).

87. ROBERT W. ADLER ET AL., THE CLEAN WATER ACT 20 YEARS LATER 177 (Island Press, 1993) (discussing extent of endangerment and extinction).

88. ROBERT J. GILLIOM & PIXIE A. HAMILTON, U.S. DEPT. OF THE INTERIOR: U.S. GEOLOGICAL SURVEY, PESTICIDES IN THE NATION'S STREAMS AND GROUND WATER, 1992–2001—A SUMMARY 2 (Mar. 2006), *available at* http://pubs.usgs.gov/fs/2006/3028/pdf/fs2006-3028.pdf ("Of the 178 streams sampled nationwide that have watersheds dominated by agricultural, urban, or mixed land uses, 56 percent had one or more pesticides in [the] water that exceeded at least one aquatic-life benchmark.").

89. *Id.* at 2 (discussing potential effects of pesticides on aquatic life and wildlife).

ments.[90] Studies have discovered pesticides can cause decreased hormonal levels in fish, developmental and reproductive anomalies or death in amphibians, and fatalities in waterfowl.[91]

C. The Effects of the Herbicide Atrazine on Wildlife

A diverse range of wildlife species suffer devastating, if not fatal, responses to herbicides and pesticides in their water sources.[92] A prime example of this is the unprecedented rates of demasculinization in populations of amphibious wildlife linked to the herbicide atrazine.[93] Atrazine is one of the most extensively used pesticides both in the United States and throughout the world.[94] From 1993 to 1997, California used between 38,000 to 60,000 pounds of atrazine each year, and it has been detected in numerous surface waters within the state.[95] This powerful herbicide, produced by Syngenta, is extremely effective in controlling weeds in corn, sorghum, and sugarcane crops.[96] Many in the scientific community, however, believe atrazine causes reproductive and developmental defects in wildlife and increases incidences of cancer in humans exposed to the herbicide.[97] In 2003, the European Union banned atrazine because it believed a ban on the herbicide was the only way to prevent "ubiquitous and unpreventable water contamination."[98] Yet, even in the wake of studies indicating hormonal impairment in wildlife and humans, the United States Environmental Protection Agency (EPA) has refused to recognize the potential detrimental effects of atrazine.[99]

In one study, scientists found that when they raised male African clawed frogs to sexual maturity, all of the male frogs not treated with atrazine retained their male reproductive organs and traits.[100] Ten percent of the frogs treated with atrazine, however, displayed female sexual organs and traits.[101] In addition, males exposed to atrazine had reduced testosterone levels and suffered

90. ADLER, *supra* note 87 at 177 (stating "approximately thirty-seven percent of the 436 species listed in the Endangered Species Information Database are endangered in part due to effects of irrigation and the use of pesticides").

91. Lal, *supra* note 3, at 455 (detailing that pesticides affect or damage gonadal development, fertilization, fecundity, and lower hormonal levels in Indian fishes); Manosa, *supra* note 3, at 191 (finding herbicides cause loss in biodiversity and greatly damage diving ducks and coot populations); Rouse, *supra* note 3, at 799 (explaining finding that nitrogen concentrations near Great Lakes are enough to cause death and developmental abnormalities in amphibians in addition to adversely affecting other animals in aquatic ecosystems).

92. For further discussion, see *supra* note 91 and accompanying text.

93. Hayes, *supra* note 1, at 4576 (discussing high rates of demasculinization in amphibians).

94. *Pesticide Atrazine Can Turn Male Frogs into Females*, SCIENCEDAILY (Mar. 1, 2010), http://www.sciencedaily.com/releases/2010/03/100301151927.htm (noting extensive use of atrazine around world); *see also Atrazine Updates*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/pesticides/reregistration/atrazine/atrazine_update.htm (last updated Nov. 17, 2011) (noting extensive use of atrazine in United States).

95. DEREK W. GAMMON ET AL., MED. TOXICOLOGY BRANCH CAL. DEP'T OF PESTICIDE REGULATION, CAL. ENVTL. PROT. AGENCY, ATRAZINE RISK CHARACTERIZATION DOCUMENT 7, 15 (Aug. 15, 2001), *available at* http://www.cdpr.ca.gov/docs/risk/rcd/atrazine.pdf (detailing atrazine use in California).

96. *Atrazine Updates*, *supra* note 94 (providing background on herbicide atrazine).

97. J.B. Sass & A. Colangelo, *European Union Bans Atrazine, While the United States Negotiates Continued Use*, 12 INT'L J. OF OCCUPATIONAL & ENVTL. HEALTH 260, 261-62 (2006) (noting scientific concerns of potential human harm).

98. *Id.* at 260 (discussing European Union ban on atrazine).

99. *Id.* (discussing existence of evidence suggesting Syngenta made efforts to influence EPA in atrazine assessment through private meetings and sponsoring studies which concluded there were no harmful effects caused by atrazine on humans or wildlife).

100. Tyrone B. Hayes et al., *Atrazine Induces Complete Feminization and Chemical Castration in Male African Clawed Frogs (Xenopus Laevis)*, 107 PROC. OF THE NAT'L ACAD. OF SCIS. OF THE U.S. 4612, 4613 (Mar. 2010) (discussing atrazine exposure in adult amphibians).

101. *Id*. at 4612 (discussing reproductive consequences of atrazine on African clawed frogs).

significantly decreased fertility rates.[102] Another study found American bullfrogs, northern leopard frogs, and wood frogs all exhibited deformed larvae and respiratory distress in response to increased doses of atrazine.[103] Yet another study demonstrated that northern leopard frog larvae exposed to atrazine during development often suffered premature gonadal development.[104] Furthermore, when atrazine was exposed to nitrate, a widely used agricultural nutrient, the scientists observed drastic changes in the northern leopard frog sex ratios.[105]

Entire amphibian populations face extinction due to reproductive failures, developmental mutations, and hermaphroaditism caused by the runoff of agricultural pollutants into the waters they depend on for survival.[106] By disrupting the balance of the aquatic ecosystem, agricultural pollutants pose substantial threats to the stability of these fragile systems and jeopardize the survival of an inestimable number of species throughout the United States.[107]

IV. CLEAN WATER ACT

The objective of the CWA is to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[108] While the CWA has made significant strides in improving water quality through point source regulation, it has been ineffective in regulating nonpoint source pollution, the "largest remaining threat to water quality and source of water quality impairments in the nation."[109] Nonpoint and point source pollution differ in that the former is the "runoff from broad sources such as fields" whereas the latter is "emitted from discrete sources such as sewage pipes."[110] Today, thirty years after the CWA was enacted, the United States is still plagued with polluted waters that fail to meet the water quality standards.[111] In 2004, after assessing the water quality in 16% of the nation's streams, states reported that 44% of these waters were impaired and failed to meet one or more of its designated uses.[112] Of the 11.8 million lake acres, 30% were impaired for supporting fish, shellfish, and wildlife, as were 36% of the 446,617 miles of assessed streams.[113]

In 2000, the National Water Quality Inventory reported "agricultural nonpoint source... pollution was the leading source of water quality impacts on surveyed rivers and lakes, the second

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102. *Id*. at 4614 (discussing additional reproductive consequences of atrazine).

103. John W. Allran & William H. Karasov, *Effects of Atrazine on Embryos, Larvae, and Adults of Anuran Amphibians*, 20 ENVTL. TOXICOLOGY & CHEMISTRY 769, 772 (2001) (noting differences atrazine caused in subject species).

104. Orton, *supra* note 2, at 65 (analyzing effects of atrazine and sex ratios of Northern Leopard Frog).

105. *Id.* (analyzing additional effects of atrazine and sex ratios of Northern Leopard Frog).

106. For a discussion of the impact of agricultural pollutants on amphibians, see *supra* notes 100-105 and accompanying text.

107. For a description of agricultural pollution's impact on fish and birds, see *supra* note 91 and accompanying text.

108. 33 U.S.C. § 1251(a) (setting forth objectives of CWA and measures to achieve those objective).

109. *Nonpoint Source Program and Grants Guidelines for States and Territories*, 68 FED. REG. 60656 (Oct. 7, 2003) (noting continued threat of nonpoint source pollution in United States); *see* Johnson, *supra* note 6, at 486 (recognizing nonpoint pollution as being "primarily responsible for the failure in most states to meet the Clean Water Act's water quality standards"); *see also* Zaring, *supra* note 7, at 515 (discussing ineffectiveness of CWA in addressing nonpoint source pollution).

110. Zaring, *supra* note 7, at 515 (explaining differences in pollution discharges).

111. *See* Johnson, *supra* note 6, at 486 (describing failure of most states to meet CWA water quality standards).

112. U.S. ENVTL. PROT. AGENCY, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2004 REPORTING CYCLE: FINDINGS 9 (2009), http://water.epa.gov/lawsregs/guidance/cwa/305b/upload/2009_05_20_305b_2004report_report2004pt3.pdf (reporting results of national water quality assessment).

113. NATIONAL WATER QUALITY INVENTORY, *supra* note 112, at 10, 14 (noting impairment of nation's lakes for designated use).

largest source of impairments to wetlands, and a major contributor to contamination of surveyed estuaries and ground water."[114] Even though the CWA is slowly expanding to regulate more agricultural pollution through point source pollution permitting programs, much of it remains unregulated as nonpoint source pollution.[115] Nonpoint source pollutants from runoff typically include: "[e]xcess fertilizers, herbicides and insecticides from agricultural lands... [s]ediment from improperly managed construction sites, crop and forest lands and eroding streambanks, [s]alt from irrigation practices, [and] [b]acteria and nutrients from livestock."[116]

In 1972, Congress attempted to address the agricultural problem by implementing § 208 of the CWA, which "directed states to adopt area-wide waste treatment management plans."[117] However, under § 208, the governor of each state was responsible for designating areas with water quality control problems, the boundaries of that area, and a representative organization to develop an effective area-wide waste treatment management plan.[118] These plans were to include "agriculturally and silviculturally related nonpoint sources of pollution... and their cumulative effects, runoff from manure disposal areas, and... land used for livestock and crop production," as well as " set forth procedures and methods (including land use requirements) to control to the extent feasible such sources."[119] After a great deal of time and money was spent in developing the § 208 plans, few mandatory requirements were adopted, which effectively made the plans voluntary.[120] Nearly two hundred § 208 plans were created, of which almost all were abandoned in the 1980s due to a lack of federal funding, inadequate water quality data, poor EPA management, and a lack of public education and awareness.[121] States were also "unwilling to provoke powerful agricultural constituencies" by creating strict regulations when the government had not required them to do so.[122]

Dissatisfied with the state of nonpoint pollution regulation, Congress amended the CWA by adding § 319 to strengthen agricultural and runoff controls in 1987.[123] This new nonpoint pollution control provision stated "it is the national policy that programs for the control of nonpoint

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114. *Agriculture*, *supra* note 82 (discussing study on agricultural nonpoint source pollutants in rivers, lakes, wetlands, estuaries, and ground water).

115. Both Concentrated Animal Feeding Operations (CAFOs) and certain agricultural equipment are considered point sources and require NPDES permits under the CWA. *See* 40 C.F.R. § 122.23(a) (2006) (requiring CAFOs to have NPDES permits); Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 119 (2d Cir. 1994) (recognizing manure spreading vehicles as point sources); *see also Enforceable State Mechanisms for the Control of Nonpoint Source Water Pollution*, ENVTL. LAW INST., ELI PROJ. NO. 970300, 4 (1997) [hereinafter *Enforceable State Mechanisms*], *available at* http://www.epa.gov/owow/NPS/elistudy/nonpoint.pdf (examining state law enforcement mechanisms controlling nonpoint source pollution). Nonpoint source pollution is not defined in the CWA, however, it is often recognized as pollution which does not fall under the definition of a point source in § 1362(14) of the CWA and it is often described as pollution coming from a "diffuse source" associated with precipitation, rather than a point source, which is then carried by runoff into lakes, rivers, wetlands, coastal areas, and groundwaters. *What is Nonpoint Source Pollution?*, ENVTL. PROT. AGENCY, http://water.epa.gov/polwaste/nps/whatis.cfm (last updated Sept. 29, 2011).

116. *What is Nonpoint Source Pollution?*, *supra* note 115 (providing examples of common nonpoint source pollutants).

117. Adler, *supra* note 81, at 78 (recalling 1972 Congressional attempt at addressing pollutant problems).

118. 33 U.S.C. § 1288(a)(1)-(2) (1972) (providing guidelines on how to identify and address water quality control problems).

119. 33 U.S.C. § 1288(b)(2)(F)(i)-(ii) (providing guidelines on what needs to be included in waste treatment management plans).

120. Adler, *supra* note 81, at 79 (noting § 208 did not include many mandatory provisions); *see* Zaring, *supra* note 7, at 522 (describing practical effect of § 208).

121. Adler, *supra* note 81, at 184 (listing reasons behind abandonment of § 208 plans).

122. Zaring, *supra* note 7, at 524 (explaining state's rationale for not enacting strict agricultural regulations).

123. *Id.* at 525 (asserting Congressional dissatisfaction with state if nonpoint source regulation led to 1987 amendment of CWA).

sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of [the CWA] to be met through the control of both point and nonpoint sources of pollution."[124] In many respects § 319 is very similar to § 208, as it too failed to significantly encourage the states to develop more stringent assessments and plans.[125] Section 319 required "states to complete comprehensive nonpoint source pollution assessments statewide, but where possible on a watershed basis; and to prepare and implement comprehensive nonpoint source pollution control plans to address the identified problems."[126] By way of § 319, Congress increased the substantive standard for runoff controls only slightly—raising the standard from "to the extent feasible" in § 208 to "the maximum extent practicable" in § 319.[127]

In 1996, the EPA and the states agreed to address nine key elements in an effort to upgrade the state nonpoint source management plans.[128] These elements consisted of the following: creating long- and short-term goals for restoring water quality, strengthening working partnerships, balancing approaches for state and watershed management, focusing on eliminating current water quality impairment problems and preventing future ones, upgrading and implementing all program requirements to be more flexible with targeted approaches to control, and creating feedback loops for evaluation and revisions of the programs.[129] These efforts, however, still inadequately incentivized the states to create more stringent pollution control programs.[130]

To add to these problems, there continued to be insufficient funding, a lack of consequences for failure to comply with § 319, and political pressure on state agencies to restrain from developing nonpoint source pollution plans.[131] Section 319 provides that if a state failed or chose not to submit a nonpoint source monitoring report, the responsibility simply shifted to the EPA without any consequences to the state.[132] In addition, farmers had very little incentive to voluntarily participate in the plans; because they did not bear the "total costs of off-farm pollution and erosion" there was no reason for them to change their practices.[133] Finally, the states continued to find themselves faced with significant political and monetary pressure from powerful agricultural interests if they choose to voluntarily regulate nonpoint source pollution.[134]

Section 303 of the CWA offers an additional means to address nonpoint source pollution by

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124. 33 U.S.C. § 1251(a)(7) (1987) (addressing need to implement new programs to address nonpoint source pollution).

125. Adler, *supra* note 81, at 80 (analyzing effect of § 319).

126. *Id.* (footnote omitted) (elaborating upon requirements of § 319).

127. *Id.* (comparing and quoting § 319 runoff control standard to § 208).

128. *Nonpoint Source Program and Grants Guidelines for States and Territories*, *supra* note 109, at 60654 (describing further efforts to improve nonpoint source management plans).

129. *The Virgin Islands Non Point Source Pollution Mgmt. Plan: Non Point Source: 9 Key Elements of an Effective Territorial Program*, U.S. V.I. DEPT. OF PLANNING & NATURAL RES. (Jan. 10, 2000), http://www.dpnr.gov.vi/dep/FactSheets/nonpointelements.htm (listing key elements).

130. Zaring, *supra* note 7, at 527 (finding 1996 efforts insufficient incentive to guarantee state action).

131. *Id.* (describing additional problems with implementing more stringent pollution control programs).

132. *Id.* (explaining failure of § 319 to reduce nonpoint source pollution).

133. *Id.* at 528 (explaining failure of § 319 to reduce nonpoint source pollution).

134. *See* BARBARA A. BARDES ET AL., AMERICAN GOVERNMENT AND POLITICS TODAY: THE ESSENTIALS 2010-2011, 226 (Carolyn Merrill et al. eds., 2012-2012 ed. 2010) (explaining effect of agricultural interest groups on legislation). Even though they "represent less than 1 percent of the U.S. population," farmers have had a great deal of influence on legislation because they are "geographically dispersed and therefore have many representatives and senators to speak for them." *Id. See also* Zaring, *supra* note 7, at 523-24 (noting voluntary nature of § 208). Zaring described the unbalanced competition between agricultural polluters and other water users, noting agricultural interests "have a stronger incentive per person" to lobby for their interests than those who would only receive a small benefit from nonpoint source regulation. *Id.* at 542.

requiring states set water quality standards for water bodies within the state and determine which of those waters are impaired.[135] Impaired water bodies are then placed on the § 303(d) list for which the state must create a Total Maximum Daily Load (TMDL).[136] A TMDL is the "calculation[] of the maximum 'load' of a pollutant that a waterbody can receive from all sources, including point, nonpoint, and background sources, without exceeding the water quality standards for the pollutant."[137] Section 303 requires a state include water bodies that are impaired solely due to nonpoint source pollution from agricultural runoff.[138]

Because no authority exists to regulate these nonpoint source polluters, however, the responsibility to develop TMDLs once again falls into the hands of the state and local agencies subject to the pressures of "politically powerful interests" concerned with TMDL program costs.[139] In effect, § 303 faces essentially the same problems as §§ 208 and 319 in that it leaves regulation up to the state to enforce, while simultaneously failing to set limits on nonpoint source pollution.[140]

While many states have attempted to fill the gaps left by the CWA's lack of sufficient legislation regulating nonpoint source pollution, most are unable to do so through the patchwork of laws they have passed.[141] The difficulty with these mechanisms is they vary greatly by state, watershed, and activity, and therefore provide no regional standard.[142] Additionally, the responsibilities of setting and implementing the standards and enforcing the state laws are often delegated to various groups that have no communication method to ensure they can effectively address any problems that may arise.[143] Therefore, it is necessary to find other avenues for the public to ensure their interests in wildlife and water quality dependent public trust uses are protected from agricultural nonpoint source pollution.

V. THE PUBLIC TRUST DOCTRINE AS AN ALTERNATIVE MEANS OF ADDRESSING NONPOINT SOURCE POLLUTION

The shortcomings of § 319 have left the American public to suffer the consequences of a nearly unregulated agricultural nonpoint source water pollution predicament.[144] Not only are the effects of the pesticides, herbicides, fertilizers, and sediment taking a toll on the quality of our

135. 33 U.S.C. § 1313 (2006) (establishing water quality standards).

