



THE OFFICIAL PUBLICATION OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON ANIMALS AND THE LAW

From the Chair

Welcome to this issue of Laws and Paws.

This issue of Laws and Paws showcases two articles written by students who won first and second prizes in the Committee on Animals and the Law Student Writing Competition. Katherine Wenner, the first-place winner, wrote a compelling piece on animal welfare food labeling and how those labels stating the food we're buying was raised "organically" or "free range" don't always mean what we think they do (or want them to). It's called, "Pulling the Wool Over Our Eyes: How Inconsistent and Misleading Voluntary Animal Welfare Food Labels are Failing Consumers and Animals."

Alexandra Monson's second-place winning article discusses how to fix a "regulatory gap" to protect animals in captive hunts. Captive hunts, also known as canned hunts or game ranches, sell hunters an opportunity to kill an animal living in an enclosure. Ms. Monson's article is titled, "A Case For Animal Welfare Act ("AWA") Regulations Of Captive Hunt Facilities."

One of our Committee members, Lisa Cobb, also contributed to this issue with a piece on residential chicken-keeping. Ms. Cobb surveys local laws in New York State and offers helpful information to lawyers and those interested in the law behind raising chickens outside of the typical farm environment in her article entitled, Urban Chickens- Neighbors Cry "Fowl!".

Molly Armus, another Committee member, interviewed our very own Barbara J. Ahern who has been the Committee's

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From the Chair (continued)

Legislation Subcommittee chair since 2009 but has been a vital part of the Committee since 2002. Ms. Ahern is the recipient of the Committee's 2019 Exemplary Service Honor. The Exemplary Service Honor was first developed in 2017 by the Committee's officers to show appreciation to members who have served as subcommittee chairs and have gone above and beyond to advance the humane treatment of animals through the law and have worked to serve the mission of the Committee. The honor was first presented to James Gesualdi in 2018.

All the articles are well thought out and thoughtful and provide as great resources for anyone who is interested in animals and animal law. Animal law is so diverse and touches on so many other areas of life and the law; it's impossible not to learn something new when reading about it.

I hope you find these articles as enriching as I did.

Amy

Committee on Animals and the Law 2019 Annual Meeting

On January 16, 2019 the Committee on Animals and the Law will hold its annual CLE program. This years program is “When Disaster Strikes, What Happens To The Animals? A Guide to The Laws and Policy That Protect Animals In Emergencies.” The program will be presented by experts in their fields and will offer a practical discussion of laws relating to animals. Topics discussed will include the current status of laws pertaining to animal rescue during natural disasters and issues that shelters and rescues face during disasters. To register, please visit www.NYSBA.org.



The Student Writing Competition

This issue of Laws and Paws includes the 2018 Student Writing articles, First Place: Pulling The Wool Over Our Eyes: How Inconsistent and Misleading Voluntary Animal Welfare Food Labels are Failing Consumers and Animals, by Katherine E. Wenner and Second Place: A Case For Animal Welfare Act (“AWA”) Regulation of Captive Hunt Facilities, by Alexandra Monson.

Amy Pontillo, Esq., Committee Chairperson
Ashlee Cartwright, Esq., Committee Co-Chairperson
Kirk Passamonti, Esq., Publications Subcommittee Chairperson
Charis Nick-Torok, Esq., Secretary

NYSBA COMMITTEE ON ANIMALS AND THE LAW

MEMBER SPOTLIGHT: BARBARA AHERN, ESQ., LEGISLATION SUBCOMMITTEE CHAIRPERSON/ RECIPIENT OF THE COMMITTEE'S 2019 EXEMPLARY SERVICE HONOR

INTERVIEW BY MOLLY ARMUS, ESQ.

How did you get involved in animal law?

I got involved in animal issues through my work with the New York State Veterinary Medical Society (NYSVMS). I was General Counsel to the NYSVMS for almost 30 years and worked very closely with veterinarians. In that period of time, I learned a lot about animals and how they are treated by people who take them into their families, by veterinarians and by others who interact with them. One of the best parts of being affiliated with the NYSVMS is that it brought me to the New York State Bar Association(NYSBA) Committee on Animals and the Law, when it was first formed by NYSBA President Lorraine Power Tharp.