136. *See* Reed D. Benson, *Pollution Without Solution: Flow Impairment Problems Under Clean Water Act Section 303*, 24 STAN. ENVTL. L.J. 199, 218-19 (2005) (explaining states' obligations under § 303).

137. Meline MacCurdy, *Private Landowners Granted Right to Challenge EPA's Clean Water Act "Impaired Waters" Listing Decisions*, MARTEN LAW (Mar. 3, 2011), http://www.martenlaw.com/newsletter/20110303-impaired-waters-listing-decisions (defining "total maximum daily load" for purposes of § 303(d)).

138. Pronsolino v. Nastri, 291 F.3d 1123, 1140-41 (9th Cir. 2002) (finding § 303(d)(1) listing and TMDL requirements include waters "impaired only by nonpoint sources of pollution").

139. Benson, *supra* note 136, at 227 (analyzing source of controversy over TMDL program).

140. *See* Endre Szalay, Comment, *Breathing Life into the Dead Zone: Can the Federal Common Law of Nuisance Be Used to Control Nonpoint Source Water Pollution?*, 85 TUL. L. REV. 215, 239 (2010) (criticizing voluntary nature of § 319).

141. These legal mechanisms may include general discharge provisions, erosion control, enforcement authorities, land use regulations, adopting accepted agricultural practice requirements, nutrient management plans, using BMPs as enforcement mechanisms, and pesticide handling provisions. *Enforceable State Mechanisms*, *supra* note 115, at 37-49.

142. *Id.* at 54 (comparing states' primary responses to nonpoint source pollution).

143. *See id.* at i (comparing states' primary responses to nonpoint source pollution).

144. Zaring, *supra* note 7, at 517 (discussing extent of nonpoint source pollution in surface and ground waters, significantly affecting water quality).

nation's waters, they are also detrimental to aquatic environments, biodiversity, and the wildlife which depend solely on these waters.[145]

The topic of nonpoint source pollution regulation is politically charged, often revolving around the potential costs incurred by the polluters if more stringent standards are appropriately enforced.[146] In addition, the strength of the agricultural lobbying sector allows it to place considerable pressure on legislators to prevent legislation running counter to the interests of its constituents.[147] With threats of financial repercussions and political turmoil, states are often forced to create toothless pollution control plans or, worse yet, none at all.[148] Fortunately, the judicial system, free from the confines of the special interest groups' excessive political pressure, is in a prime position to protect the public's interests through the enforcement of pollution control plans.[149] It is in this context the public should use the public trust doctrine in wildlife, along with the related public trust uses adversely affected by poor water quality, as a tool to pressure their state legislatures and agencies to uphold their duties to protect such interests when developing, implementing, and reevaluating § 319 agricultural nonpoint source pollution control plans.

In California, state agencies must consider the public trust when planning and allocating water resources in an effort to minimize harm to public interests.[150] Using this as a foundation, a litigant in California has several possible litigation strategies available in which they can use the public trust doctrine as a means to control agricultural nonpoint source pollution.[151] For example, in an effort to save a local population of American bullfrogs suffering from reproductive and developmental defects and living in a river containing high levels of atrazine, a member of the public could bring a claim before the court under several potential causes of action.[152] Assuming there is a § 319 nonpoint source pollution control plan developed by the Regional Water Quality Control Board (RWQCB), the citizen could bring a claim against: (1) the RWQCB for failing to consider the public's interest in protecting the American bullfrog population, which is dependent on this river, when developing and implementing the regional water quality control plan; (2) the RWQCB for failing to comply with state and federal regulations regarding nonpoint source pollution; or (3) the permitting agency that granted a land use permit causing an increase in the level of atrazine in the river through nonpoint agricultural runoff.[153] In both the second and third claims, a citizen would raise the public trust doctrine issue later in the proceeding as a means of strengthening their argument. Any of these causes of action, however, would essentially pres-

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145. *See* discussion *supra* Part III.B-C.

146. *See* MARC O. RIBAUDO ET AL., U.S. DEP'T OF AGRIC., AER-782, ECONOMICS OF WATER QUALITY PROTECTION FROM NONPOINT SOURCES: THEORY AND PRACTICE 1 (1999), *available at* http://www.ers.usda.gov/publications/aer782/aer782.pdf (explaining negative consequences of stronger enforcement).

147. Zaring, *supra* note 7, at 515 (noting strength of agricultural interest groups' influence on legislation); Bardes, *supra* note 134, at 226 (explaining effect of agricultural interest groups on legislation).

148. *See* Zaring, *supra* note 7, at 523-24 (explaining weaknesses of § 208).

149. *See* Wood, *supra* note 30, at 75-77 (finding "judicial branch remains the ultimate guardian of the [public] trust").

150. Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty., 658 P.2d 709, 712, 728 (Cal. 1983) (holding state has affirmative duty to consider public trust).

151. See *infra* text accompanying note 153.

152. See *infra* text accompanying note 153.

153. *See generally* J.M. GERSTEIN ET AL., UNIV. OF CAL. DIV. OF AGRIC. & NATURAL RES., STATE AND FEDERAL APPROACH TO CONTROL OF NONPOINT SOURCES OF POLLUTION 3-4 (2006), *available at* http://ucanr.org/freepubs/docs/8203.pdf (providing background information on California's Regional Water Quality Control Board (RWQCB), agency used as example in hypothetical).

sure an agency to enforce an agricultural nonpoint source control plan. While these are just a few of the options available to California citizens, the list is not exclusive.[154] As noted earlier, California has developed a common law system best suited to apply the public trust doctrine in the manner proposed.[155] Yet this does not prevent members of the public from attempting to enforce nonpoint source pollution control plans in their states if the common law system allows for it.[156]

When using the public trust doctrine to attack an agency's lack of nonpoint source pollution management, citizens might face a potential hindrance if the state agency only recognizes the public's interest in wildlife resources to the minimum extent necessary when reviewing or developing a nonpoint source pollution control plan. As noted previously, however, a reviewing court would likely regard the agency's decision with great skepticism and review it with meaningful judicial scrutiny to ensure the agency acted reasonably as trustee of the public trust.[157] In this situation, if the agency failed to reasonably consider the public interest in their decision, the court could simply ask the agency to reevaluate the plan.

When recognizing a public interest in wildlife and related water quality dependent uses, an agency must address numerous issues that may not lie solely within their control. Therefore, to ensure the public interests are properly considered, several different agencies might need partner and work together to minimize agricultural nonpoint source pollution. The agencies involved could include those managing wildlife resources, monitoring agricultural nonpoint source pollution, and those who focus specifically on water quality issues, all of which would need to join forces to efficiently address agricultural nonpoint source pollution. In such a situation, there is tremendous potential for the individual agencies to form partnerships and collaborate with other agencies in an effort to protect these public trust interests. Collaboration between agencies will better protect the public interests and promote long-term relationships between the agencies, thus allowing them to more effectively respond to a diverse range of environmental concerns by approaching the ecosystem as a whole rather than in fragmented sections.

VI. CONCLUSION

The CWA is known as the "most comprehensive federal regulatory program for controlling discharges to surface waters."[158] It provided Americans with the rules and regulations necessary to clean up many of the nation's waters so they could meet fishing and swimming standards: a

154. *See* Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 83 Cal. Rptr. 3d 588, 600 (Cal. Ct. App. 2008) (holding private citizens have standing to bring claim of harm to public trust).

155. See *supra* note 12 and accompanying text.

156. Numerous courts have set a foundation for wildlife protection and water quality through public trust uses even if not to the extent of California's common law. *See generally* Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 387, 455 (1892) (noting navigable waters and soils underneath them are held in public trust); In re Steuart Transp. Co., 495 F. Supp. 38, 40 (E.D. Va. 1980) (noting State of Virginia has public trust interest in protecting wildlife for people); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094-95 (Idaho 1983) (permitting public trust cause of action); Owsichek v. Alaska Guide Licensing & Control Bd., 763 P.2d 488, 491 (Alaska 1988) (permitting public trust claims).

157. *See* Sax, *supra* note 42, at 490 (noting courts will review "with considerable skepticism" governmental conduct affecting public resources); *see also* Wood, *supra* note 30, at 75-77 (finding "judicial branch remains the ultimate guardian of the [public] trust").

158. ROBERT V. PERCIVAL & CHRISTOPHER H. SCHROEDER, ENVIRONMENTAL LAW: STATUTORY AND CASE SUPPLEMENT WITH INTERNET GUIDE 2009-2010, at 749 (Vicki Bean et al. eds., 2009) (providing overview of CWA).

far cry from the water pollution issues that plagued the country in the 1960s, such as the burning of the Cuyahoga River.[159] Yet, even with these vast improvements, the CWA still fails to adequately regulate agricultural nonpoint source pollution.[160]

To address their concerns, the public should turn to the ancient public trust doctrine—a proven and powerful enforcement mechanism available to the public with the potential to protect the nation's wildlife and waters from agricultural nonpoint source pollution. The public trust doctrine is the ideal vehicle for citizens to require state and local agencies to protect the public's interests in wildlife and water quality dependent public trust uses when developing, regulating, and reevaluating nonpoint source pollution control plans under § 319 of the CWA.

159. *See Cuyahoga Valley Water Quality*, U.S. NAT'L PARK SERV. DEP'T OF THE INTERIOR, http://www.nps.gov/cuva/naturescience/waterquality.htm (last visited Dec. 20, 2011) (providing background on pollution in Cuyahoga River).

160. *See* Szalay, *supra* note 140, at 245 (comparing weaknesses of nonpoint source pollution legislation compared to comprehensive legislation banning point source pollution).

Waste Not, Want Not:
Using Factory Farm Regulations to Pursue Puppy Mill Reform in Texas[*]

INTRODUCTION

There is more than one way to *save* a cat…or a dog. And no field of law celebrates a creative approach to lawyering more than public interest law, where the clients so often start from a legal and social disadvantage. In that spirit, this paper draws on two values—creativity and efficiency—to arrive at a novel approach to the problem of puppy mills, using environmental regulations already on the books. Using Texas as a case study, this paper discusses how state water regulations governing factory farms or Animal Feeding Operations (AFOs) may apply to puppy mills. It goes on to describe how puppy mill reform advocates might use these regulations to stifle the proliferation of puppy mills while a more elegant legislative solution remains pending.

Part I of this paper briefly touches on the problems posed by puppy mills, from animal welfare concerns to threats to the environment. Part II summarizes some existing federal and state laws governing puppy mills and commercial dog breeding, including bills recently introduced and still pending. This Part also addresses the controversy over pending puppy mill reform legislation in Texas, setting the stage for our case study. Part III proposes a creative interim alternative to puppy mill reform legislation: the application of Texas factory farm regulations to puppy mills. This Part also summarizes the federal and state laws governing industrialized agriculture, the unique regulatory regime governing such operations in Texas, and the steps necessary to repurpose the existing regulations to address the problem of puppy mills.

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I. THE PROBLEM WITH PUPPY MILLS

In recent years, Americans have become increasingly aware of the animal welfare abuses taking place at "puppy mills" or large-scale commercial dog breeding operations. Puppy mills place profits above the welfare of their animals, often raising dogs in overcrowded and unsanitary conditions, without adequate veterinary care, food, water, or socialization.[1] Irresponsible breeding and deplorable conditions result in puppies and dogs suffering from disease, illness, and genetic malformations. Puppy mill dogs are sold to pet stores, which in turn sell them to consumers, sometimes under false pretenses.

In addition to animal welfare concerns, puppy mills present significant, albeit subtler, environmental concerns. Like any operation involving an artificial concentration of animals, puppy mills pose a threat to air and water quality in their vicinity. Runoff from puppy mills may contaminate local water supplies with animal waste and the associated pathogens, which pose a threat to human health.[2] They also produce foul and oppressive odor, which contaminates the air for miles around. In West Virginia, one sheriff was prompted to investigate a local puppy mill because neighbors complained that dog urine was contaminating a nearby creek.[3] Upon arriving

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[1] *See* Am. Soc'y for the Prevention of Cruelty to Animals, What is a Puppy Mill, http://www.aspca.org/fight-animal-cruelty/puppy-mills/what-is-a-puppy-mill.aspx (last visited Feb. 14, 2012). For a detailed discussion of the origin, nature, purpose, and effect of puppy mills, see Adam J. Fumarola, *With Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage it, and the Positive Prospects of Animal Rights*, 6 BUFF. ENVTL. L.J. 253, 254-65 (1999). For examples of puppy mill operations discovered across the country, see Animal Abuse Crime Database, http://www.pet-abuse.com/pages/cruelty_database.php (enter keyword "puppy mill")(last visited Feb. 14, 2012).

[2] *See* U.S. Envtl. Prot. Agency, Pathogens, http://www.epa.gov/agriculture/ag101/impactpathogens.html (last visited Feb. 14, 2012)(listing pathogens found in animal waste, the associated diseases affecting humans, and the symptoms of those diseases).

[3] Justin D. Anderson, *Kennel Owner Calls Raid Witch Hunt, Rescuers Seize 1,000 Dogs from Wood County Farm*, CHARLESTON GAZETTE & DAILY MAIL, Aug. 25, 2008, at 1A.

at the scene, one deputy sheriff remarked, "[y]ou simply can't describe the overwhelming smell of the ammonia, the feces…the smell was just horrible."[4]

II. The Law Governing Puppy Mills

a. *Existing Federal and State Laws*

Most advocates would agree that the existing regulation of commercial breeding and animal welfare has been ineffective at curbing the puppy mill problem, often due to legal loopholes and lack of enforcement. The primary federal law applicable in this area is the Animal Welfare Act (AWA), which was enacted to ensure the humane treatment of animals used for research, bred for commercial sale, exhibited to the public, or otherwise commercially transported.[5] Although the AWA requires licensing and inspection of commercial dog breeding operations, several loopholes in the act combined with inadequate funding and poor enforcement have rendered it nearly useless to the campaign to curb abuses at puppy mills.[6] In a recent audit, the Office of the Inspector General at the Department of Agriculture—the agency tasked with administering AWA licensing of commercial breeders—pointed out several major deficiencies in the program.[7] These deficiencies included ineffective enforcement against problematic dealers, failure to document violations properly, minimization of penalties, misuse of guidelines to lower penalties, and an inability to regulate puppy sales over the internet under the AWA as written.[8]

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[4] *Wood Kennel Surrenders 1,000 Dogs, Operator Denies Animals Had No Human Contact*, Charleston Gazette & Daily Mail, Aug. 26, 2008, at 1C.
[5] 7 U.S.C. § 2131 *et seq.* Originally Pub. L. No. 89-54 (1966), amended by Pub. L No. 91-579 (1970).
[6] For an extended discussion of the Animal Welfare Act and its failure to address the puppy mill problem, see, e.g., Fumarola, *supra* note 1, at 267-71; Katherine C. Tushaus, Note, *Don't Buy the Doggy in the Window: Ending the Cycle that Perpetuates Commercial Breeding with Regulation of the Retail Pet Industry*, 14 Drake J. Agric. L. 501, 506-10 (2009).
[7] Office of the Inspector Gen., U.S. Dep't of Agric., Animal & Plant Health Inspection Service Animal Care Program Audit Report (2010), *available at* http://www.usda.gov/oig/webdocs/33002-4-SF.pdf.
[8] *See id*. at 1-3.

Although several bills were introduced in the 110th and 111th Congresses which would have amended the AWA to address these deficiencies, none of these amendments were enacted.[9]

Some states have responded to these deficiencies in the federal law by enacting their own laws aimed at eliminating puppy mills, with some notable success stories. The enactment of Pennsylvania's amended Dog Law in 2008—considered "pioneering legislation" in the field—was the first major state effort at puppy mill reform legislation.[10] Pennsylvania's widely-publicized experience encouraged other states to try tightening their control of commercial dog breeders.[11] In 2008 alone, twenty-one states introduced legislation regarding puppy mills. These laws and those proposed since have taken the guise of everything from animal welfare statutes to commercial breeder licensing programs to consumer protection laws.[12] Some states, including Maine and Virginia, have succeeded in enacting puppy mill reform laws, but most have not.[13] Despite increasing public awareness of the abuses taking place at puppy mills nationwide, the opposition to puppy mill reform remains deeply entrenched, and has successfully stalled many meaningful reform bills.

b. *Recent Bills and Ballot Initiatives*

Traditionally, animal welfare advocates have approached the problem of puppy mills head on, by supporting legislation which would regulate commercial dog breeding or strengthen

[9] For a discussion of recent bills to amend the Animal Welfare Act, and a brief legislative history of the Act, see TADLOCK COWAN, CONG. RESEARCH SERV., THE ANIMAL WELFARE ACT: BACKGROUND AND SELECTED LEGISLATION (2010), *available at* http://www.nationalaglawcenter.org/assets/crs/RS22493.pdf.

[10] Scholars have touted the Pennsylvania law as "pioneering legislation" which effectively confronted the puppy mill problem in a state dubbed the "Puppy Mill Capital of the East." Melissa Towsey, Comment, *Something Stinks: The Need for Environmental Regulation of Puppy Mills*, 21 VILL. ENVTL. L.J. 159, 166-67 (2010).

[11] For a discussion of the backstory to Pennsylvania's Dog Law and subsequent commercial breeder legislation in Virginia, see Sandra K. Jones, *Dealing Dogs: Can We Strengthen Weak Laws in the Dog Industry?* 7 RUTGERS J. L. & PUB. POL'Y 442 (n.pg.)(2010).

[12] For a discussion of the variety among state laws addressing commercial breeders, see Robin Fae Katz, Comment, *The Importance of Enacting a Texas Commercial Breeder Law To Regulate Loopholes that the Federal Law Creates*, 11 TEX. TECH. ADMIN. L.J. 185, 189-96 (2009); Tushaus, *supra* note 6, at 510-14.

[13] Tushaus, *supra* note 6, at 511-13.

existing animal welfare statutes, like Pennsylvania's Dog Law amendment of 2008. Recently, however, animal welfare advocates have also embraced the use of ballot initiatives as a means to accomplish reform. Initiatives and referenda take the issue directly to the voters, thwarting special interests and dilution by compromise in the legislature.[14] The recent enactment of the Puppy Mill Cruelty Prevention Act in Missouri by ballot initiative is one celebrated example of how ballot initiatives can be used successfully to circumvent special interests in the state legislature.[15] However, in several states, legislative and initiative successes have been short-lived, with the opposition attempting to gut or unravel reform laws post-enactment.

For example, the states of Missouri and Oklahoma both enacted controversial puppy mill reform legislation in 2010. Missouri garnered national attention when it enacted the hotly contested Missouri Puppy Mill Cruelty Prevention Act or "Proposition B" using the ballot initiative process.[16] Advocates turned to the initiative process after their earlier attempts to push reform legislation through Missouri's legislature failed.[17] In Oklahoma, after a three year long battle over reform, the state legislature successfully enacted the Commercial Pet Breeders Act to regulate and license high-volume commercial dog breeders.[18] In both Missouri and Oklahoma, puppy mill reform proved highly controversial and was achieved only after prolonged campaigns. Further, in both these states, opponents to puppy mill reform refused to capitulate, even after the respective laws were approved. Almost before the governors' signatures had dried, opponents of the new laws began campaigns to have them undermined or repealed.

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[14] For a discussion of recent use of initiatives in animal welfare advocacy, see Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 153-56 (2009).
[15] To read the initiative petition, see Mo. Sec'y of State, 2010 Initiative Petitions Approved for Circulation in Missouri, Statutory Amendment to Chapter 273, Relating to Dog Breeders, http://www.sos.mo.gov/elections/2010petitions/2010-085.asp (last visited Feb. 14, 2012).
[16] *See Id.*; *Initiative Would Force Better Kennel Conditions*, SPRINGFIELD NEWS-LEADER, Dec. 20, 2009, at A1.
[17] *See, e.g.*, H.B. 1921, 95th Gen. Assem., 2d Reg. Sess. (Mo. 2010).
[18] *See* Barbara Hoberock, *Henry Signs Bill on Puppy Mills*, TULSA WORLD, May 7, 2010, at A8; Jennifer Loren, *Governor Signs Puppy Mill Regulation Bill into Law*, May 6, 2010, http://www.newson6.com/story/12440514/governor-signs-puppy-mill-regulation-bill-into-law.

Within days of the November referendum that affirmed enactment of the Missouri ballot initiative, opponents were hard at work on a bill to amend the new law. Although successful, the reform initiative passed by a narrow margin and faced vehement opposition from Missouri's dog breeding industry, which at that time included more USDA-licensed breeders than any other state.[19] Between January and April of 2011, state legislators opposed to reform introduced nine bills to amend or repeal the Puppy Mill Cruelty Prevention Act.[20] In April, the Missouri legislature passed S.B. 113, which animal advocates called "effectively a repeal of all the meaningful measures in [the puppy mill reform law]."[21] Among other changes, the senate bill repealed the limit on the number of breeding dogs a commercial breeder can own and removed certain criminal penalties from the law. In a bid for compromise, Governor Nixon signed both the S.B. 113 amendment and a second bill, S.B. 161, which included some concessions to reform advocates.[22]

Likewise, in Oklahoma, newly-enacted puppy mill reform legislation was the subject of no less than four senate bills calling for predatory amendments and noncodification, as well as a joint resolution of both houses disapproving the rules promulgated to enforce the new law.[23] The Oklahoma Commercial Pet Breeders Act became effective in January 2011, and enforcement under the Act was not scheduled to begin until July 2011. Most of the proposed amendments to

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[19] Jason Noble, *Limits on Dog Breeding in Missouri Races to the Winning Vote*, KAN. CITY STAR, Nov. 3, 2010.
[20] S.B. 4, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2010)(pre-filed); H.B. 94, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); H.B. 99, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); H.B. 131, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); S.B. 95, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); S.B. 113, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); H.B. 281, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); H.B. 332, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011); H.B. 405, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011).
[21] Jason Noble, *Bill to Modify Puppy-mill Law Goes to Missouri's Governor*, KAN. CITY STAR, Apr. 14, 2011 (statement of Cori Menkin, ASPCA). *See* S.B. 113, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011)(as passed, the bill incorporated provisions of S.B. 95).
[22] S.B. 161, 96th Gen. Assem., 1st Reg. Sess. (Mo. 2011). *See*, Jason Noble, *Puppy Mill Compromise Is Now Law in Missouri*, KAN. CITY STAR, Apr. 28, 2011.
[23] S.B. 15, 53d Leg. (Okla. 2011); S.B. 128, 53d Leg. (Okla. 2011); S.B. 637, 53d Leg. (Okla. 2011); S.B. 773, 53d Leg. (Okla. 2011); H.J.Res. 1045, 53d Leg. (Okla. 2011)(stating the rules enacted pursuant the new law "[do] not reflect the intent of the Oklahoma Legislature").

the Act would have taken effect on passage or on July 1, 2011, potentially gutting the Act before any enforcement could begin. Advocates of puppy mill reform in Oklahoma were outraged, but legislators opposed to the act continued to work toward amendment.[24] Ultimately, the legislature passed a much-revised version of S.B. 637, which was signed by Governor Fallin, and a house resolution disapproving several of the regulations promulgated under the new puppy mill law. Sponsors and the Governor described their solution as a compromise, which does not eliminate the reform program entirely, but cuts the more controversial provisions of the Commercial Pet Breeders Act. These provisions included allowing humane societies to perform inspections and certain grounds for the denial of a commercial breeders' license.[25]

c. *Puppy Mill Reform Efforts in Texas*

In Texas, legislators and activists have been trying for two years to pass a law regulating puppy mills. At present, Texas is one of a minority of states that does not regulate or require licensing of commercial dog breeders.[26] In fact, Texas law ranks 36th in the nation when it comes to providing animal welfare protections generally.[27] Many officials, consumers, and animal advocates believe that Texas' puppy mill problem is growing.[28] Large expanses of sparsely inhabited land, mild winters, lack of state regulations governing puppy mills, and an upswing in neighboring states' regulation of puppy mills combine to make Texas an attractive jurisdiction for puppy mill operators.

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[24] *See, e.g.*, *Editorial: Puppy Power*, TULSA WORLD, Mar. 22, 2011, at A13; Omer Gillham, *Pet-breeder Amendment Questioned*, TULSA WORLD, Apr. 8, 2011, at A1; Omer Gillham, *Puppy-mill Law Snag Feared,*, TULSA WORLD, Mar. 21, 2011, at A1; *Opinion: A Dirty Trick*, THE OKLAHOMAN, Apr. 11, 2011, at 8A.
[25] S.B. 637, 53d Leg. (Okla. 2011). *See*, Barbara Hoberock, *Pet Breeding Measures Get Fallin Signature*, TULSA WORLD, May 17, 2011, at A5.
[26] Katz, *supra* note 12, at 186.
[27] Erin Mulvaney, *Animal-related Bills Show Push To Protect Pets*, DALLAS MORNING NEWS, Mar. 15, 2011, at B1.
[28] *See, e.g.*, Erin Mulvaney, *BBB Stymied on Puppy Mills*, DALLAS MORNING NEWS, Aug. 24, 2010, at B03; Erin Mulvaney, *Puppy Mills Spur Call for Legislation*, DALLAS MORNING NEWS, July 19, 2010, at A01.

In 2011, Texas state legislators considered a reform bill that, as introduced, would have required commercial breeders with more than eleven unspayed adult female dogs or cats to hold a state-issued license, pay licensure fees, and submit to annual inspections.[29] The bill also prohibited commercial breeders from possessing more than fifty unspayed females at one time, without complying with additional requirements set by the state. It set standards for the care of confined animals, and allowed assessment of administrative penalties for failure to comply with the act. Opponents managed to stall the reform bill, House Bill 1451, in the Texas House of Representatives for most of the spring session, before it ultimately passed in April 2011.[30]

The bill was highly controversial among both voters and legislators, with opponents claiming it was an expensive program that invited excessive intrusion by the state into individuals' private lives.[31] Still others feared that regulation would restrict the supply of family pets. Representative David Simpson, who spearheaded the stalling of HB 1451, claimed it would create a new bureaucracy at great cost to responsible breeders, and would have little effect on irresponsible breeders.[32] Those arguments held sway in the Texas Senate, which passed a watered-down version of the bill in May after several amendments.[33]

As signed by the governor on June 17, 2011, the amended puppy mill reform legislation contains major concessions to commercial breeders and a few gaping loopholes.[34] For instance,

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[29] H.B. 1451, 82d Leg., Reg. Sess. (Tex. 2011)(as introduced).
[30] Erin Mulvaney, *House Tentatively Approves Puppy Mill Bill To Regulate Dog and Cat Breeders*, DALLAS MORNING NEWS, Apr. 27, 2011, available at 2011 WLNR 8144690; Jordan Smith, *Puppy Mill Bill in Trouble?*, THE AUSTIN CHRONICLE, Apr. 15, 2011, http://www.austinchronicle.com/blogs/news/2011-04-15/puppy-mill-bill-in-trouble/.
[31] *See, e.g.*, Aman Batheja, *Texas House Passes Bill To Battle 'Puppy Mills'*, FORT WORTH STAR-TELEGRAM, Apr. 27, 2011, available at 2011 WLNR 8124526; Joe Holley, *Bill Targets 'Puppy Mills', Legislation Would Set Limits, Require Checks*, HOUS. CHRONICLE, Apr. 22, 2011, at B2.
[32] David Simpson, Animal Cruelty and the "Puppy Mill" Bill, http://davidsimpson.com/blog/?tag=puppy%20mill (last visited Feb. 19, 2012).
[33] *See*, Erin Mulvaney, *Texas Senator Plans to Alter Puppy Mill Bill*, DALLAS MORNING NEWS, May 21, 2011, *available at* http://www.dallasnews.com/news/politics/texas-legislature/headlines/20110520-texas-senator-plans-to-alter-puppy-mill-bill-.ece.
[34] H.B. 1451, 82d Leg., Reg. Sess. (Tex. 2011)(as enrolled).

the amendments created a significant exemption for breeders of dogs intended to be used primarily for agricultural uses, hunting, organized performance events, and racing. Inspections will occur at least every eighteen months, not annually. The amendments also significantly undercut the requirement that inspections be unannounced. The bill as signed permits use of wire-floor cages and stacking of cages, things that were prohibited in the bill as introduced. The signed legislation also prohibits breeders from euthanizing adult dogs except by a veterinarian, but the bill as introduced would have prohibited euthanizing dogs of any age, except by a veterinarian. So while Texas now has comprehensive puppy mill legislation, the final product suffered significant dilution during the legislative process and fell short of many reformers' aspirations.

III. A Creative Approach to Regulating Puppy Mills

Although Texas has enacted comprehensive puppy mill reform legislation, the efficacy of the program remains to be seen. And reformers may wait quite a while to see any effect at all, since breeders will not have to begin complying with the new law until September 1, 2012. The significant loopholes in the legislation have been noted above, as well as the undesirability of several provisions as passed, particularly when compared to the bill as introduced. And given the experiences in Oklahoma and Missouri, achieving enactment of a puppy mill reform law in Texas could be only a temporary triumph. In any event, the practical-minded reformer can look to other sources of law to prevent the expansion of puppy mills in Texas, namely to existing Texas factory farm rules. This approach, as described below, may also be available in other states where no puppy mill reform law yet exists.

a. *Puppy Mills…Meet CAFOs*

Those familiar with Concentrated Animal Feeding Operations (CAFOs)—a creation of the Federal Water Pollution Control Act, also known as the Clean Water Act—will immediately see a parallel to puppy mills. CAFOs or "factory farms" are an industrialized approach to animal agriculture. CAFOs "grow" selected animals in large quantities and on accelerated schedules to meet consumer demand for cheap meat, milk, or eggs. In their way, puppy mills do the same. A puppy mill produces puppies in large quantities and on an accelerated schedule to meet the consumer demand for cheap, purebred dogs. The same governing principle of "profit above all else" lies at the heart of the production model for both puppy mills and CAFOs. Recall that puppy mills originated when the market for traditional crops slumped, and the U.S. Department of Agriculture suggested that farmers raise dogs in bulk for profit to make up the shortfall.[35]

The term "CAFOs" describes an Animal Feeding Operation (AFO) that exceeds certain size thresholds, involves selected animals, and discharges or proposes to discharge pollutants to waters of the United States. The Clean Water Act defines Animal Feeding Operations as follows:

> Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where…: (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.[36]

The Clean Water Act requires all facilities that qualify as CAFOs to obtain permits as part of the National Pollutant Discharge Elimination System (NPDES) program.[37] AFOs are not required to

[35] Fumarola, *supra* note 1, at 262.
[36] 40 C.F.R. § 122.23(b)(1).
[37] This aspect of the NPDES program was recently the subject of an opinion by the Fifth Circuit Court of Appeals, in which parts of the 2008 regulations governing CAFOs were vacated (again). *See National Pork Producers Council v. U.S. EPA*, No. 08–61093, 2011 WL 871736 (5th Cir. Mar. 15, 2011). It is not yet clear how the EPA will respond to this decision, or what the ramifications will be for CAFO permitting programs nationwide. This paper continues its discussion of the NPDES CAFO permitting program as it existed under the 2008 CAFO regulations

obtain NPDES permits. Through enforcement of NPDES permits, the Environmental Protection Agency (EPA) minimizes the threat to nearby water supplies from a CAFO's contaminated runoff and intentional discharges.

Under the current federal law, most puppy mills will qualify as AFOs, but not CAFOs. Only operations involving specified numbers of cattle, swine, horses, sheep, turkeys, chickens, and ducks can be regulated as CAFOs and required to obtain NPDES permits.[38] Some scholars have suggested that the EPA regulations defining a CAFO should be amended to include dog breeding operations, so that puppy mills would be subject to same permitting and enforcement mechanisms as CAFOs.[39] Or that puppy mills that qualify as AFOs could be designated as CAFOs and required to obtain permits under a separate provision, 40 C.F.R. § 122.23(c).[40] Given the procedural and political complexity of amending federal regulations, and the additional procedural hurdles for designation already imposed in § 122.23(c), these two proposals, while innovative, are unlikely to be realized. Instead, advocates seeking to regulate puppy mills should turn to state water quality laws, which present a wider and more flexible range of regulatory tools.

b. *Texas Water Law*

Advocates tasked with a national campaign of any sort might reasonably shy away from resorting to state law. After all, using state law to accomplish such a campaign would be analogous to visiting fifty different produce stands, bakeries, butchers, and dairies to acquire the

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prior to *National Pork Producers Council*, while noting that the Fifth Circuit decision could result in significant changes to the CAFO rules.

[38] 40 C.F.R. §§ 122.23(b)(4), (6), (9).

[39] *See, e.g.*, Towsey, *supra* note 10, at 182-87.

[40] *Id.* (citing 40 C.F.R. §122.23(c)). While on its face, nothing about §122.23(c) would prohibit its application to puppy mill AFOs, in practice, this section is very rarely, if ever, invoked, even for the regulation of traditional livestock operations.

ingredients necessary to prepare a single dish. This makes for an onerous proposition compared to the one-stop shopping that federal law offers. However, the multiplicity of state law yields a host of new opportunities for advocates when resorts to federal law have failed. For instance, in this case we will find that Texas state water law offers advocates the opportunity to hold puppy mill owners to the same environmental standards as owners of livestock AFOs, something that would be impossible or highly improbable under existing federal rules.

i. *CAFO Regulation in Texas*

Texas has a long history of relatively diligent regulation of the livestock operations within its jurisdiction. In fact, Texas authorities were monitoring and permitting CAFOs under state law years before the EPA seriously turned to doing so under the NPDES program. Although the Clean Water Act defined CAFOs as point sources subject to the NPDES program as early as 1976, that definition exempted most facilities from regulation under the 25-year, 24-hour storm rule.[41] The tide turned in 2003, when the EPA revised the CAFO rules to require all CAFOs to apply for an NPDES permit and to develop and implement a nutrient management plan.[42]

Meanwhile, Texas authorities were already subjecting CAFOs in their jurisdiction to a time-intensive individual permitting process and distinct technical requirements for both air and water quality protection.[43] Their workload was significant. Between 1992 and 1994, Texas authorities received 119 new CAFO applications and 46 major amendment applications.[44] In 1995, the state switched to a more streamlined permit-by-rule system, and then in 1998, the EPA

[41] *See* 41 Fed. Reg. 11,458 (Mar. 18, 1976).
[42] *See* 68 Fed. Reg. 7175 (Feb. 12, 2003).
[43] 24 Tex. Reg. 5721, 5722 (July 23, 1999).
[44] *Id.*

authorized Texas to administer the NPDES permitting program for its jurisdiction.[45] Texas revised its state CAFO rules to incorporate the federal CAFO rules, but the marriage of the two systems retains some elements of the state's pre-NPDES permitting program. As a result, the CAFO regulatory scheme in Texas is more comprehensive than the NPDES program.[46]

To operate legally in Texas, CAFOs must demonstrate to the satisfaction of the Texas authorities that their facilities comply with Texas rules for CAFOs. Texas calls this process "authorization."[47] Once authorized, the state issues the CAFO a permit, essentially an agreement between the facility and the state as to how the facility will operate during the term of the agreement. Failure to comply with a permit can lead to enforcement action by the state and administrative penalties. Today in Texas, most facilities that qualify as CAFOs seek coverage under the general federal permit for CAFOs, administered by the Texas authorities.[48] Other CAFOs are required to obtain individual permits, also administered by Texas authorities.[49] Facilities that do not meet the statutory definition of a CAFO, but are designated as such by the Texas permitting authority, must obtain coverage under either the general permit or an individual permit.[50]

ii. *AFO Regulation in Texas*

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[45] *Id.* The 1995 system, called the Subchapter K program, was vacated by judgment rendered by the District Court of Travis County in *ACCORD Agriculture, Inc. v TNRCC*, No. 96-00159, and later affirmed by the Court of Appeals. No. 03-98-00340-CV, 1999 WL 699825 (Tex. Civ. App. Austin Sept. 10, 1999).

[46] *See generally* 29 Tex. Reg. 6652 (July 9, 2004); 24 Tex. Reg. 5721 (July 23, 1999). As a general rule in cooperative federalism schemes like the Clean Water Act, the state's implementation must be at least as stringent as the federal rule, and may be more so.

[47] For a comprehensive discussion of the current CAFO permitting regime in Texas, and some pertinent legislative history, see 46 TEX. PRACTICE SERIES ENVTL. LAW § 24.2 (2010).

[48] The current general permit became effective on July 20, 2009 and will expire on July 20, 2014. Tex. Comm'n on Envtl. Quality, General Permit No. TXG920000, *available at* http://www.tceq.state.tx.us/assets/public/permitting/waterquality/attachments/general/txg92draft.pdf.

[49] These are generally CAFOs located in vulnerable watersheds or near impaired waters. For a comprehensive list of CAFOs required to obtain individual permits, see 30 TEX. ADMIN. CODE § 321.33(b).

[50] Such facilities are designated either Small CAFOs or State-Only CAFOs, described in greater detail at 30 TEX. ADMIN. CODE § 321.32(13)(C), (D).