With the knowledge I gained from working with the committee, and working with other original committee members like Stacy Wolf(now Senior VP of the Anti-Cruelty Group at ASPCA), I put together several programs for veterinarians on animal cruelty – showing them how to identify animal cruelty, what they can do when they have an animal who has been subjected to neglect or cruel treatment, how to be prepared to work with the prosecution when a case goes to court and how their expertise in veterinary medicine can help the prosecution prepare a case.

What kind of work do you do as an attorney? Do you ever work on any animal issues in that role?

Although I do some general practice, most of my work is in the field of lobbying, at the state level. I represent clients on legislative issues before the legislature and the governor's office, and on regulatory issues before many of the executive agencies of the state. As an outgrowth of the regulatory side of my lobbying practice, I also represent clients in enforcement actions taken by state agencies. None of my lobbying clients are related to animals, so I don't lobby on any animal issues. I am delighted to be able to use my legislative knowledge and experience to help the Committee on Animals and the Law on legislative issues.

Do you have any passions outside of animals/animal law?

I was fortunate enough to grow up, summers, on Lake George in the Adirondacks. When my father died, my husband and I inherited the family camp and, after a lot of renovation work, we have been able to share it with many friends who come up for days or weekends. As long as they don't mind sharing it with our three dogs, too. I am passionately in love with the mountains. I can feel my heart lift when we first come over the hill and the lake and surrounding

mountains come into view. When I was younger I climbed many of the Adirondack High Peaks, but I am very happy now to climb any of the lower peaks, as long as I'm out in the woods and breathing in the tree-scented air – and as long as there's a great view when we get to the top.

During your career, what do you feel has been the most significant advance in animal law? Do you feel there have been any setbacks?

The way society views animals now is so different from the prevailing view of animals when I started my career. I am most interested in addressing animal cruelty, so the biggest advance in that area was the passage of the law establishing the crime of aggravated animal cruelty (Section 353-a of the Agriculture and Markets Law), making it a felony to intentionally kill or injure an animal with aggravated cruelty. I say that because I saw it from the legislative side, and saw how much attitudes there had to change before the legislature could pass this bill. The bill creating the felony crime of aggravated animal cruelty had been introduced for at least ten years before the legislature finally passed it. I remember some of the negative reaction that greeted the bill's first appearance, from many who simply didn't think it should be viewed as such a serious crime. I give a lot of credit to now-Senator Jim Tedisco for persevering with this bill for so many years, even to the point of giving the prime sponsorship to Democratic members of the Assembly (then-Assemblyman Tedisco is a Republican) so it could be passed. There is so much that flows from that recognition of the seriousness of violent crimes against animals. It has been law for 19 years now, and we take it for granted, but it was a major step in addressing severe animal cruelty.

I don't see setbacks. You're talking to someone who educates her clients in the "erosion theory of lobbying," recognizing that it can take a very long time to achieve many goals, and change may happen bit by bit. Along those lines, I have urged the Legislation Subcommittee to support legislation that would modify language in the aggravated animal cruelty law that, according to prosecutors, have prevented some convictions under this law, and I hope we can continue working on it to give prosecutors the tools they need to go after animal cruelty.

Do you think New York is leading in any areas of animal protection?

Without having a good nationwide perspective, I would still say that I don't see New York taking the lead in this area of law, as it has in, for example, many areas of consumer protection, and I'm not sure why. Many times when we look at bills that the Legislation Subcommittee wants to support, the sponsor's memo will recite that similar laws have been enacted in X number of other states already – so we aren't first. One of the jokes around the Capitol is that the New York Legislature needs to be either *first* or *last* among states in passing new initiatives – but as long as we're not last in passing specific pieces of legislation for animals, I think we're still ahead.

I also think – from a legislator's point of view – there is good reason to carefully watch how new initiatives are implemented elsewhere before passing them here. One of the bills that the Legislation Subcommittee considered this year was legislation to require that pet stores sell only animals obtained from a shelter or rescue organization. While the desire to eliminate "puppy mills" as a source of pet store animals is laudable, the subcommittee had a lot of questions about

taking this step. They asked one of the members of the subcommittee to provide information on how a similar law passed in California was working before further considering it for support, and I think this approach is better than rushing to be “the first” to enact something.

Where do you think New York law is lacking in terms of animal protection?

One area where I think we’re lacking is represented by a bill that the committee has supported in 2017 and 2018, S.2167 (Serino) / A.668 (Rosenthal), that would amend twenty separate provisions of our laws (which allow Orders of Protection to be granted by the courts), in order to allow those Orders of Protection to provide greater protection to pets in the household. It seems simple – we’re always talking about how animal abuse in the household is used by an abuser to keep human members of the family under the abuser’s control and how an animal abuser often “tries out” their ability for violent action on animals before using the same violence on humans. Yet the legislature can’t seem to authorize the courts to provide the needed protection to animals in abusive situations? I hope there will be some reconsideration of this issue.

If you could get one piece of animal legislation passed in the New York Legislature in 2019, what would it be?

In addition to everything I’ve already mentioned, I would like to finally see the legislature take some action to help retired racehorses. This year, the Legislation Subcommittee took up several bills that would work toward creating programs that provide for racehorses when their racing careers are over. These bills would ensure that they are provided good homes, new careers and are not sent outside the country to be slaughtered for horse meat consumption. Reviewing these bills and learning more about the fate that awaits many horses at the end of their racing careers was a real eye-opener for me. I don’t think any of the bills the committee supported this year is the perfect answer, but I would to see this issue addressed – and it must be done with legislation that provides funding to care for these horses.

If you could offer one piece of advice to those thinking about a career in animal law, what would it be?

Certainly there are entire careers in animal law, but those are probably in jobs for the organizations that work solely for animals, ASPCA, HSUS and many others, who do wonderful work. What I would tell any attorney interested in helping animals is that – as in real life – animal issues run through almost every area of the law. In real property, there is a need to ensure that pets are allowed in rental housing; in trusts and estates, you do tremendous good in ensuring that every client who makes a will (or testamentary trust) provides for the care of their pets that may survive them; in domestic relations, every attorney representing a party in a divorce should ensure that any family pets are taken into consideration when arrangements are made for the dissolution of that family unit and care of family members. Everywhere you look, animals are part of the law and lawyers can help animals and their human families simply by being aware that animals must be taken into consideration, protected and provided for in appropriate ways.

Pulling the Wool Over Our Eyes: How Inconsistent and Misleading Voluntary Animal Welfare Food Labels are Failing Consumers and Animals

By: Katherine E. Wenner

I. Introduction

Imagine an animal-loving law student, extremely conscientious about animal welfare. She consumes only eggs—no other food animal protein. Because of her love for animals, she pays extra money for eggs raised in a cage-free hen house. Despite the fact that she lives on a law student's meager budget, the extra money she pays is worthwhile to ensure that the hens which raise her eggs come from a happy, healthy environment. That is, until one day when she learns that the years of paying extra money for her eggs have resulted in increased profits for the producer, yet very little improvement in the hen's quality of life.

This is a true story and it happens frequently to customers purchasing all sorts of food animal protein products. The following paper discusses how the United States' current voluntary animal welfare labeling system is ineffective. Section II describes why the United States developed its current voluntary animal welfare system. In today's food production world, animals are often raised in environments where the producer gave no thought as to the animal's welfare at any point during its lifetime. However, consumers have voiced their concerns and shown a willingness to pay more money for products coming from a farm with heightened animal welfare. Section III explains the actual labeling system in place, illustrating government and third-party organizations that are responsible for certifying animal welfare labels. Section IV proceeds to outline the problems with the current system. The current system has failed to satisfy consumers' principles regarding animal welfare concerns. More importantly, it has failed to significantly improve animal welfare. Certification programs are not closely regulated and this

has led to inconsistent and misleading claims. Finally, Section V provides a proposed solution to how the federal government could improve the current system. One potential solution is a more closely regulated system, where a government agency monitors all animal welfare claims to ensure that producers are not benefitting from higher priced products without actually providing heightened welfare standards to the animals.