Recall that under the federal rules, AFOs which do not meet the definition of CAFOs have no duty to obtain a permit and can largely escape regulation by the federal government.[51] Not so in Texas. Under Texas rules, AFOs that are not designated or defined as CAFOs are authorized to operate without a permit; however, they still must comply with operational requirements designed to protect water quality.[52] The specificity of the operational requirements differs depending on whether or not the AFO uses a control facility for wastewater management.[53] An AFO that does not use a control facility to manage waste generated on site must (1) ensure that manure, litter, or wastewater is stored, beneficially used, or disposed of so as to protect surface and groundwater quality and (2) prevent nuisance conditions and minimize odor conditions at the facility.[54] An AFO that does use a control facility must comply with a lengthy list of technical specifications for the design and siting of facilities, limits on expansion, buffers and setbacks, vegetation, land application, required equipment, soil sampling and recordkeeping, and other aspects of the AFO's operation.[55]

What constitutes a "control facility" under the law is likely to be a point of contention when it comes to applying Texas AFO regulations to puppy mills. The Texas AFO rule defines a control facility as "[a]ny system used for the collection and retention of manure, litter, or wastewater on the premises until their ultimate use or disposal. This includes all collection ditches, conduits, and swales for the collection of runoff and wastewater, and all retention control structures."[56] Texas authorities have espoused a broad reading of the term in the past and

[51] *See infra*, note 37 and accompanying text. That is to say, they escape the duty to obtain a permit. Strictly speaking, any discharge of pollutants from a point source into waters of the U.S. is actionable under the Clean Water Act.
[52] 30 TEX. ADMIN. CODE § 321.47(a). Note that Texas defines an AFO in exactly the same words as the Clean Water Act, reproduced above. *See infra*, note 36 and accompanying text.
[53] 30 TEX. ADMIN. CODE § 321.47(b).
[54] 30 TEX. ADMIN. CODE § 321.47(b)(3).
[55] 30 TEX. ADMIN. CODE § 321.47(b)(1).
[56] 30 TEX. ADMIN. CODE § 321.32(14).

it seems at least plausible that tools for waste management at a puppy mill could qualify as a "control facility."[57] If puppy mills did qualify as AFOs using control facilities, and were required to meet the technical specifications for such facilities under the AFO rule, the expense and inconvenience of doing so would certainly put the average puppy mill out of business. And if puppy mills did not qualify as AFOs using control facilities, they would still be required to use waste management practices designed to protect water quality and minimize nuisance, as described above.

In Texas, an AFO that wishes to avoid compliance with these regulations may do so by qualifying for, obtaining, and operating under a certified water quality management plan from the Texas State Soil and Water Conservation Board (TSSWCB).[58] The TSSWCB is the lead agency in Texas for addressing non-point source agricultural pollution. A certified water quality management plan from the TSSWCB is cheaper to develop than a plan prepared by a consulting engineer for compliance with the point-source discharger rules,[59] and places the facility under the jurisdiction of the Board.[60]

Texas authorities have enforced their rules governing AFOs not designated or defined as CAFOs frequently in recent years. These rules have been the basis, in whole or part, for at least twenty-five enforcement actions settled since 2005. Administrative penalties assessed in those actions ranged from a few hundred dollars to $23,400.[61] In addition, it is usually a condition of

[57] For instance, in responding to stakeholder comments when the CAFO provisions were amended in 2008, the Texas Commission on Environmental Quality (TCEQ) wrote, "[t]he term "control facility" is meant to be a general term intended to cover all the facilities used in controlling manure and wastewater at the CAFO." 23 Tex. Reg. 9354, 9362 (Sept. 11, 1998).
[58] 30 TEX. ADMIN. CODE § 321.47(b)(2).
[59] Meaning the AFO rules at 30 TEX. ADMIN. CODE § 321.47.
[60] 46 TEX. PRACTICE SERIES ENVTL. LAW § 24.2 (2010).
[61] *See* In the Matter of an Enforcement Action Concerning Stanley Haedge d/b/a Kow Castle Dairy, Docket No. 2010-0744-AGR-E (Tex. Comm'n on Envtl. Quality Feb. 2, 2011), 2011 WL 423296 (administrative penalty of $525 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Salvador G. Gonzalez d/b/a Gonzalez Dairy, Docket No. 2009-1604-AGR-E (Tex. Comm'n on Envtl. Quality Dec.

1, 2010), 2010 WL 5080470 (administrative penalty of $6,600 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Julio Cesar Lozano, Docket No. 2010-0362-AGR-E (Tex. Comm'n on Envtl. Quality Dec. 1, 2010), 2010 WL 5080471 (horse stable)(administrative penalty of $1,050 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Salvador Anguiano, Docket No. 2009-1461-AGR-E (Tex. Comm'n on Envtl. Quality July 8, 2010), 2010 WL 2737023 (calf raising operation)(administrative penalty of $2,200 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning David Montanez d/b/a David Montanez Calf Farm, Docket No. 2009-1741-AGR-E (Tex. Comm'n on Envtl. Quality July 8, 2010), 2010 WL 2737024 (administrative penalty of $11,250.00 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Larry West d/b/a/ W 3 Dairy, Docket No. 2009-0150-AGR-E (Tex. Comm'n on Envtl. Quality Oct. 28, 2009), 2009 WL 3497659 (administrative penalty of $2,369 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning David Montanez d/b/a David Montanez Calf Farm, Docket No. 2008-0732-AGR-E (Tex. Comm'n on Envtl. Quality Mar. 11, 2009), 2009 WL 755317 (administrative penalty of $3,150 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Bert and Heidi Velson d/b/a Mike Schouten Feedlot, Docket No. 2008-1178-AGR-E (Tex. Comm'n on Envtl. Quality Feb. 11, 2009), 2009 WL 427492 (administrative penalty of $850); In the Matter of an Enforcement Action Concerning Jon Stowater and James Pool d/b/a S&P Dairy, Docket No. 2008-0728-AGR-E (Tex. Comm'n on Envtl. Quality Nov. 19, 2008), 2008 WL 5726213 (administrative penalty of $11,445 and ordered to undertake an SEP and comply with technical requirements); In the Matter of an Enforcement Action Concerning Thelma Hall d/b/a Thelma Hall Dairy, Docket No. 2008-0931-AGR-E (Tex. Comm'n on Envtl. Quality Nov. 5, 2008), 2008 WL 5726174 (administrative penalty of $23,400 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Tommy Manion of Texas, Inc., Docket No. 2008-0773-AGR-E (Tex. Comm'n on Envtl. Quality Nov. 5, 2008), 2008 WL 5726230 (administrative penalty of $1,900 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning WHB Cattle, L.P., Docket No. 2004-2023-MLM-E (Tex. Comm'n on Envtl. Quality Oct. 8, 2008), 2008 WL 5725945 (administrative penalty of $5,000); In the Matter of an Enforcement Action Concerning Salvador G. Gonzalez d/b/a Gonzalez Dairy, Docket No. 2008-0405-AGR-E (Tex. Comm'n on Envtl. Quality Sept. 24, 2008), 2008 WL 5726272 (administrative penalty of $5,775 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Daniel Viss d/b/a Daniel Viss Dairy, Docket No. 2007-1104-AGR-E (Tex. Comm'n on Envtl. Quality June 18, 2008), 2008 WL 4375344 (administrative penalty of $5,830 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Larry Martindale d/b/a Sundance Dairy, Docket No. 2007-1323-AGR-E (Tex. Comm'n on Envtl. Quality Apr. 2, 2008), 2008 WL 2505913 (administrative penalty of $1,575 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Pottsboro Independent School District, Docket No. 2007-1209-AGR-E (Tex. Comm'n on Envtl. Quality Feb. 13, 2008), 2008 WL 769340 (agricultural barn)(administrative penalty of $3,150 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Brad Allen d/b/a A+ Angus Ranch, Docket No. 2005-1357-AGR-E (Tex. Comm'n on Envtl. Quality Dec. 19, 2007), 2007 WL 5037987 (administrative penalty of $1,050); In the Matter of an Enforcement Action Concerning Nico Jaap de Boer, Docket No. 2007-0196-AGR-E (Tex. Comm'n on Envtl. Quality Oct. 24, 2007), 2007 WL 4668344 (administrative penalty of $7,000 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning David Medina d/b/a Whitis Dairy, Docket No. 2005-2028-AGR-E (Tex. Comm'n on Envtl. Quality Sept. 29, 2006), 2006 WL 4093215 (administrative penalty of $6,825 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning the Estate of Robert Walker, Docket No. 2005-0418-AGR-E (Tex. Comm'n on Envtl. Quality Sept. 18, 2006), 2006 WL 4093202 (hog farm)(administrative penalty of $6,300 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Mike Moyers d/b/a Sandy Creed Farm, Docket No. 2006-0354-AGR-E (Tex. Comm'n on Envtl. Quality Sept. 18, 2006), 2006 WL 4093204 (administrative penalty of $5,885 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Larry West d/b/a West Dairy Farm, Docket No. 2006-0174-AGR-E (Tex. Comm'n on Envtl. Quality June 26, 2006), 2006 WL 3415028 (administrative penalty of $2,750 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Gil Villa d/b/a Villa Dairy, Docket No. 2005-1969-AGR-E (Tex. Comm'n on Envtl. Quality June 23, 2006), 2006 WL 3415082 (administrative penalty of $5,000 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Woodward Trading, Inc., Docket No. 2004-0903-AGR-E (Tex. Comm'n on Envtl. Quality Oct. 21, 2005), 2005 WL 3694957 (administrative penalty of $10,000 and ordered to comply with technical requirements); In the Matter of an Enforcement Action Concerning Producers Livestock Auction Company, Docket No. 2004-2085-AGR-E (Tex. Comm'n on Envtl.

the enforcement order that the violator must—at his or her own expense—bring the facility up to the technical standards set by 30 TEX. ADMIN. CODE § 321.47 or other relevant provisions of the Texas rules, on pain of additional penalties. Under Texas law, violation of a water quality order, rule, or permit can result in administrative penalties of up to $10,000 per day.[62]

c. *Applying Texas AFO Rules to Puppy Mills*

As discussed above, most puppy mills qualify as AFOs under the Clean Water Act, the definition of which has been incorporated and adopted into Texas law. Recall that federal law does not impose permitting requirements on AFOs or regulate their discharges except in the most general terms. However, Texas rules, being more stringent than their federal counterparts, do regulate the operation of AFOs not designated or defined as CAFOs in some significant ways. So the creative advocate can reasonably look to enforcement options presented by the Texas rules as a means for addressing that state's puppy mill problem. In order to realize that goal, advocates will likely have to convince the governor's office to make an executive policy decision that the state's AFO rules will be enforced against puppy mills. Doing so provides a necessary directive to the state agency tasked with enforcing the AFO rules, and puts the regulated community on notice of an impending change in the agency's enforcement policy.

From a strategic perspective, a statement of policy by the state executive offers advocates all the advantages of a ballot initiative, and presents an even greater potential for economies of scale. Bringing the issue of reform to the governor, as opposed to the legislature, creates an opportunity for reform advocates to make greater strides in a shorter time and with less effort and expense than a full-scale legislative campaign. Advocates can also focus their resources on

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Quality Aug. 26, 2005), 2005 WL 2252342 (administrative penalty of $2,550 and ordered to comply with technical requirements).

[62] 46 TEX. PRACTICE SERIES ENVTL. LAW § 24.2 (2010)(citing Tex. Water Code § 7.052(b)).

courting a single person—the state's most powerful and visible lawmaker—instead of dispersing them in pursuit of the many members of the legislature. Given the high-profile and personality-driven nature of executive office, the state governor is more likely to respond to popular pressure for reform on issues like puppy mills than state legislators, who can conceal themselves in the crowd or pass the buck to party leadership.

Once the governor issues a policy statement that AFO rules may be enforced against puppy mills, and that decision is communicated to the enforcement authorities, some form of legal notice should be issued to the public. This might be an informal notice, through a press release or a series of public meetings, or it might take the form of formal legal notice, in which the agency publishes a notice in the state register of their forthcoming interpretation of the rule. Or it could be both. It seems unlikely that a full notice and comment rulemaking would be required in Texas, as there would be no actual changes to the text of the rule, but the agency might choose to undergo the notice and comment process in an abundance of caution. Regardless of the form, once the enforcement authority has given some form of notice to the public, ignorance of the rule is no defense to enforcement and prosecution.[63]

And the enforcement options presented by the Texas AFO rules are attractive ones, even more attractive than those offered by the state's recently-enacted puppy mill law. The AFO rules offer a range of penalty options, including up to $10,000 per violation. Under the new puppy mill law, violators may be assessed a maximum of $5,000 per violation, and no actual penalty schedule has yet been set.[64] Puppy mills are profit-driven enterprises, but rarely wealthy

[63] 46 TEX. PRACTICE SERIES ENVTL. LAW § 24.2 (2010)(citing Texas Water Code §7.201).
[64] H.B. 1451 as enacted does not specify the amount of civil penalties for violations of the law, except to refer to the penalty provisions in Subsections F and G of the Texas Occupations Code, Chapter 51. The $5,000 maximum per violation per day is found in TEX. OCC. CODE ANN. § 51.302 and applies generally to all licensing programs under Chapter 51. Other costs for failure to comply with the law might include payment of the inspection and licensing fee, which amount has not yet been determined.

or sophisticated ones. One hefty administrative penalty could render the average puppy mill insolvent and force it out of business. The mere threat of such a penalty, or enforcement against a few high-profile violators, could be sufficient to chill the growth of the puppy mill industry in Texas by frightening operators out of state or out of the business entirely.

Moreover, enforcement could begin almost immediately, since a program staffed with experienced technical and legal professionals already exists and is actively enforcing the AFO rules today. Of course, widening the scope of the current enforcement program may necessitate allocating additional funds to ensure that supervision of traditional livestock AFOs does not suffer. And petitioning the legislature for an additional appropriation could embroil the enforcement budget in political squabbles like those that beleaguered the puppy mill reform legislation. However, the agency could find the resources to cover new enforcement by reallocating funds from its existing appropriation that were earmarked for other programs, at least initially. Just a few strategic enforcement actions could achieve the desired chilling effect, even if there is not sufficient funding for a comprehensive enforcement initiative.

CONCLUSION

The approach described above may be available to reform advocates in several states, since it is permissible under the Clean Water Act for authorized states to create regulatory regimes that are more stringent than the federal baseline. Of course, this approach can not replace meaningful, comprehensive puppy mill reform legislation in any state, nor should it. But while legislation is pending or enforcement is lacking, the puppy mill problem and the associated animal rights and environmental abuses will continue to grow. Resorting to creative applications of existing law, like factory farm rules, offers reform advocates a thrifty and relatively immediate

response to the issue, and also serves to raise public awareness and pressure legislators to enact a more elegant solution. Once they have served their purpose, it should remain the goal to replace these creative interim measures with permanent, effective legislation backed by political consensus.

Cage-Free, Free-Range, Organic? Why Animal Welfare Depends on a New Government Labeling Scheme

Tabitha N. Mitchell

Introduction

Grocery stores now offer more products perceived as animal friendly than ever before.[1] In turn, animal conscious consumers increasingly desire to make food purchases that advance the animal welfare movement. In 2007, a survey showed that 68% of consumers care about the welfare of farm animals raised for food.[2] Still, the aisles contain a confusing myriad of labeling consumers must decipher to infer whether the welfare of these animals is looked after.[3] Consumers are forced to navigate their local grocery stores for humanely raised options, many of which will have no offerings at all. Cage-free. Free-range. Even conscientious consumers have a hard time knowing what the best options are. Few know that the USDA informally recognizes the label of cage-free or free-range with no regulatory standards defining the term.[4] Even worse is the meat department: Rows of labels declaring the meat "all-natural" or "hormone free." These labels do not inform the customer, however, of any other harm that came to the animal during its life, transport to slaughter, or slaughter.[5] Many animals are now raised on industrial compounds, commonly referred to as "factory farms," where the livelihood of the owners depends on how quickly the animal can gain enough weight to be slaughtered.[6] To achieve this end the animals are given synthetic substances and feed that have drastically altered their natural behaviors and could have undesirable effects on the humans who consume them.[7] The absence of labeling

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[1] The World Society for the Protection of Animals, "Finding Animal Friendly Food: The Availability of Humanely Labeled Food in U.S. Grocery Stores," http://www.wspa-usa.org/download/165_finding_animal_friendly_food_2009_for_web.pdf (last visited April 23, 2010).
[2] *Id.*
[3] *Id.*
[4] Farm Sanctuary, "The Truth Behind the Label: Farm Animal Welfare Standards and Labeling Practices," http://www.farmsanctuary.org/issues/campaigns/truth_behind_labeling.html (last visited Jan. 24, 2012).
[5] United States Dept. of Agriculture, "A Guide to Federal Food Labeling Requirements for Meat and Poultry Products," August 2007.
[6] Pollan, Michael, "The Omnivore's Dilemma: A Natural History of Four Meals," 68, Penguin Books 2006.
[7] *Id.* at 70.

standards that fully encompass the concerns of animal welfare advocates, that being the health and well-being of the animal, and, in turn, the advocate themselves, perpetuates the information gap in this area.

Without government oversight and more consistency in labeling standards it is not surprising that consumers are so confused. While the federal government, through various agencies, has regulated the labeling of food and drugs, there is ample room for abuse. Further, federal agencies have been given considerable discretion in the promulgation and interpretation of rules regarding labeling.[8] This system has contributed to the current consumer confusion.

In response to some of the same abuses occurring in the European Union (EU), the EU has worked in recent years to pass legislation that significantly increases farm animal welfare. Using more current scientific knowledge of animal etiology, the EU has more specifically laid out required husbandry practices for each species. Members of the EU must comply with these requirements and the public is informed of the label definitions and common husbandry practices through a public education program.

This paper explores whether the creation of an Animal Welfare label similar to that proposed in the European Union might alleviate some of this confusion while at the same time improving the lives of farm animals across the nation. Part I will address the current labeling standards, both through federal regulation and voluntary labeling through private interest groups. Part II will discuss how the federal system perpetuates the abuse of farm animals while at the

[8] *See e.g. American Public Health Assn. v. Earl Butz*, 511 F.2d 331 (U.S. App. D.C. 1974)(finding the secretary of Agriculture did not abuse his discretion when determining a public education program instead of labeling would best serve to inform consumers of the risk of salmonellae in meat and poultry); *Levine v. Connor*, 540 F.Supp.2d 1113 (N.D. Cal. 2008), vacated and remanded in *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009)(granting summary judgment in favor of government whose interpretation of the Humane Slaughter Act excluded poultry from its requirements. The ruling was subsequently vacated because the appellate court found plaintiffs did not even have standing to bring suit in the first place); *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (D. Mass. 1986); *Nat. Meat Assn. et al v. Brown et al*, No. CV-F-08-1963, 2009 U.S. Dist. LEXIS 12523 (E.D. Cal. Feb. 19, 2009).

same time encouraging the misleading labeling and marketing aimed at animal welfare-conscious consumers. Finally, this paper will suggest specific regulations similar to the European Union's current standards that might be employed to address all of these problems.

I. Marketing vs. Regulation: FDA, USDA and Voluntary Labeling Standards

Both the Food and Drug Administration (FDA) and the United States Department of Agriculture (USDA) federally govern the current system for the labeling of food products.[9] These regulatory agencies derive their power from several statutory authorities.[10] Of these, the most relevant to food labeling and animal welfare are the Federal Meat Inspection Act (FMIA) and the Humane Methods of Slaughter Act (HMSA) for the USDA.[11] These statutes give broad power to the agency to determine the standards producers must meet and the labeling requirements for food packaging. The National Organic Program (NOP), also run by the USDA, operates to control the approval and labeling of organic products in the marketplace.[12] Under the Federal Food, Drug and Cosmetic Act (FDCA), the FDA is given powers to find a violation of the statute if the agency determines a label is "false or misleading in any particular way."[13] For the purposes of this paper, the focus will be on the USDA rules and regulations as they are most pertinent to the welfare of food animals.

Additionally, many voluntary labeling schemes have developed as a supplement to the federal regulations to provide consumers with even more information about the products they

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[9] Post, R., et al eds., *A Guide To Federal Food Labeling Requirements For Meat and Poultry Products*, U.S. Department of Agriculture (Aug. 2007) http://www.fsis.usda.gov/PDF/Labeling_Requirements_Guide.pdf.
[10] *Id.* The statutes granting the agencies their power are: Federal Meat Inspection Act (FMIA) 21 U.S.C. §§601 et. seq., Humane Methods of Slaughter Act (HMSA) 7 U.S.C. §1901 et. seq., the Poultry Products Inspection Act (PPIA) 21 U.S.C. §451 et. seq., the Egg Products Inspection Act (EPIA) 21 U.S.C. §1031 et. seq, the Federal Food, Drug and Cosmetic Act (FDCA) 21 U.S.C. §§301 et. seq., and the Fair Packaging and Labeling Act (FPLA) 15 U.S.C. §1451.
[11] FMIA, 21 U.S.C. §601 and HMSA, 7 U.S.C. §1901.
[12] 7 U.S.C. §6501 (2000). The NOP was assembled under the authority of the Organic Food Production Act of 1990.
[13] *Post,* supra note 9, at 5.

purchase. For example, the animal welfare group, the World Society for the Protection of Animals (WSPA), has recently created the "Certified Humane" label.[14] This voluntary label allows producers who follow strict standards for raising, transporting and slaughtering food animals to affix the seal to their product labels indicating their adherence to the practices embodied in the WSPA's mission statement.[15] It appears that among these three entities consumers' interests would be well looked after. However, the federal regulations contain many loopholes and voluntary labeling is not widespread.

B. Current Process for Label Approval of Food Products

Under the authority of legislation, the USDA has created an application process by which producers must comply before legally labeling their meat food products.[16] All labels under USDA's authority must be pre-approved.[17] This is opposite of the FDA's labeling policy, which does not require pre-approval and instead monitors compliance through post-marketing surveillance.[18] Once the USDA approves a label, however, the producer may make small changes without reapplying.[19] The initial process involves submitting a complete application, which includes the requested label and supporting documents for claims made on labels to include protocols for production, affidavits and feed formulas.[20] FSIS evaluates more than 60,000 label applications annually.[21] The agency may deny the initial application and/or request further documentation from the producer,[22] however, there is no independent inspection of the

[14] The World Society for the Protection of Animals*, supra* note 1.
[15] *Id.*
[16] *Animal Production Claims: Outline of Current Process*, United States Department of Agriculture: Food Safety and Inspection Service, *available at* http://www.fsis.usda.gov/OPPDE/larc/Claims/RaisingClaims.pdf.
[17] Post, *supra* note 9, at 7.
[18] *Id.*
[19] *Id.* at 7-8.
[20] *Animal Production Claims, supra* note 16.
[21] Post, R., *supra note 9,* at 7.
[22] *Animal Production Claims, supra* note 16.

validity of the claims made. The agency is relying on the veracity of the producer's documentation as evidence of truthfulness of the claim(s) made on the label.[23]

Animal friendly product claims on labels such as "all-natural," "cage-free," "free-range" and "hormone free" are minimally regulated. The only regulation barring claims of all natural or hormone free are whether the item is "minimally processed"[24] and whether the applicable statutes allow the use of hormones or not.[25] The all-natural chicken label has great potential for deception of animal welfare advocates because, as discussed above, poultry is excluded from all federal regulation.

Organic Labeling

Obtaining a "USDA Certified Organic" label requires a similar process but with some extra steps. The producers must first submit an organic system plan to the National Organic Standards Board (NOSB).[26] The plan must include a "description of practices and procedures" to be performed, a list of each substance used, a description of monitoring practices, a description of recordkeeping methods, a description of the plan to keep organic and non-organic components from commingling and any additional information the NOSB requests.[27] The NOSB is a 15-member group of stakeholders appointed by the Secretary of Agriculture responsible for reviewing and evaluating the submitted organic system plans. The organic system plan must detail in what way the food will be produced and/or handled in order to ensure compliance with the regulations set forth by the USDA. Though the federal government regulates this system,

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[23] Post, *supra* note 9, at 18.
[24] USDA Department of Food Safety and Inspection Service, "Food Labeling: Meat and Poultry Labeling Terms," http://www.fsis.usda.gov/FactSheets/Meat_&_Poultry_Labeling_Terms/index.asp (last visited Jan. 24, 2012).
[25] *Id.*
[26] National Organic Program, 7 C.F.R. §205.201 (2008).
[27] 7 C.F.R. §205-201(a)(1)-(a)(6) (2008).

participation in the organic program is completely voluntary. However, organic production of products has increased significantly since the inception of the program in 1990.[28]

C. Voluntary Labeling Standards Governed by Animal Welfare Groups

To compensate for the inadequate concern the governing statutes have placed on animal welfare, many animal welfare groups have created their own set of voluntary standards to which producers can comply for permission to use the groups' label. One such example is the "Certified Humane" label created by the WSPA.[29] There are many others, and they are becoming increasingly more popular as the demand for animal-conscious food is increased.[30] One example is the Global Animal Partnership 5-Step Program created by Whole Foods Market in 2008.[31] This program starts with step one and builds upon that foundation through each successive step.[32] The label will indicate the highest step with which the producer was compliant to inform consumers of the animal welfare conditions of the product they are purchasing.[33]

Support for growing consumer concern over animal welfare is evident in their purchase demands. Grocery stores have increased their humane offerings in almost all areas from 2008 to 2009.[34] The grocery store taking the number one spot on the list is Whole Foods, Inc., a retailer

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[28] Dimitri, Carolyn, Oberholtzer, L., *Recent Trends from Farms to Consumers*, United States Department of Agriculture, Economic Information Bulletin No. 58 (Sept. 2009), http://www.ers.usda.gov/publications/eib58/eib58.pdf.
[29] World Society for the Protection of Animals, *supra* note 1.
[30] Farm Sanctuary, *supra* note 4, at 5-6.
[31] http://www.wholefoodsmarket.com/meat/5-StepAnimalWelfareRating.pdf at 2-7(last visited Jan. 25, 2012)
[32] *Id.* The steps for beef cattle are: 1) No crowding, 2) Enriched environment, 4) Pasture centered, 5) Animal centered: no physical alterations, and 5+) Animal centered: entire life on same farm. The steps for chicken/poultry are: 1) No cages, no crowding, 2) Enriched environment, 3) Enhanced outdoor accommodations, 4) pasture centered, 5) Animal centered: bred for outdoors, 5+) Animal centered: entire life on same farm. The steps for pigs are: 1) No crates, stalls or cages, 2) Enriched environment, 3) Enhanced outdoor environment, 4) Pasture centered, 5) Animal centered: no physical alterations, and 5+) Animal centered: entire life on same farm.
[33] *Id.*
[34] World Society for the Protection of Animals, *supra* note 1, at 5.

nationally known for its animal friendly and environmentally friendly options.[35] Though some of these voluntary labeling systems still allow animal practices that harm animal welfare, these standards are always greater than even the USDA Organic label requirements by allowing fewer inhumane practices and having certified labels.[36]

II. Animal Welfare and Its Demise Under the Current System

Under the current system and the current governing legislation animals have come to experience much cruelty. The FMIA and HMSA are full of ambiguous language and vague exceptions making it easy for producers to conform the language to their needs.[37] Farming has become an uber-business. The idyllic small, family farm where animals graze freely on grass and roam the pasture is no longer the reality.[38] Farming is big business and businesses need to make money. The easiest way for them to make the most money is to get the animals to slaughter weight or produce the most milk or eggs as fast as possible at the highest rate possible.[39] Practices that achieve this in the current agribusiness industry are detrimental to the very nature of food animals.[40]

A. Overview of the New Agribusiness

In the 1970's, Earl Butz dismantled the farm bill and created the subsidy system farmers currently work under.[41] The significance of this move is the over-production of corn that ensued. Corn became the most profitable crop for farmers because the government paid them a subsidy that regulated the cost so that farmers could sell the corn at drastically lowered prices to

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[35] *Id.*
[36] Farm Sanctuary, *supra* note 4, at 1.
[37] *Id.*
[38] Pollan, *supra* note 6, at 69.
[39] *Id.* at 71.
[40] *Id.* at 74-76. The corn feed now given to cows changes the pH of their stomachs because they are not naturally evolved to eat grain as ruminants. The change in pH creates an environment ripe for bacterial growth and perpetuates the need for daily antibiotics in their feed.
[41] *Id.* at 49.

manufacturers.[42] This flux of corn created new industries. For example, high fructose corn syrup was developed in the 1970's and is now part of almost everything humans consume.[43] Another creation was feed for food animals.[44] Animals that evolved as ruminants were now being given feed containing mostly corn.[45] Eating corn rather than grass may not seem taboo to most people, but other additions to the animals' diet should. The FDA has allowed the addition of beef tallow and other animal by-products to the daily feed of herbivores.[46] This new diet caused many problems. For example, a cow's stomachs are naturally at a neutral pH. The corn diet, however, made their stomachs acidic and caused various illnesses.[47] To remedy this, farmers began adding multiple antibiotics to cattle feed. The most common antibiotics used today are Rumensin and Tylosin.[48]

The effect on both animal and human health from the current agribusiness practices has been dramatic because the two are inextricably linked. Animal health is affected both psychologically and physiologically. Scientists have shown, for example, that sensory deprivation causes self-narcotizing, like in the case of intense confinement of gestation sows and veal calves.[49] The daily use of antibiotics in beef cattle has created an acid-resistant strand of E. coli bacteria known as 0157:H7.[50] Because the bacteria are immune to the acids in a cow's stomachs, it can be transmitted into beef during slaughter.[51] In humans, 0157 strands cause

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[42] *Id.* at 49-50.
[43] *Id.* at 57.
[44] *Id.* at 64 (noting that 60 percent of corn grown in the United States goes to feed animals on factory farms).
[45] *Id.* at 73-74.
[46] 21 C.F.R. §589.2000(a)(1) (2010).
[47] Pollan, *supra* note 6, at 77-78.
[48] *Id.* at 74.
[49] Broom, D.M., *Animal Welfare: Concepts and Measurement*, 69(10) J. Anim. Sci. 4167 (1991).
[50] Pollan, *supra* note 6, at 82.
[51] *Id.*

Hemolytic Uremic Syndrome (HUS) in about 5-10 percent of cases.[52] There have been twenty-eight 0157:H7 outbreaks reported to the CDC since October 6, 2006. [53] Most of these outbreaks, about 79%, occurred in contaminated beef.[54] Additionally, the feedlot diet allows the acids in the ruminant's stomachs to eat away at the lining causing abscessed livers in between 15 to 70 percent of cows.[55]

In addition to the harm to animals under current animal husbandry practices on factory farms, those animals have little protection under the law. For example, the "28-Hour Law" governs animal transport.[56] This law, enacted in 1877, restricts the transport of animals for more than twenty-eight hours without unloading the animals to give them food, water and rest.[57] Until 2006, the USDA interpreted the law not to include trucks, which is the method 95 percent of producers ship their animals to slaughter.[58] Though this loophole was finally closed, the maximum penalty for violation is a mere $500.[59] Animals that are forced into confined transport spaces for such extended periods suffer from injuries that include bruising, lacerations, crippling injuries and death.[60]

Animals fare no better, certainly, during slaughter. The protections in place are insufficient and enforcement of violations is scarce. Undercover investigators from the Humane

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[52] Centers for Disease Control and Prevention, "Escherichia coli 0157:H7: Frequently Asked Questions," http://cdc.gov/nczved/divisions/dfbmd/diseases/ecoli_0157h7/index.html (last visited Jan. 25, 2012).
[53] Centers for Disease Control and Prevention, "E. *coli* Outbreak Investigations," http://www.cdc.gov/ecoli/outbreaks.html (last visited Jan. 25, 2012).
[54] *Id.* The other outbreaks were in cookie dough, peanut butter and fresh spinach.
[55] Pollan, *supra* note 6, at 78. The percentage varies among the feedlots. Abscesses are found at time of slaughter.
[56] 49 U.S.C. 80502.
[57] *Id.*
[58] The Humane Society of the United States, *USDA Reverses Decades-Old Policy on Farm Animal Transport* (December 28, 2006) *available at* http://www.hsus.org/farm/news/ournews/usda_reverses_28_hour_policy.html.
[59] 49 U.S.C. 80502.
[60] The Humane Society of the United States, *supra* note 58. The change by Congress was spurred by an investigative report, Compassion Over Killing, uncovering numerous abuses of the law in truck transport. In one instance, investigators noted 50 dead pigs left on a truck for more than 30 hours during transport from Kansas City, MO to Modesto, CA, a trip that took 35-hours.

Society of the United States videotaped slaughterhouse workers using a forklift to force a downer cow to slaughter.[61] Downer cows are cattle that are unable to walk themselves to slaughter.[62] The abuse of downer cows is appalling, but there are also human consequences to forcing downer cattle into the food supply. Bovine spongiform encephalopathy (BSE), otherwise known as "Mad Cow" disease is known to originate in these downer cows.[63] In humans, exposure to BSE-contaminated meat can lead to Creutzfeldt-Jakob Disease, a neurological degenerative disease that is always fatal, usually within one year of developing the disease.[64]

Poultry are not excluded from cruel slaughter practices. As discussed above, poultry are excluded from all federal legislation regarding the humane slaughter of animals.[65] The normal process for slaughtering a chicken in a factory involves hanging them from their feet on an assembly line, then a worker cuts their throat and the chicken moves down the assembly line.[66] By the time the chicken reaches the next station they are presumed dead and then are thrown into boiling water.[67] This method is prone to many errors. Animal rights advocate and former Tyson employee Virgil Butler has first-hand knowledge of these errors. Working at a Tyson slaughterhouse in Arkansas, Butler chronicled the abuses in his online blog. With chickens going through at 182-186 per minute, he says, one cannot possibly kill every one before they enter the

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[61] The Humane Society of the United States, *Rampant Animal Cruelty at Slaughterhouse in California*, (January 30, 2008) *available at* http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html (last visited Jan. 25, 2012). The workers were witnessed jabbing the cattle in the eye, using a forklift, a hose and water and electrical shocks to force them to stand.

[62] *Id.*

[63] *Id.*

[64] Center for Disease Control and Prevention, *Creutzfeldt-Jakob Disease, Classic Fact Sheet*, available at http://www.cdc.gov/ncidod/dvrd/cjd/index.htm (last visited Jan. 25, 2012).

[65] Humane Methods of Slaughter Act, 7 U.S.C. §1901 – 1907.

[66] Farm Sanctuary, *Factory Poultry Production*, *available at* http://www.farmsanctuary.org/issues/factoryfarming/poultry/ (last visited Jan. 25, 2012).

[67] *Id.*

scalding water.[68] Other abuses happen regularly because of the sheer number of animals being slaughtered every hour.

B. Problems With The Current Labeling Scheme

1. Misleading, Confusing and False Advertising

Federal regulations can be vague and invite producers to find loopholes that circumvent the language of a regulation. This circumvention allows misleading, confusing and false advertising to consumers. One such example is Tyson's "Naturally Raised" label. Tyson includes ionophores in their chicken feed, which are antimicrobial agents designed to prevent certain intestinal parasites in poultry.[69] Tyson included their use of these agents on their initial application for the "Naturally Raised" label.[70] The label application was reviewed and approved by the USDA in May 2007[71] and the company was allowed to market the label until 2008, after the USDA wrote them in November 2007 and ordered the label be revised or removed.[72] The compromise agreed upon between Tyson and the USDA at the time was later rescinded after the USDA received information that Tyson was using Gentamycin, an antibiotic, regularly in their animals.[73]

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[68] Butler, Virgil, *The Cyberactivist: Inside the Mind of a Killer* (August 31, 2003) available at http://cyberactivist.blogspot.com/2003/08/inside-mind-of-killer.html (last visited Jan. 25, 2012).

[69] Tyson Foods, Inc., *Tyson to Use New Label for Raised Without Antibiotics Chicken; Company and USDA Agree to More Informative Wording*, (December 20, 2007) available at http://www.tysonfoods.com/Media-Room/News-Releases/2007/12/Tyson-to-Use-New-Label-for-Raised-Without-Antibiotics-Chicken.aspx (last visited Jan. 25, 2012) Though ionophores are classified as an antibiotic, Tyson attempted to argue that they were microbials and are technically different because the USDA allows their use in animal feed and therefore the label was not misleading or false in any manner. The company and the USDA agreed upon a compromised label that said "Raised Without Antibiotics that affect human antibiotic resistance."

[70] *Id.*

[71] *Id.*

[72] Consumers Union, *Letter to Secretary Vilsack* (February 11, 2009) available at http://consumersunion.org/pub/pdf/consumersunion.org_letter_to_secretary_vilsack_021109.pdf (last visited Jan. 25, 2012) (noting that, in their letter, the USDA clarified their interpretation of ionophores was that they were antibiotics and though they were approved for use in animal feed the producer could not then use a "naturally raised" label claim if they chose to include it in their feed).

[73] USDA Food Safety and Inspection Service, Congressional and Public Affairs, *Statement by Under Secretary for Food Safety Dr. Richard Raymond Regarding the Tyson Foods, Inc. Raised Without Antibiotics Label Claim*

III. Following the European Union's Lead: Changing Farmed Animal Practices and Creating a Label to Indicate Animal Friendly Handling and Slaughtering

Recently, the European Council developed new standards of care for raising, transporting and slaughtering farm animals.[74] This legislation was created with the idea that farmed animals were worthy of and in need of legal protection.[75] Additionally, the Council recognized the link between animal welfare and food safety.[76] The European Council undertook this project with an understanding of the need for governmental rather than voluntary third-party regulation. These new standards set out the basic requirements for the living conditions of various species of farmed animals and authorized the creation of a committee whose primary responsibility is to promulgate the specific regulations using the legislation and its purpose as their guiding light.[77]

Many of these standards could be implemented in the United States without causing a huge disruption to the industry while at the same time increasing the welfare of farmed animals. Implementing these standards, or something similar, in the United States in combination with creating a label scheme informing consumers of the standards to which the producer adhered will serve to reduce the confusion consumers who care about the welfare of farmed animals often face, make animal friendly products available to a larger section of the population and, most importantly, improve the lives of millions of animals every year. Education of the standards set forth and the new labeling scheme will be a key factor in achieving these goals.