II. The change in food animal agriculture that led to voluntary animal welfare labeling claims

The environment in which food animals are raised has changed dramatically in recent years, leading to consumer concerns regarding food animal welfare. In the early nineteenth century family farmers raised a small number of crops to support their own pigs, cattle, and chickens.¹ Now, in the early twenty-first century, most American family farms have disappeared and industrial farms have replaced them.² The majority of America's food animal products are raised in a Confined Animal Feeding Operation ("CAFO"), more commonly known as a "factory farm."³ Factory farms are high density environments where animals are designed to grow faster than ever to improve efficiency and productivity.⁴ The increased efficiency of factory farms has led to decreased food prices for consumers, but the lower prices come at a cost—the adverse effect on living conditions and welfare for food animals.

While factory farms have succeeded in reducing consumer costs for food animal products, their emergence has led to numerous concerns about animal welfare.⁵ Some animal welfare concerns include animals' limited access to the outdoors, lack of clean bedding, and

¹See DAVID N. CASSUTO, *THE CAFO HOTHOUSE: CLIMATE CHANGE, INDUSTRIAL AGRICULTURE, AND THE LAW* 3 (2010).

²See *id.*

³See Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 *ANIM. L. & POL'Y.* 325, 325 (2007).

⁴See *id.* at 328.

⁵See *id.* at 329.

inability to move naturally or stretch out.⁶ Laying hens may live in cages,⁷ and sows are often confined to crates.⁸ Further, numerous physical operations are completed on the animals without the use of anesthesia.⁹ These operations include debeaking, dehorning, tail docking, and castration.¹⁰ Techniques such as debeaking or dehorning are used to prevent animals from attacking each other, and tail docking is to prevent animals from biting each other's tails.¹¹ However, these techniques are only necessary because the animals are subjected to overly crowded, dense environments.¹² Thus, the very nature of a factory farm has led to these practices that affect animal welfare, which consumers find objectionable.

Recently, consumers began to voice their opinions and concerns regarding food animal production in order to raise awareness and to affect a change in the agricultural industry. As consumers have grown increasingly concerned over food animal production techniques and the current state of animal welfare, the United States has chosen a “market-regulation” approach to improve animal welfare.¹³ This approach “assumes that consumers will express their preferences for agricultural animal welfare in their purchasing decisions, thereby incentivizing producers to adopt desired welfare practices with dollars and obviating the need for direct governmental regulation of producer behavior.”¹⁴ Theoretically, this approach would allow consumers who have a “strong preference for improved animal welfare” to pay more for “heightened animal

⁶*Id.*

⁷*Id.*

⁸*Id.* at 331.

⁹*See id.* at 328, 341.

¹⁰*See id.*

¹¹*See* Animal Welfare Institute, *Inhumane Practices on Factory Farms*, <https://www.farmsanctuary.org/learn/factory-farming/> (last visited Nov. 28, 2017).

¹²*Id.*

¹³*See* Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 392 (2013).

¹⁴*Id.*

welfare.”¹⁵ Yet, if producers charge increased prices for food that is not actually raised in an environment with heightened animal welfare, the result is a “windfall” for producers.¹⁶ In a windfall situation, producers receive more profits on their goods while consumers do not receive the product they expected—a product raised in an environment that matches their personal standards for animal welfare.¹⁷ Because of these windfalls, some legal commentators declare that the United States’ market-regulation approach for animal welfare has failed.¹⁸ Commentators claim the failure is due to the current labeling practices the United States has chosen to implement.¹⁹ Thus, consumer attempts to encourage heightened animal welfare have not yet improved the situation, but the failure is attributable to the means the United States has chosen to correct the problem.

III. The current status of animal welfare labeling claims

Currently, animal welfare claims on food labels are moderated in part through government programs, third-party organizations, and consumer purchase decisions.²⁰ Technically, the federal government has ultimate control over voluntary animal welfare labeling.²¹ The United States Department of Agriculture (“USDA”) carries the general responsibility for food labeling oversight, including animal welfare claims on food products.²² However, the Food Safety Inspection Service (“FSIS”), a public health agency within the

¹⁵*Id.*

¹⁶ Zak Franklin, *Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare*, 21 *Animal L.* 285, 294–95 (2015).

¹⁷*Id.*

¹⁸*Id.*

¹⁹*See* Sullivan, *supra* note 13, at 392 (stating “market regulation is failing . . . because current voluntary and nonstandard animal-welfare labeling practices do not clearly or credibly disclose to consumers the actual treatment of agricultural animals”); Franklin, *supra* note 16, at 294–95 (asserting that market failure is occurring because consumers are willingly paying more for goods while mistakenly believing the food is produced humanely).