Withdrawal (June 3, 2008) available at http://www.fsis.usda.gov/news/NR_060308_01/index.asp (last visited Jan. 25, 2012).

[74] Commission Working Document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, COM (2006) 14 final (Jan. 23, 2006).

[75] *Id.* at 3.

[76] *Id.*

[77] *Id.* at 6.

A. Overview of the European Union Plan

The European Union first took note of a need for improvement in animal welfare standards more than 30 years ago and in 2006, the Commission of the European Communities met in Brussels, Belgium to discuss the status and needed reformations of animal welfare and proposed a Community Action Plan.[78] The ideas set forth in the Council's plan to change husbandry practices built upon the EU's Common Agricultural Plan (CAP) Reform policy created in June 2003.[79] CAP was successful in gaining consumer confidence in food safety while at the same time encouraging more rural farm policies and stabilizing prices and surplus.[80] The plan worked by offering several incentives to farmers.[81]

The general principles of the European Convention for the Protection of Animals Kept for Farming Purposes addresses the particular needs of farmed animals and requires that specific regulations developed by the Committee be based on the "physiological and ethological needs in accordance with established experience and scientific knowledge" of the animal with regard to its species.[82] In each of the species-specific regulations promulgated, the Standing Committee included at the beginning an ethological description of the animals' natural instincts and needs for which the subsequent regulations attempted to promote and encourage.[83] These regulations

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[78] COM (2006) 14 final (Jan. 23, 2006).
[79] *Id.* at 3. The Council sought to build upon CAP reform by adding the following measures: more support for farmers whose animal husbandry practices go beyond the baseline standards, creation of "farm advisory services" to help farmers implement the standards and support of farmers who wish to advertise and market their animal friendly husbandry practices to promote these standards. More important elements of CAP Reform are the existence of sanctions for non-compliance, a comprehensive system for training of inspectors to ensure uniformity across all member states and the distribution of informational materials to enhance public understanding. The sanctions involve the reduction or repeal of subsidies.
[80] European Commission: Agriculture and Rural Development, "The Common Agricultural Policy Explained," *available at* "http://www.ec.europa.eu/agriculture/capexplained/change/index_en.htm (last visited Jan. 27, 2012).
[81] European Commission: Agriculture and Rural Development, "Funding Opportunities," *available at* http://ec.europa.eu/agriculture/grants/index_en.htm (last visited Jan. 25, 2012).
[82] *Id.*
[83] Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Turkeys*, (EC) June 21, 2001; Standing Committee of the European Convention

are the minimum standards with which all producers must comply in the European Union.[84] These regulations are far superior to the protections afforded farmed animals in the United States under the FMIA, HMSA and Twenty-eight Hour Law.[85] Additionally, the minimum standards required by the EU prohibit some practices that even the USDA Organic regulations allow regarding husbandry practices for weaning and minimum space requirements and the mutilation practices of certain species.[86]

EU Labeling Scheme

Acting on public demand for improved animal welfare standards in farming practices, the Council stressed the importance of proper labeling and education in their Community Action Plan.[87] The Council stated the lack of proper labeling might have been preventing consumers from purchasing animal friendly products though those consumers wished to do so.[88] To achieve this end, the Council proposed the creation of a label indicating whether the animal was raised under the minimum EU standards or under more strict standards that may be set forth voluntarily

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for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Cattle*, (EC) October 21, 1988 (see Appendix C for Recommendation Concerning Calves); Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Pigs*, (EC) December 2, 2004; Standing Committee of the European Convention for the Protection of Animals Kept for Farming Purposes, *Recommendation Concerning Domestic Fowl*, (EC) November 28, 1995.

[84] European Convention for the Protection of Animals Kept for Farming Purposes, *supra* note 84, Art. 9.

[85] For example, none of the U.S. statutes have regulations specific to each species and based on scientific etiologies. Further, poultry is not covered at all by the HMSA. Additionally, many of the standard farming practices employed in the U.S. such as tail docking, gestation crates, de-beaking, etc. are banned in the EU's legislation. Finally, the EU legislation has put in place measures meant to encourage more rural farming practices rather than the industrial feedlot system most common in the United States.

[86] Standing Committee of the European Convention for the Protecting of Animals Kept for Farming Purposes Recommendations, *supra.* note 84. (Every recommendation lays out specific requirements for the housing and space requirements of the animals. Additionally, the weaning of pigs and cattle are specified based on the specie's natural weaning habits. Mutilation such as tail docking and de-beaking is not allowed under the regulations. Other forms of mutilation, such as castration are allowed, but specific requirements for anesthesia and proper training for personnel performing procedure are mandated).

[87] Commission Working Document on a Community Action Plan on the Protection and Welfare of Animals 2006-2010, COM (2006) 14 final (Jan. 23, 2006).

[88] "Consumer Concerns about Animal Welfare and the Impact of Food Choice," EU FAIR-CT36-3678, Dr. Spencer Henson and Dr. Gemma Harper, University of Reading.

by each Member State.[89]Additionally, imported products that do not meet at least the minimum EU standards would be labeled clearly as such.[90] In this way, consumers may clearly choose their products with full understanding of the animal welfare standards to which the producer adhered.

To further this understanding, the European Commission of the Directorate General for Health and Consumer Protection enlisted the Food Chain Evaluation Consortium (FCEC) to research and recommend options for a new animal welfare label.[91] The study concluded that using a variety of methods to reach consumers, including a label in combination with the introduction of educational materials to make consumers aware of the minimum standards and the various levels of labeling, would be most effective for consumer knowledge and purchasing power while allowing producers to earn respectable profits on their products.[92]

The FCEC produced seven options for labeling food products that might achieve the fulfillment of the guiding principles set forth by the Council.[93] The seven options are:

> 1) Mandatory labeling of the welfare standards under which products of animal origin are produced, 2) Mandatory labeling of the farming system under which products of animal origin are produced, 3) Mandatory labeling of compliance with EU minimum standards or equivalence with those, 4) Harmonized requirements for the voluntary use of claims in relation to animal welfare, 5) Harmonized requirements for the voluntary use of claims in relation to farming systems, 6) A Community Animal Welfare Label for voluntary participation, and 7) Guidelines for the establishment of animal welfare labeling and quality schemes. [94]

After discussion of the feasibility of them, they determined that the most feasible options were mandatory labeling of the welfare standards, mandatory labeling of the farming system or the

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[89] COM (2006) 14 final (Jan. 23, 2006) *supra* note 88, at 11.
[90] *Id.*
[91] Food Safety, *Animal Welfare Labeling and the Creation of a European Network of Reference Centers for Animal Protection and Welfare*, (EC), available at http://www.ec.europa.eu/food/animal/welfare/farm/labelling_en.htm (last visited Jan. 25, 2012).
[92] *Id.*
[93] *Id.* at vii.
[94] *Id.* (see Table 1: "Summary of policy options for indicating animal welfare related information on products of animal origin").

voluntary Community Animal Welfare Label.[95] The impetus for new labeling requirements, and the purpose behind the Community Action Plan in general, was to improve animal welfare based on the current scientific knowledge and increase the baseline knowledge with the support of research.[96] The FCEC members did not feel many of the options would in any great depth address these principles.

Among the three forerunners, the voluntary Community Animal Welfare label is most favored by the consortium for several reasons. First, they believe it best enhances the guiding principles set for the by the European Council's directive.[97] Second, modeling the label after the EU organic label provides all interested parties with real indicators as to the possible success and impact of the new label.[98] And, lastly, it does not force any farmer or producer to adhere to any particular farming system in order to compete, which, in turn, will not significantly raise the operating costs unless the demand for these products becomes such that the investment is taken on by the industry.[99] Though this option is still voluntary, the combination between the new farming standards, the public demand for animal welfare improvement for farmed animals, and the greater detail of information and understanding the public will gain with the labeling and education scheme will allow those consumers who wish to make these purchases more able to do so and at the same time might increase demand for these products and force producers to undertake new practices to come into compliance with terms of the label requirements.[100] On the

[95] *Id.* at 35 (See Table 8: Assessment of compatibility of the options with guiding principles).
[96] COM (2006) 14 final (Jan. 23, 2006) *supra* note 88.
[97] Food Chain Evaluation Consortium, *supra* note 123, at 35.
[98] *Id.*
[99] *Id.*
[100] *Id.*

last reason, the FCEC actually determined that this labeling is cost neutral if the minimum requirements in the EU legislation don't change.[101]

C. Proposed Labeling Scheme for Adoption in the United States

An animal-centric labeling scheme should be implemented in the United States. Modeling a label based on the EU standards provides a solid baseline foundation both in scientific knowledge of animal welfare and sociological data regarding the demand and need for a labeling scheme to enhance animal welfare standards.[102] Using a similar standard to the Community Animal Welfare label and minimum farming practice standards mandated in the EU, an animal welfare label creates a nation-wide, federally regulated voluntary scheme. However, one reason the EU option works is because the minimum regulations for framing practices are already much improved over the United States practices. Additionally, the EU began using scientific information on animal welfare to provide inspectors with ways to rate farms for the level of animal welfare that is included on the label. Following the EU's lead in both respects, animal welfare legislation and labeling is necessary to successfully implement a meaningful animal welfare-labeling scheme.

Implementation of any proposed plan will face obstacles in the United States. For example, the agribusiness industry is strongly opposed to stricter regulations.[103]Any changes to the minimum animal husbandry practices for non-organic producers would impose a significant cost impact on the industry.[104] Further, the cost for the government to implement a successful education plan to increase consumer awareness of the standards would presumably be substantial.

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[101] *Id.* at 44.
[102] *See generally supra* Section B.
[103] Open Secrets.org, *supra* note 98.
[104] Food Chain Evaluation Consortium, *supra* note 98, at 35.

1. Using Scientific Knowledge of Animal Welfare to Determine Standards of New Label

Scientific data has amassed over recent years regarding animals in general. Animals that were once thought of as unfeeling and unthinking creatures are now viewed by many people as sentient beings.[105] More importantly here, the research regarding the effects in animals' social, emotional and physical wellbeing in modern agribusiness is more readily available.[106] Studies have shown that animals raised in confinement farming practices suffer abnormalities in all three areas.[107] The EU, in their preference for a Community Animal Welfare label, reasoned that this option provided the most flexible standards under which the changing scientific knowledge of animal welfare could be addressed without the need to make significant changes in the labeling standard. For example, research cited by the EU shows that a stimulus-organism-response (SOR) model could be used to provide indicators with which to determine an animal's overall welfare and thus be implemented into the certification process for producer's use of the label.[108] While the validity across all species and farming practices and ease of collecting data of these indicators has put into question the feasibility of a mandatory program, they could be used to establish a voluntary scheme.[109] The Welfare Quality organization in the EU has created assessment protocols for seven different species to measure the animal welfare on farms in the EU.[110]

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[105] Fraser, David, "Animal Behaviour, Animal Welfare and the Science of Affect," 118 Applied Animal Behaviour Science 108 (2009).
[106] *See generally* Swanson, J.C., *Farm Animal Well-Being and Intensive Production Systems*, 73 J. Anim. Sci. 2744 (1995); Muller-Graf, Christine, et al., *Risk Assessment in Animal Welfare – EFSA Approach*, 14 AATEX 789, 6th World Congress on Alternatives and Animal Use in the Life Sciences (August 21-25, 2007).
[107] Swanson, *supra* note 106 at 2747-48.
[108] Food Chain Evaluation Consortium, *supra* note 98, at 27.
[109] *Id.*
[110] Welfare Quality, http://www1.clermont.inra.fr/wq/index.php?id=protocol&prod=# (last visited Jan. 25, 2012). The organization has identified four needs common to all species, and defined those needs as related to each specific species. Based on these four guiding principles, they have developed assessment protocols for inspectors with specific testing requirements. The result of the inspectors' assessment gives the farm a score that is published for public record.

In order for a similar method to be viable in the United States, the baseline for animal welfare must be raised. Research similar to that used in the EU must be employed by the federal government to increase the minimum standards of animal welfare. Then there will exist a quantifiable measure with which to compare the SOR model indicators, or some similar method of determining animal welfare for labeling standards. For example, researchers might rely on the creation of a species-specific Risk Assessment (RA) to determine the minimum standards to which the SOR model indicators will be measured against.[111] In creating RAs specific to animal welfare, the hazards pertaining to adverse welfare must first be identified.[112] Armed with this data, scientists can then create tables charting the severity, duration of effect and the likelihood and the likely frequency of exposure.[113] Though this is seen as somewhat difficult in the animal welfare realm, it is not impossible.[114]

Applying RAs to the creation of SOR model indicators can give USDA inspectors assessment tools that would improve animal welfare. In the EU, the European Food Safety Authority's (EFSA) panel on Animal Health and Welfare (AHAW) is beginning to do this.[115] AHAW has used scientific data to set forth RAs on how the most relevant farming systems affect animal welfare in dairy cows and pigs.[116]

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[111] Muller-Graf, *supra* note 107, at 789-90.
[112] *Id.* at 790.
[113] *Id.*
[114] *Id.* at 791-93. Identifying clearly the hazards is crucial to developing clear RAs. Doing this on a population wide, as opposed to individual animal, basis requires the consideration of many outside factors such as the breed, species, production system, farm environment, stage of life, etc.
[115] European Food Safety Authority, Animal Welfare, *available at* http://www.efsa.europa.eu/en/ahawtopics/topic/animalwelfare.htm (last visited Jan. 25, 2012).
[116] *Id.* Four RAs have been established for dairy cows based on the research on farming practices and their affect on the cows' welfare. The hazards identified cause risks in the following areas: 1) Metabolic and reproductive disorders, 2) Udder disorders, 3) Leg and locomotion problems, and 4) Behavioral disorders, fear and pain. For pigs, the same method produced the following scientific opinions: 1) Piglet castration, 2) Effects of different space allowances and floor types on the welfare of weaners and rearing pigs, 3) Housing and husbandry practices for fattening pigs, 4) Housing and husbandry practices for adult breeding boars, pregnant farrowing sows, and unweaned piglets, and 5) Risks associated with tail biting in pigs.

A similar approach should be developed in the United States and used by inspectors to rate farms as the EU's Welfare Quality organization has done. Presumably, the RAs under current farming practices in the United States would show high severity of risks, long duration of the effects of hazards and high likelihood of affectation. Making this information available to consumers through labeling will increase awareness of farmed animals' plight and, hopefully, encourage consumers to demand improved farming and husbandry practices. Ideally, though, the creation of RAs would coincide with mandatory improvements of farming and husbandry practices by the federal government. The flexibility in this approach is ideal for both producers and consumers in that the SOR model can be easily modified as new research exposes new areas of need in animal welfare.[117]

2. Utilizing Sociological and Market Data to Evaluate Possible Success of Label

The success of the USDA Organic label can be illustrative of the success that an animal welfare label might have in the United States. While critics of the organic program say the regulations are too vague as to permit many producers to maneuver through loopholes that undermine the purpose of organic farming practices[118], several third-party organizations have stated that buying USDA Organics products is still the best way to ensure optimum animal welfare under current standards.[119] Further, the USDA recently passed a final rule that rectifies some of the concerns about the organic industry.[120]

[117] Welfare Quality, *supra* note 110.
[118] Kate L. Harrison, "Organic Plus: Regulating Beyond the Current Organic System," 25 Pace Envtl. Rev. 211, 221-27 (Winter 2008).
[119] World Society for Protection of Animals, *supra* note 1; Farm Sanctuary, *supra* note 4.
[120] 7 CFR 205. Effective June 17, 2010, this regulation clarifies many aspects of the access to pasture ambiguity used to create loopholes by producers previously. The livestock must have access to pasture for at least 120 days for growing season and must intake a minimum of 30 percent dry matter through grazing.

Additionally, the incredible growth of the organic market proves that demand for these products is on the rise.[121] Surveys both in the United States and abroad have also shown that many consumers wish to make more informed choices about animal welfare in their food purchases.[122] A relevant example in both the United States and the European Union of this evidence is the egg product market. Though there is some confusion for consumers about what the various labels mean, the sales of cage-free, free-range and organic eggs has risen dramatically in recent years. At a time when overall sales of eggs were down due to dietary concerns, the sales of specialty eggs, i.e. cage-free, free-range and organic went up 23%.[123] Additionally, the overall sale of organic meat and eggs in the United States was approximately $600 million dollars in 2008.[124] This number is up from roughly $10 million in 1997.[125] Moreover, this category of organic sales, while fast growing, represents the least popular category of organic products, falling behind produce and dairy.[126] However, the data does show that organic products overall are rising incredibly.[127] The creation of an Animal Welfare label now can take advantage of this momentum for the betterment of farmed animals.

3. Advantages to a Federal Voluntary System

Those producers who already comply with federal organic standards would have little cost in obtaining approval for an Animal Welfare label similar to the EU's Community Animal Welfare label. The organic standards in the United States are already closely aligned with the EU

[121] Golan, Elise et al., *Do Food Labels Make a Difference? … Sometimes*, Amber Waves, November 2007, available at http://www.ers.usda.gov/AmberWaves/November07/Features/FoodLabels.htm.
[122] *See generally* Consumer Concerns about Animal Welfare and the Impact of Food Choice, *supra* note 88; Farm Sanctuary, *supra* note 4; World Society for the Protection of Animals, *supra* note 1.
[123] Weise, Elizabeth, "Cage-free hens pushed to rule roost," USAToday (April 10, 2006).
[124] Dimitri, *supra* note 39, at 19.
[125] *Id.*
[126] *Id.*
[127] *Id.*

principles. Some improvement would be necessary,[128] but the organic regulations are already beginning to be amended for clarity and alignment with consumer and industry demands.[129] In addition to complying with updated organic standards, the farm would need to undergo inspection applying the RAs and SOR model indicators in order to establish a ranking for the farm's level of animal welfare to be included on the label. If the organic program is updated to meet the EU standards, the likely cost to organic farmers would be additional costs incurred by changes to the standards and the certification costs involved in the review of the Organic Farming Plan and the inspection charge for application of the SOR model indicators.

National standards and a harmonized label could diminish the confusion consumers feel when shopping for animal friendly products and reduce misleading and untruthful labeling practices. Market demand will dictate the rate at which farmers change their farming practices. Making changes to the minimum standards, using the animal welfare label and educating the public about the differences might push producers to follow standards closer to organic regulations in order to compete. In just the way consumers know that products not labeled organic fail to meet certain standards, they will also know that products without the Animal Welfare label fall short of the those standards.

The economic cost and impact on both producers and consumers should be minimal with a voluntary label. One can estimate the increase in cost based on the size of the organic farm. For example, the European Union found that the cost per hectare decreases as the number of hectares

[128] The organic standards already require livestock to have access to pasture, and prohibit the use of antibiotics and other harmful practices. However, the organic standards currently do not prohibit many of the mutilation procedures common in animal husbandry in the United States such as de-beaking, tail docking, etc. This would need to be changed to meet the EU standard.
[129] 7 CFR 205, *supra* note 121.

increases.[130] If these are similar estimates in the United States then the average increase in cost should also be small because sixty-percent of organic farms, or 866, are more than 500 acres.[131] Since the production and certification costs should remain low for these producers, the cost to consumers should remain very close to their current rate. Additionally, even if there is a slight increase in cost, studies have shown that consumers are willing to pay a premium for products in line with their beliefs and priorities.[132]

Conclusion

Protecting the welfare of animals is important to consumers in the United States. One way to improve this protection is to implement a voluntary Animal Welfare label akin to the proposed EU Community Animal Welfare label and to the USDA Organic label utilizing similar regulations for organic farming in the United States with the addition of SOR model indicators based on RA identifiers to assess the welfare of farmed animals. To have any meaningful impact, this label will need to generate market demand for animal friendly products that encourages more producers to adopt the standards and, in turn, increase the protection of farmed animals.

[130] FCEC, *supra* note 91, at 43. The cost started at 47.00 Euro per hectare for up to 5 hectares and was negligible per hectare once you went above 65 hectares.
[131] WSPA, *supra* at note 1, Figure 5.
[132] *Id.*

THE TRANSPARENCY OF ANIMAL CRIMES LEGISLATION

By Jed L. Painter, Esq.*

For now we see through a glass, darkly…

- I Corinthians 13:12

INTRODUCTION

There has never been a consensus on animals. Taxonomists differ in applying the title. Individuals differ in their sympathies and empathies. It is no surprise, therefore, that there is no clear or singular message that can be divined from the New York State Agriculture and Markets Law. This law, or more specifically Article 26 of this law, houses various crimes that are often generally lumped under the vague commonplace heading of "animal cruelty offenses;" a heading which does not do the Article justice. If you wanted to find the provisions that prohibit you from unjustifiably running a horse on a plank road,[1] displaying fowl that have been imparted an artificial color,[2] or bartering baby rabbits under two months of age "in any quantity less than six,"[3] look to this Article. As much and as often as I look to Article 26 in my role as a prosecutor, what I have discovered is that the vast majority of New York State Legislature's animal cruelty laws give way to the New York State Public's animal cruelty "rules" – amalgamations of geographic, demographic, cultural, societal, and religious viewpoints. These "rules"

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[1] NYS Agriculture and Markets Law (AML) § 364. This only begs the question about when running is justifiable.

[2] AML § 354(2).

[3] AML § 354(3).

continuously evolve, transcend statutes, and frustrate the formulaic and objective application of criminal law. Indeed, when it comes protecting an "animal," the law matters very little, if at all.

THE CONCEPT OF "ANIMAL"

Millennia of agribusiness dominating human survival and prosperity have produced a pan-human sentiment of "living property." The "human mission" regarding animals does include and has included social companionship, but there is and has always been farming, sustenance, transportation, clothing, textiles, and protection. Animals are civilizations' fuel. As such, there has been a consequence on our perception of animals. At the same time, there undeniably has also been present an awareness and appreciation of life, character, and independent thought. Evidence of this comes in the form of storybook tales and nursery rhymes involving anthropomorphized animals, animism, religions associated with half-human/half-animal deities or animal worship, animal co-burial with humans, and even the criminal prosecution of animals for their misdeeds.[4] The natural fusion of human affection and human asset has led to the institution that "We need animals and animals need us." The issue that defines all criminal law on the subject is whether these two "needs" can peaceably meet.

"Power," in its simplest definition, is the force that guides actions and inactions. "Justice" is the successful upholding of a Power; "Freedom" is the successful resisting of a Power. Laws, therefore, define the exact spot where a human will sacrifice personal freedom towards social justice (as an example: if a person were truly free, he or she could

[4] *See generally* E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (Faber & Faber Ltd. 1987).

murder someone without consequence; however, [most] people respect a limitation on their personal freedom to kill people at will in the form of a law against homicide). On that exact same principle, criminal justice for animals will exist where human property rights end and inherent animal rights begin. While most criminal disciplines (like murder or rape) exist on a razor-thin divide where the sacrifice is made, animal crimes have a very blurred line dividing personal freedom and animal protection. Unfortunately, in practice (and in accordance with basic logic), a "blurred" law is no law at all.

THE FOG OF PROTECTION

With the exception of self-defense, there is little, if any, public disagreement that murder is wrong.

Robbery is wrong.

Rape is wrong.

Arson is wrong.

Killing an animal is wrong, UNLESS….[5]

Harming an animal is wrong, unless. Mutilating an animal is wrong, unless.[6] Only rarely is the "unless" actually written;[7] more often the Legislature chose – as was presumably necessary to enact any law where public sentiment was unfathomable – to

[5] Besides social mores discussed below, there is a whole host of legal exclusions on this point – everything from hunting and slaughter for consumption to feeding live mice to pet snakes.

[6] Again, think branding cattle, impaling live worms on hooks as bait for fish, vivisection, various forms of animal experimentation, etc.

[7] For example, under AML § 377 (Disposal of dead animals), animal carcasses must be buried at least three feet below the ground, unless they were used for experimental purposes. Another example, under AML § 353, anti-cruelty provisions may, in some instances, give way to "properly conducted scientific tests," monitored by the state commissioner of health.

couch the societal ambiguity into the word "unjustifiable"[8] – that is, a person's malevolent conduct towards an animal will be criminalized only when it is first demonstrated that it was without justification. The presence and choice of that term in animal crimes statutes will always serve as automatic grounds for a motion to dismiss, no matter how well the charges are written or how timely the prosecution. Still, on its own, that term is not too debilitating to the prosecution of animal crimes. Its combination, however, with other societal X-factors – the New York State Public's "Rules" – is what may randomly, inconsistently and unpredictably nullify the law. As stated above, there is a principle that "We need animals and they need us." But what about the animals that we do not need? What about the animals that we do not even *want*?

The New York State Legislature has denied the public the option of picking the "chosen species" (at least, in theory). "Animal," as codified for New York State criminal law purposes, "includes every living creature except a human being."[9] It does not discriminate by species – whales, hornets, sardines, dogs, nematodes, ants, and oysters are all equally protected from unjustified killings, injuries, and mutilations under Article 26. Yet, this purported equality, codified in law, cedes to the "rules," whether or not we even know it. While I would not bet heavily that you have committed murder, rape, arson, or robbery in your lifetime, I would guarantee that you have violated Article 26 this past week.

[8] *See*, *e.g.*, AML § 353 (criminalizing conduct that "unjustifiably injures, maims, mutilates, or kills any animal"); AML § 353-a (criminalizing conduct of a person who, "with no justifiable purpose…intentionally kills or intentionally causes serious injury to a companion animal…."); AML § 360 (criminalizing conduct of a person who "unjustifiably administers any poisonous or noxious drug or substance to an animal."); AML § 361 (criminalizing conduct of a person who "willfully *or* unjustifiably…injures…any…domestic animal used for purposes of…breeding….").

[9] AML § 350(1).

As a hypothetical, assume that a police officer on patrol observes a man squash a spider with his boot-heel. Further assume that the police officer does not continue on patrol, but stops to further investigate the situation. The officer inquires of the man as to his justification for squashing the spider and the man cannot provide one, apart from "I don't like spiders." The Agriculture and Markets Law provides that a "police officer must…arrest…any person offending against any of the provisions of article twenty-six…."[10] The officer has just observed an unjustified killing of an animal and has elicited a confession. Must the officer now arrest? If the officer does not, what would be his reason for this dereliction of duty? What if the man had instead been observed stomping on a stray cat? A pet chihuahua?

As another hypothetical, imagine you saw a person take a turtle, rip its shell off, pour acid in its wounds, let it suffocate to the point of death, then give it to a buddy who then stabs it and crushes it again and again. You might call 911 immediately and even need some counseling for witnessing such a sight. Now, on the exact same set of facts, imagine you saw a chef take a fresh oyster, shuck its shell off, pour lemon juice on its body, let it suffocate to the point of death, and then serve it to a customer who then jams a tiny fork into it and thoroughly masticates it before swallowing. You might either (a) not care at all or (b) order some blue points for yourself to complement your Sauvignon Blanc. The only significant difference in the above scenarios is the species of animal – something that is supposed to be irrelevant under Article 26.

While the full import of these hypotheticals might be easy to brush aside, they are scenarios that an animal crimes prosecutor must seriously contemplate and an animal law

[10] AML § 371. This is in addition to the arrest mandates contained in Article 140 of the Criminal Procedure Law and the local rules and regulations of municipal police departments.

professor would be well within her rights to place on a final examination. They are meant to demonstrate that, with animal cases in particular, before there can be a decision to arrest and prosecute on the law, there practically (though not legally) must be a decision as to what society's rules are as to that particular species of animal and what the local demographic conventions are as to particular conduct. More often than not, this decision is subconscious, instantaneous, and never reconsidered. It is also regional – a Long Island jury pool's concept of justifiable conduct towards a given animal will be much different from an Adirondack-region pool, with each concept sounding equally absurd when presented to the other group.[11] With such a variance between urban, suburban, and rural viewpoints, not to mention the four centuries of an agrarian-based economy in this country, it is no wonder why the New York State Legislature cannot achieve great specificity when legislating crimes against animals. Rather, the law is intentionally blurred by broad terms like "unjustifiable" and "animal."

Therefore, the notion that we have laws to protect animals is technically accurate, but practically fraudulent. The laws do not serve to protect animals; they serve to protect the animals that warrant our sympathies at any given time in any given place. They protect humans and human emotions. In reality, it is jury nullification – not the law – which is and has always been the standard of prosecution, whether that is a conscious or subconscious decision.

As stated above, every person, village, town, county, and region of New York State will have different "rules" which will serve as benchmarks for jury nullification.

[11] By way of illustration on this point, my office once received a complaint from a concerned Long Island citizen that her neighbor was keeping chickens in a coop during the night and that this conduct was surely criminal. I received another complaint from another Long Island citizen that she suspected that her neighbor was raising cows with intent to later slaughter them for personal consumption and that this individual needed to be prosecuted.

Combining these rules with legal protections, exemptions, and other societal conventions can cause quite a headache. If you dare to think critically about your own views, you will likely find that you are even inconsistent with yourself. In an effort to illustrate and satirize the befuddling discord between these laws, conventions, and principles, I have written a list of 8 Rules, which I share below. In authoring these rules, I voice no support or disdain for them, nor do I comment on the practices upon which they are based. Rather, I am simply attempting to characterize the current, prevalent, yet invisible mores that seem to govern the breadth and practical depth of New York's animal crimes statutes.

THE RULES

1. An animal that is loved by a human will merit enhanced protection.

You hear a lot about "Doggie Heaven" and, to a lesser extent, "Kitty Heaven." You never hear much about Fish Heaven, Chameleon Heaven, or Cattle Heaven. The amount of legal and practical protection afforded to an animal directly correlates with the degree to which an average human identifies with it and/or recognizes a soul within it that is capable of transcending into an afterlife. Consequently, in 1999, the State Legislature gave felony protection to these "companion animals," an honorary title that automatically includes dogs and cats and extends further to essentially any animal taken in as a pet, regardless of species.[12] This was illustrated in *People v. Garcia*,[13] where a family's beloved pet goldfish merited protection as a "companion animal." Thus, while

[12] *See* AML §§ 350(5); 353-a.
[13] 3 Misc.3d 699 (Sup. Ct. N.Y. Co. 2004), *aff'd* 29 A.D.3d 255 (1st Dept. 2006).

extreme cruelty to a pet turtle will merit a felony arrest, the burning and stabbing of a wild turtle confined in a milk crate can only, by law, merit a misdemeanor arrest.[14]

2. Palatable species are exempted from protection.

I have received hundreds of complaints regarding multiple dogs that are kept crammed together in crates, either in a home, puppy mill, or pet store. I have never once received a complaint regarding multiple lobsters that are kept crammed together in a tank at a restaurant or supermarket. The palatability of a particular species of animal is a cultural and regional choice – I use "palatable" rather than "edible" as any non-poisonous animal, including a horse, dog, or cat, is technically edible. (As an aside, section 96-h of the Agriculture and Markets Law prohibits the selling or bartering of dog and cat meat, but has no prohibition against eating it). If New York society has adjudged an animal to be tasty or otherwise salubrious, then slaughtering that animal for consumption will be "justifiable" conduct for purposes of the animal cruelty statutes. However, note that this designation does not release the custodian of the farm animal from criminal prosecution if the animal is otherwise abused or neglected while it is alive.[15]

3. Nuisance species are exempted from protection.

Section 11-0523(1) of the Environmental Conservation Law provides that homeowners, their family, or agents, may "take…unprotected wildlife …when such wildlife is injuring their property or has become a nuisance thereon. Such taking may be

[14] *See, e.g.*, Druin-Keith, *Teens Charged with Burning, Stabbing Turtle in Bellport*, NEWSDAY (June 13, 2010), *available at* http://www.newsday.com/long-island/suffolk/teens-charged-with-burning-stabbing-turtle-in-bellport-1.2016796.
[15] *See, e.g.*, *People v. Paragallo*, 2011WL1160150 (3d Dept. 2011); *People v. Richardson*, 15 Misc.3d 138(A) (App. Term 9th & 10th Dists. 2007).

done in any manner, notwithstanding any provision of the Fish and Wildlife Law…the Penal Law or any other law." "Take" has many meanings under the statute, and includes "kill."[16] Thus, a homeowner, after making a subjective determination that such animals have become a nuisance on her property, should be able to kill cotton-tail rabbits, squirrels, raccoons, skunks, opossums, and foxes using any methodology she deems fit without any consequence from Agriculture and Markets Law. This is with the caveat that the subjective determination must be genuine (or at least perceivable as genuine).[17]

4. Rodents are exempted from protection, unless fluffy, placed in a pet tank, or bearing a fuzzy tail.

As discussed above, any gerbil, hamster, or chinchilla with a loving owner is protected by the animal cruelty laws – possibly even to the tune of a felony charge. Any non-cherished member of the Rodentia order of mammals, however, will face commercial-grade poisons, back-breaking traps, suffocation traps, and sticky traps – legally sold and available at any local grocery store or pharmacy. By way of bizarre punctuation on this point: a person may also purchase live mice to feed to his or her pet snake.

5. Animals with exoskeletons are exempted from protection, unless they are commercial property.

[16] *See* Environmental Conservation Law § 11-0103(13).
[17] *See People ex rel. Thomas v. Suffolk County District Attorney*, 2010 WL 2802679 (Sup. Ct. Suffolk Co. 2010) (upholding jury conviction, despite ECL provisions, in case where defendant was alleged to have killed squirrels without intent to hunt or preserve his property).

Society accepts and encourages massive poisoning operations, undertaken in partnership with a corporate sponsor such as Terminix or Raid. It also accepts inventions such as fly-swatters, fly-paper, and bug-zapping-lights for killing animals with exoskeletons on an as-needed, one-at-a-time basis. However, it is not recommended to pursue extermination of "valuable" insects, such as farmed honey-bees or medical leaches, not so much because an individual bee or leach compels particular respect as an "animal" from society-at-large for Agriculture and Markets purposes, but because their commercial value compels respect as property for Penal Law purposes.[18]

6. Microscopic animals are exempted from protection.

As a general rule, as the size of the animal decreases, the level of its medical and hygienic nuisance to humans increases. Therefore, despite the law, society has all but denied protection for nature's smallest animals. To my knowledge, the District Attorneys of New York City were not consulted before a campaign to aggressively eliminate bed-bugs began in 2010. Likewise, doctors do not routinely consult law enforcement before prescribing antibiotics – even if the doctor is aware of other medical options available to the patient before embarking on the annihilation of all bacteria in the human body. In a similar vein, the extermination of all dust mites from this state and country would not draw much public protest, except perhaps from scientists with concerns about damaging the national ecosystem.

7. Select wild animals may be exempted from protection in the state's discretion.

[18] *See* Alexander, *US Fears over Honey Bee Collapse*, BBC NEWS. http://news.bbc.co.uk/2/hi/science/nature/7312358.stm (last updated March 25, 2008).

Recreational hunting, and efforts to reconcile it with animal cruelty laws, will forever plague the State Legislature. Judge Margarita L. Pez Torres, in a written opinion, noted that hunting was "arguably the ultimate form of cruelty…justified by the need of some people to engage in killing animals as a recreational activity."[19] From a prosecutor's perspective, the quandary is not over the ethics of the practice, but the boundaries of criminal law. Recently, in *State v. Kuenzi*,[20] the Wisconsin Court of Appeals grappled with the issue of whether two defendants, on a hunting trip, violated the state's cruelty provisions by chasing the deer with snowmobiles and killing them by running the deer over and doing "burn outs" on top of the bodies. A similar issue presented in New Mexico's *State v. Cleve*,[21] where a man was charged for animal cruelty for using wire snares to capture deer. In New York, like these other states, hunting permits can be obtained by the state and acting within those permits will shield the hunter from criminal liability. The question that lingers is whether a regularly-practicing hunter that knowingly kills an animal one day, one week, or one month out of season should be prosecuted under the Environmental Conservation Law for a regulatory infraction or should be prosecuted under the Agriculture and Markets Law for an "unjustified killing" of an animal.

8. <u>One animal will merit more protection than many</u>.

If a defendant is found to be in possession of one severely neglected animal, then public sentiment – steadfastly represented in a jury pool – will turn against that individual without much goading. Likewise, if a defendant is found to have murdered in excess of

[19] *People v. Arroyo*, 3 Misc.3d 668, 676 (N.Y. City Crim. Ct. 2004).
[20] 2011WL659380 (Wis.App. 2011).
[21] 124 N.M. 289 (NM App. 1997).

30 victims, raped in excess of 30 people, or robbed in excess of 30 banks, public sentiment will greatly turn against that individual without passionate overture. Yet, animal hoarders, made trendy by television, are perceived to have different mental culpability than the other large-scale offenders listed above. If a defendant is found to be in possession of 30 severely neglected animals, public perception – extending to judicial perception – will often conclude mental infirmity to the point of vitiating criminal culpability. This type of second-guessing is something that does not happen if only one severely neglected animal is found in a person's possession. If a prosecutor or law enforcement official found a sobbing animal hoarder to be in possession of 100 malnourished animals, and decided to pursue some type of non-criminal "intervention" as an alternative to criminal prosecution, public sentiment might brand that official as "reasonable," "compassionate," or "just." However, if that same official found a sobbing man to be in possession of 100 hard drives filled with child pornography, and proposed some type of non-criminal "intervention" as an alternative to criminal prosecution, public sentiment would absolutely brand the official forever as "soft on crime" and the ensuing public uproar would likely get the official terminated. Whatever the psychological cause, our societal empathy seems to increase as the number of neglected animals increases whereas it markedly decreases as the number of loaded guns, rapes, or murders increases.