²⁰*See* Sullivan, *supra* note 13, at 396, 398, 414 (referencing federal regulation, state regulation, and animal welfare certification programs such as Animal Welfare Approved, the Global Animal Partnership, and the American Humane Association).

²¹*See* 21 U.S.C. § 601 *et seq.* (2012).

²²*See id.*

USDA,²³ is the agency primarily responsible for regulating food labeling claims.²⁴ The FSIS requires applications for special statements on labels, such as voluntary animal welfare production claims,²⁵ and there are fluctuating methods the FSIS uses for approving those claims.²⁶ The FSIS can approve labels coming from a USDA-certified program, or it can approve labels coming from a non-government, third-party organization.²⁷ Regardless of the method the FSIS chooses to implement for claim approval, it has the ultimate authority to regulate animal welfare claims. This section will discuss the various methods of certifying animal welfare labels, including labeling programs that are certified directly through the USDA before FSIS approval, and labeling programs that are certified through third-parties before the FSIS approves them.

A. USDA-regulated certification programs

There are several government labeling programs, facilitated by the USDA, which the FSIS then approves. USDA-certified labels that relate to animal welfare and production standards are rarely categorized as animal welfare programs, even if the program contains a welfare component.²⁸ The USDA has acknowledged labeling claims including ‘USDA Organic,

²³See United States Department of Agriculture, *About FSIS*, <https://www.fsis.usda.gov/wps/portal/informational/aboutfsis/about-us> (last visited Nov. 28, 2017).

²⁴See 9 C.F.R. § 412.1 (2017).

²⁵*Id.*

²⁶See generally United States Department of Agriculture, *Food Standards and Labeling Policy Book* (2005), https://www.fsis.usda.gov/OPPDE/larc/Policies/Labeling_Policy_Book_082005.pdf (last visited Nov. 28, 2017) (explaining the different requirements for approval of claims ranging from gluten free to animal production standards).

²⁷See Food Safety Inspection Service, *Labeling Guidelines on Documentation Needed to Substantiate Animal Raising Claims for Label Submissions* 13 (2006), <https://webcache.googleusercontent.com/search?q=cache:jRyQBo0ZY-MJ:https://www.fsis.usda.gov/wps/wcm/connect/6fe3cd56-6809-4239-b7a2-bccb82a30588/RaisingClaims.pdf%3FMOD%3DAJPERES+%&cd=1&hl=en&ct=clnk&gl=us&client=safari> (last visited Dec. 15, 2017) [hereinafter FSIS, *Labeling Guidelines*].

²⁸See United States Department of Agriculture, Food Safety and Inspection Service, *Meat and Poultry Labeling Terms*, https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms!/ut/p/a1/jZFRb4IwEMc_DY-lx3AG90ZIFmUTZsxm5WUpehSS0pK2jrhPP9wyExed9p569_vn7v5HC8pooafhHI7hrtOLy8C_G77CAcTBJIM0nwSPMsrdF_pQkEC3vB2D9D5CFN-ovvBiu6dMbGtyZeTIXtOi4q0mjKk2ZQEe4sj0aS1ml9ZZYXqHbk4pvHLE1ovstSF6ibJSgrEV-

‘Cage-Free,’ and ‘Free-Range.’²⁹ Further, the USDA allows producers to make and define their own claims regarding the living and raising conditions of their animals.³⁰ The rest of this subsection is devoted to explaining key points of the USDA’s certification programs.

The USDA’s most strictly regulated program relating to animal welfare is USDA Organic. USDA Organic requires that numerous animal welfare-related components are met to achieve certification.³¹ For instance, USDA Organic has detailed requirements for health care, bedding, and sanitation practices.³² Further, while physical alterations such as debeaking or tail docking are acceptable without anesthesia, USDA Organic requires they are performed in a manner that “minimizes pain and stress.”³³ The program does not list explicit space requirements for animals, but requires that animals have space for freedom of movement.³⁴ Animals must also have year-round access to the outdoors.³⁵ Each operation shall receive annual on-site inspections.³⁶ Further, agents may conduct inspections announced or unannounced to ensure compliance.³⁷ Thus, even though USDA Organic does not focus primarily on animal welfare, it can constitute as an animal welfare certification program since it does improve animal welfare in many ways. As evidenced, the requirements to become USDA Organic certified are very clear and extensive, unlike other certification programs administered through the USDA.

In contrast to USDA Organic, there is a USDA Cage-Free or Free-Range certification process for egg producers, which is less stringent. These labels are considered “animal care

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²⁹See *id.*

³⁰See FSIS, *Labeling Guidelines*, *supra* note 27, at 10.

³¹ 7 C.F.R. § 205 *et seq* (2017).

³²*Id.* at § 205.238(a)(3).

³³See *id.* at § 205.238(a)(5).

³⁴*Id.* at § 205.238(a)(4).

³⁵*Id.* at § 205.239(a)(1).

³⁶*Id.* at § 205.403(a)(1).

³⁷See *id.* at § 205.403(a)(2)(iii).

marketing claims” and producers may place a USDA grademark on their products, once verified.³⁸ For certification, a Federal-State supervisor or designee will visit egg production sights “to verify the animal husbandry practices” and these visits are conducted two times per year at minimum.³⁹ These claims only relate to whether hens are able to roam freely around the layer house (“cage-free”) or whether hens also have access to the outdoors (“free-range”).⁴⁰ During onsite verification, producers may also request verification of other claims, such as having layer houses designed to provide perches, scratch or dust bathing areas, and other comparable marketing claims.⁴¹ Since these USDA-approved grademarks are considered animal care marketing claims, they are acknowledged to directly pertain to animal welfare.

The least stringent USDA-approved claims regard general living or raising conditions claims, not categorized within a specific USDA program. Producers, for example, may claim animals were raised in a crate-free, unconfined, free-roaming, or pasture raised environment.⁴² Any claim of this nature requires producers to define its meaning, using additional terminology.⁴³ These definitions must appear on the food packages, either with the claim or connected by a symbol on the panel that leads to the definition.⁴⁴ To place living and raising claims on packages, producers must provide a “detailed written description explaining controls for ensuring that the animals are raised in a manner consistent with the meaning of the raising

³⁸See United States Department of Agriculture, Agricultural Marketing Service, *Grading Certification and Verification Section 9: Special Gradings* 9 (2012) [hereinafter USDA, *Section 9: Special Gradings*].

³⁹*Id.* at 9–10.

⁴⁰*Id.*

⁴¹See *id.*

⁴²See FSIS, *Labeling Guidelines*, *supra* note 27, at 10. This is not a comprehensive list of the claims producers can make, but is representative of common claims. *Id.*

⁴³*Id.*

⁴⁴*Id.* For example, a package can claim “Humanely Raised,” then have an asterisk on the package stating the welfare standards meet that particular farm’s “humane policy for raising turkeys on family farms in a stress-free environment.” See Plainville Farms, *Our Values*, <http://www.plainvillefarms.com/en/our-values/#humane> (last visited Dec. 15, 2017).

claim”⁴⁵ Additionally, they must submit a “signed and dated document describing how the animals are raised to support that the claims are not false or misleading[,]” which is referred to as an affidavit.⁴⁶ Thus, the approval process for various living and raising claims is far less stringent—it does not require onsite visits to verify the claims.⁴⁷ Consequently, living and raising condition claims can vary farm-to-farm, and the only manner to verify that these animals receive a higher standard of care is through a written affidavit. As shown here, there are several welfare claims that farmers can have USDA-certified and approved through the FSIS. However, some farmers instead use a non-government organization to certify their farm’s welfare standards and there a number of these programs as well.

B. Non-government, third-party certification programs

Instead of using a USDA certification program, producers may choose to use a non-government, third-party entity to certify their animal welfare claims. When doing so, producers must receive a certificate showing that an independent certifying agent verified that the claimed animal care standards were met.⁴⁸ Then, they must present this certificate and the certifying organization’s standards for animal care to a USDA representative.⁴⁹ Some organizations may choose to certify only laying hen producers, while others regulate a number of species. Programs that certify multiple species often have a number of standards in common, but then also have marked differences. It is important to understand this concept in order to understand why the

⁴⁵See FSIS, *Labeling Guidelines*, *supra* note 27, at 10.