CONCLUSION

There likely never will be a consensus on animals, and each individual's viewpoint will continue to seem frustratingly overreaching to another individual's opposing viewpoint. The New York State Legislature, which repeatedly catches

invective for its failure to produce viable, modern, and clear laws to protect animals, is not as culpable as it is often made out to be. In reality, it is merely acting as intended – as a mirror of societal indecision.

Amy Sheridan
Committee on Animals and the Law
June 7, 2012

Comfort Animals and Children in the Criminal Justice System, an overview

Staten Island District Attorney Daniel Donovan recently announced that his office will be incorporating comfort dog Bronksey into their witness and victim interviews[1]. Bronksey is a sweet-faced, velvet-black Labrador/golden retriever mix. His job is to provide comfort for children who enter the criminal justice system because they've been abused, alleged to have been abused, or have witnessed crimes. More and more, child advocacy centers, prosecutors' offices and courthouses are working with trained dogs and other comfort animals in order to alleviate some of the stress inherent in being involved in the criminal justice system.

Prior to the announcement from Staten Island, Dutchess County Court Judge Stephen L. Greller allowed Rose, a comfort dog, to accompany a 15-year-old rape victim to the stand. In that case, People v. Tohom[2], Judge Greller looked to Executive Law §642-a and held the victim qualified as a "child victim"; under the statute, the child would suffer serious emotional and psychological distress if she were to testify in front of the defendant (in this case, her father, whom she alleged had abused her from the age of 11 and had impregnated her), and that these factors warranted the court making special considerations to accommodate her. Judge Greller cited precedence in People v. Gutkaiss[3] and likened Rose's presence to that of a child victim holding a teddy bear while testifying.

[1] Silive.com. Donnelly, Frank. *'Comfort' Dog Becomes Staten Island District Attorney's Newest Crimefighter*. Last visited, June 4, 2012 at 11:46 AM; orig. publ. date May 30, 2012, 4:05pm.
[2] SCI No. 338/2010 (Dutchess County Court June 1, 2011)
[3] 206 AD2d 628, 614 NYS2d 599 (App. Div. 3d Dept. 1994) holding as "entirely appropriate in view of Executive Law §642-a (4)" to allow a child victim to hold a teddy-bear while testifying.

The Executive Law

Article 23 §642-a of the Executive Law, "The Fair Treatment of Child Victims as Witnesses", was meant to minimize the child victim's exposure to further trauma caused by having to relate the abuse he or she endured[4]. Section (1) promotes a "multi-disciplinary team … for the investigation and prosecution of child abuse cases involving abuse of a child…" Section (4) relays the need for the presiding judge to be sensitive to the psychological and emotional stress a child witness may undergo when testifying, and section (6) allows for the presence of a "support person" during a child's testimony. These factors and the multi-disciplinary approach to working with child witnesses[5] is intended to minimize a child victim's stress in order to maximize each interaction the child has with the justice system to promote as expeditious a process as possible.

Why dogs?

The American Humane Association, in collaboration with the Delta Society (now Pet Partners), developed the TASK (Therapy Animals Supporting Kids) manual[6], a "how-to" guide on how prosecutors, child advocates, and other organizations involved in working with child victims may develop their own Animal Assisted Therapy program (AAT). In the manual, the authors report children who have suffered abuse often also suffer from social deficiencies, such as the inability to sit still, pay attention and relax. Many abused children also harbor a great distrust of adults[7].

[4] 2007 Legis. Bill Hist. NY A.B. 7858.
[5] Abused children, allegedly abused children, and children who have witnessed crimes.
[6] http://www.americanhumane.org/assets/pdfs/children/therapy-animals-supporting-kids.pdf Last visited June 5, 2012 at 12:18 PM.
[7] More information on abused children and the effects of abuse can be found in, Coordinated Response to Child Abuse and Neglect:The Foundation for Practice *Chapter Six: What Are the Consequences of Child Abuse and Neglect?* By Office on Child Abuse and Neglect, Children's Bureau. Goldman, J., Salus, M. K., Wolcott, D.,

In addition, children who have been victimized are often reluctant to talk about the abuse they endured. Finding themselves in the court or other "official" unfamiliar setting can be intimidating and confusing. Having to relate what will like be a horrific story can be paralyzing for a child. All of these factors become obstacles to providing an expedited process for children to go through the system efficiently and without additional trauma.

Data shows that the mere presence of a kind, good-natured dog can alleviate some of the physiological symptoms of stress by decreasing a person's blood pressure and slowing the heart rate. This relief helps the child talk to the interviewer. When children have had the opportunity to bond with a facility dog during pre-trial interviews, they more readily provide productive testimony, whether or not the dog actually accompanies the child to the stand. Furthermore, by incorporating the dog, the interviewer can more readily build rapport with the child, counteracting distrust.

Courthouse Dogs[8] and the TASK manual cite several incidents in which children progressed from refusing to speak with interviewers to opening up once the dog was present. In at least one account, after therapy that included a comfort animal, a 10-year-old girl began showing improvement in her overall behavior and treatment goals, not just in her ability to relate the abuse to the interviewers[9]. The child, showing signs consistent with post-traumatic stress disorder (PTSD), had demonstrated an inability to become calm and relaxed, manage her anger, focus and show empathy, as well as displaying other problems. After participating in the AAT sessions, designed to provide rules and structure for the child and to motivate her to modify her

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Kennedy, K. Y. A Available at: http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationf.cfm last visited on June 13, 2012 at 4:10 PM.

[8] http://courthousedogs.com/. Last visited June 4, 2012 at 2:31 PM. Courthouse Dogs is an organization that provides "Expert education and guidance for legal professionals" in the use of therapy dogs.

[9] TASK Manual, *Case Study: The Power of AAT for a Child in Need*, p. 13.

behavior, the child was able to sit quietly, listen, relax and follow rules regarding interaction with the comfort dog.

In the Tohom case, the 15-year-old victim also suffered from PTSD, presumably brought on by the abuse. She was inattentive, exhibited a failure to connect, and would not discuss the abuse with the therapist. However, when the victim was with Rose, a golden retriever comfort dog, the therapist testified that she became "significantly more verbal". The victim also expressed feeling calm when she was with Rose and that Rose's presence would make her feel safer at trial.

How does it work?

The Dogs

Prosecutors' offices and child advocacy centers considering incorporating comfort dogs in their practice may either have one working "on site", as in Staten Island, or may outsource to a therapy animal service provider. For example, in the Tohom case, East Coast Assistance Dogs[10] (ECAD) supplied Rose and her handler. The American Humane Association recommends dogs be professionally trained by an accredited training organization such as those recognized by Pet Partners and Therapy Dogs International.

The terms "comfort dog" and "therapy dog" seem to be used synonymously. However, in contrast to the American Humane Association's promotion of the use of therapy dogs and other animals, Courthouse Dogs cautions against using therapy animals and strongly advocates for the

[10] Also referred to as "Educated Canines Assisting with Disabilities". http://ecad1.org/default.htm?0,0,OurProg,eca. Last visited, June 5, 2012 at 2:34 PM.

use of "facility" dogs instead[11]. Courthouse Dogs recommends using dogs trained by an organization recognized by Assistance Dogs International and that the handler is a criminal justice professional, such as a staff member of the facility in which the dog will work.

Whether a therapy dog or facility dog is used, the dog must be very gentle and calm[12]. The dogs cannot be distracted by sounds or people and must be very obedient. They must also meet health and behavior standards in order to ensure safety.

Service/Assistance Dogs vs. Facility Dog vs. Comfort/Therapy Animal: What's the difference?

While no definition of a therapy animal exists under the Federal Americans with Disabilities Act (ADA), a therapy animal is typically the personal pet of the handler, and the handler and the pet undergo training to provide people contact with animals[13]. They interact with many different people to provide comfort and/or therapy - in contrast to a service animal that's focused on one person only. Furthermore, therapy dogs are almost never service animals, and since they're pets (not service animals), there is no requirement that they be granted access to public places.[14]

The Federal ADA defines service animals as "dogs that are individually trained to do work or perform tasks for people with disabilities." Note that under the Federal ADA only dogs are recognized as service animals[15]. The work or task a dog has been trained to provide must be

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[11] Courthouse Dogs, LLC. Position paper against the use of pet therapy dogs in the criminal justice system. http://courthousedogs.com/pdf/CourthouseDogs-PetTherapyDogs.pdf last visited June 6, 2012 at 4:50 PM.

[12] See the video of "Bronksey" at: http://video-embed.silive.com/services/player/bcpid619329477001?bctid=1661867982001&bckey=AQ~~,AAAAQBxUxyk~,OfuBKPHdVzO8G-uazu0xfoYZZxiinQvZ , last visited June 13, 2012 at 4:21 PM.

[13] Pet Partners (Delta Society) asserts it is the only national registry that requires volunteer training and screening of animal-handler teams.

[14] http://www.deltasociety.org/page.aspx?pid=303#Difference , last visited June 7, 2012 at 10:43 AM.

[15] 28 CFR Part §35.104 available at: http://www.ada.gov/regs2010/titleII_2010/titleII_2010_regulations.htm#a35104, Last visited June 5, 2012 at 12:18 PM.

directly related to the person's disability. Comfort dogs are specifically excluded from the ADA's definition of service animal.

The relevant sections of New York ADA laws similarly refer only to "guide dog, hearing dog or service dog"[16]. New York Civil Rights Law§ 47-b(4) defines "guide dog", "hearing dog" or "service dog" as "a dog which is properly harnessed and has been or is being trained by a qualified person, to aid and guide a person with a disability."

Courthouse Dogs promotes the use of facility dogs to counteract many of the pitfalls associated with working with the therapy animal and handler team[17]. A facility dog is one trained through an organization accredited by an institution, such as Assistance Dogs International. Facility dogs are bred to become assistance dogs; their training begins when the dog is a new puppy and continues until the dog is about two years old, but can continue throughout the dog's career. Facility dogs are also handled by local staff, rather than the volunteer "civilian" handler. The training is more rigorous than therapy animal training as well.[18]

Courthouse Dogs cautions against working with therapy animals for a variety of reasons. For example, there are no nationally recognized standards for safety around children, there are no uniform training standards generally, and the civilian handler's presence may become problematic; therapy animals may only work for two hours at a time, and there is a need for extensive local staff oversight[19]. In fact, Courthouse Dogs cautions against even using the term "therapy dog" at all. They claim that because of its origins in the medical and psychiatric fields,

[16] New York Civil Rights Law § 47(1), Executive Law § 296 (14).
[17] *Courthouse Dogs Position Paper.*
[18] http://www.courthousedogs.com/settings_courtroom.html, last visited June 7, 2012 at 11:21 AM.
[19] *Courthouse Dogs Position Paper.*

the designation “therapy dog” implies that the child witness is a victim - a question of fact for the jury. They argue that this could lead to a mistrial or serve as a basis for appeal[20].

TASK acknowledges these concerns; however, it puts forth several suggestions to balance any deficiencies the use of a therapy animal might present. The main foci of these suggestions are training and communication.

TASK strongly advocates that handlers undergo a training program that includes guidance specifically how to work with children who have been abused. The training should also include modules on legal terminology and local practice. The handler must understand the unique challenges child victims endure and be prepared to hear about traumatic, shocking events. Handlers should be instructed not to react to what the child is saying and that their main priority in this setting is the dog. Handlers should also be on notice that they may be called as witnesses because of their presence during the interview.

In any event, whether to incorporate a therapy animal or facility dog is a decision for local staff and management who must consider their resources and what will work best for their situation.

Animal and Child Interactions

Depending on the scope of the program, animals may serve as “greeters”: they may be stationed in open areas available to provide a warm, furry hello for everyone who enters the building; or they may be involved in confidential child interviews. Therapy animals may even be allowed to accompany the child to the stand when testifying in court. It should also be noted that therapy animals do not always have to be dogs. Rabbits, birds, guinea pigs, cats and horses (the latter

[20] http://www.courthousedogs.com/settings_courtroom.html , last visited June 7, 2012 at 11:21 AM.

perhaps not brought into the building) have all been used as therapy animals; dogs may just be the most common. Dogs' unique ability to respond to commands and to interact with humans make them ideal for this kind of work[21].

When incorporating an animal into an interview or therapy session with a child, the interviewer or therapist must first ascertain whether it is appropriate to have an animal present and whether a particular animal will be a good fit with the child. Some children may have witnessed animal abuse in the home and will associate the animal with the abuse; therefore they might not benefit from animal interaction. Some children may have been abusive to animals themselves, making assisted animal therapy inappropriate. There are also issues of fear and allergic reactions to the animal that must be considered before introducing a child to a therapy animal[22].

The interviewer must also provide rules for interacting with a dog. Rules provide a sense of safety and boundaries for the child, who is most likely unfamiliar with both.

The handler must be given the opportunity to take breaks, both for the dog and the handler him/ herself. TASK encourages using multiple therapy teams to avoid handler team "burnout". TASK also suggests that interviewers debrief with handlers after particularly difficult sessions to help with the emotional impact that can be caused by listening to accounts of abuse[23].

[21] TASK, p. 8.
[22] TASK, *Potential drawbacks and misapplications of AAIs for Children who have been abused,* p.7.
[23] TASK, p. 12.

Legal considerations and common objections

It is important that a child is not given the impression that he or she will be rewarded with time with the dog for disclosing information. Not only will it be counterproductive; it will also provide the defense with fodder for objection[24].

When the time comes for the child to testify, the prosecutor may submit a brief requesting that the comfort dog accompany the child witness. The brief may include a report from the forensic interviewer detailing the child's progress while the dog was present and the likelihood that the child will provide more competent testimony within the dog's presence. The judge may then decide if an *in camera* interview with the child is appropriate in order to determine whether the dog is necessary in obtaining the child's testimony[25].

The defense's most common objection is that the presence of the dog will prejudice the jury's decision; the dog's presence will increase the likelihood that the jury will perceive the witness as a victim. However, Courthouse Dogs and both the Gutkaiss and Tohom cases offer that an appropriate limiting jury instruction will mitigate any perceived prejudice, if not eliminate prejudice all together. The instruction maybe, for example, something such as:

> The purpose of the comfort dog is to help reduce anxiety and has nothing to do with the truth or falsity of the witness's statements[26] .

Another similar objection is that since the dog is trained to react to stress, the dog could be responding to a witness who is stressed because he or she is lying rather than one who is stressed

[24] TASK, p. 7, 18.
[25] See the balancing test put forth in State v. T.E. 342 NJ Super. 14 (NJ 2001) on the presence of support persons during children's testimony.
[26] Developed from the partial instruction reported in Gutkaiss.

from relaying truthful traumatic events. The New York Times article, "By Helping a Girl Testify at a Rape Trial, a Dog Ignites a Legal Debate" [27] reported, "At least once when the teenager hesitated in Judge Greller's courtroom, the dog rose and seemed to push the girl gently with her nose." However, the dogs presented on the Courthouse Dogs website and promotional DVD[28] do not appear to have any specialized reactive training. In fact, therapy dogs are often chosen because of their ability to remain calm and not to react to any external stimuli. They are trained to respond to commands from their handlers rather than to a specific emotions presented by the witness[29].

As mentioned earlier, there are also varying degrees of how to incorporate the dog to minimize any perceived intrusion on the hearing. For example, the dog may sit towards the back of the courtroom within the child's view. The dog could lay quietly by the child's side at the stand. Or the dog could sit with his or her head in the child's lap. And, as in Staten Island, the therapy animal or facility dog may assist only during interviews and office visits. In these instances, the dog may also be available to walk with the child to the courtroom and wait outside in order to give the child something to look forward to once testimony is finished.

Furthermore, having a dog in the courtroom has been compared to having a support person available for the child. The Executive Law §642-a (6) contemplates the use of support persons so long as the support person does not influence the child's testimony. It could be argued that a facility dog could not possibly influence the child's testimony because, very simply, it's a *dog*.

Support and precedence in other jurisdictions

[27] http://www.nytimes.com/2011/08/09/nyregion/dog-helps-rape-victim-15-testify.html?_r=1, last visited Nov. 7, 2011 at 4:37 pm, orig. publ. date Aug. 8, 2011.
[28] Available at no charge upon request from courthousedogs.com.
[29] For a complete list of other therapy dog attributes, see TASK p. 9.

Vachss, a German Shepard, is one of the first dogs ever to have assisted a child in testifying.[30] In State of Mississippi v. Tatum, the court allowed Vachss to be used as a comfort item during a seven-year-old child's testimony in court. Additionally, the Board of Directors of the National District Attorneys' Association passed a resolution supporting the use of comfort dogs to aid investigations involving young and vulnerable[31] crime victims. [32] Furthermore, Courthouse Dogs counts Arizona, California, Massachusetts, Missouri, Ohio, Pennsylvania, Texas and Washington, among others, on their website as supporting the use of dogs in assisting victims in the criminal justice system. [33]

Finally, a very important aspect of animal assisted therapy, reported by agencies and offices that incorporate comfort animals in their practice, is that staff themselves benefit from the animal's presence[34]. Professionals who work with abused children often suffer from secondary trauma[35]. Animals may help to brighten the mood where circumstances may otherwise appear dire. Staff reaps the same stress-reducing benefits as do the victims.

[30] http://www.courthousedogs.com/settings_courtroom.html , last visited June 7, 2012 at 3:32 PM.
[31] Comfort animals can be beneficial in many situations, including those involving impaired adult witnesses and any vulnerable crime witness, such as a victim of domestic or sexual violence. Comfort dogs are also used in drug courts to alleviate stress on the drug court participant in order to maximize their time before the judge.
[32] NDAA, Resolution of the Board of Directors, November 19, 2011 available at: http://www.ndaa.org/pdf/NDAA_resolution_courthouse_dogs.pdf , last visited June 7, 2012 at 3:07 PM.
[33] http://www.courthousedogs.com/dogs_jurisdictions.html , last visited June 7, 2012 at 3:13 PM.
[34] Both TASK and courthousedogs.com cite several accounts of staff benefitting from interaction with a therapy or facility animal.
[35]Pryce, Shackelford, & Pryce from Secondary Traumatic Stress and the Child Welfare Professional, "Educating Child Welfare Workers about Secondary Traumatic Stress" (2007). http://lyceumbooks.com/pdf/stsch3.pdf