⁴⁶*Id.*

⁴⁷See *id.*

⁴⁸See *id.* at 13 (stating the “FSIS accepts animal raising claims verified by third-party auditing or certifying programs,” including programs such as Certified Organic or Global Animal Partnership); *see also* USDA, *Section 9: Special Gradings*, *supra* note 38, at 9 (referencing third-party organizations for egg producers).

⁴⁹See FSIS, *Labeling Guidelines*, *supra* note 27, at 13.

current labeling system is in need of change. The following sub-section will explain one egg certification program and four multi-species programs.⁵⁰

The United Egg Producers (“UEP”) has developed one of the country’s largest voluntary labeling programs for egg producers. UEP has animal husbandry guidelines for egg-laying flocks and more than eighty-five percent of the eggs produced in the United States are from farms that participate in the program.⁵¹ The program allows beak trimming on hens and does not provide for anesthesia or any other pain relief.⁵² Additionally, there are explicit space requirements for hens, but UEP does not require hens receive access to the outdoors.⁵³ There is an application and audit system, which requires farms to be audited yearly.⁵⁴ Other labeling programs outside the UEP also certify egg producers, but UEP is the main third-party program that is exclusively for laying hens.

There are four major multi-species animal welfare programs in the United States, which include Animal Welfare Approved (“AWA”), Certified Humane (“CH”), American Humane Certified (“AHC”), and Global Animal Partnership (“GAP”). The first three programs listed, AWA, CH, and AHC, contain numerous similarities, but also a few differences. First, AWA and CH prohibit beak trimming for hens, while AHC allows it.⁵⁵ Additionally, AWA and CH

⁵⁰ The list of programs explained in this section is not comprehensive, but is representative of the major third-party certification programs that exist in the United States. See generally Animal Welfare Institute, *A Consumer’s Guide to Food Labels & Animal Welfare*, <https://awionline.org/sites/default/files/products/FA-AWI-FoodLabelGuide-Web.pdf> (last visited Dec. 14, 2017) (providing a more comprehensive summary of the various labeling programs in the United States).

⁵¹ See United Egg Producers, *UEP Certified Eggs Show Farm Commitment to Hen Care Committee*, <http://uepcertified.com> (last accessed Dec. 13, 2017).

⁵² *Id.* at 9.

⁵³ See *id.*

⁵⁴ United Egg Producers, *Complete Guidelines for Cage and Cage-Free Housing* 6 (2017), <http://uepcertified.com/wp-content/uploads/2017/11/2017-UEP-Animal-Welfare-Complete-Guidelines-11.01.17-FINAL.pdf> (last visited Dec. 15, 2017).

⁵⁵ Animal Welfare Approved, *Laying Hen Standards*, <https://animalwelfareapproved.us/standards/layinghens-2017/> (last visited Dec. 13, 2017) [hereinafter AWA, *Laying Hens*]; Humane Farm Animal Care Animal Care Standards 2017 Standards, *Egg Laying Hens* 21 (2017), <http://certifiedhumane.org/wp-content/uploads/Std17.Layers.1A-3.pdf> (last visited Dec. 13, 2017) [hereinafter CH, *Laying Hens*]; American Humane Certified, *Science-Based Standards*,

prohibit tail docking,⁵⁶ but AHC permits tail docking in hogs.⁵⁷ While neither AWA nor CH requires anesthesia for acceptable physical alterations, AHC requires it for many procedures such as dehorning and castration.⁵⁸ All three programs prohibit cages for hens.⁵⁹ Additionally, they each have their own set space requirements that vary depending on the species, age, and weight of the animal.⁶⁰ However, none of these programs require access to the outdoors.⁶¹ Finally, each program requires annual on-site audits for certification,⁶² but only AWA provides that certified farms are also subject to unannounced audits at any time.⁶³ Based on these standards, it appears that AWA is the most strict program, but CH follows comparable animal welfare standards. Generally, it appears that AHC has the lowest set of standards. However, in some areas, such as requiring local anesthesia for physical operations, it maintains valuable, unmatched animal welfare standards. Each of these three programs is similar, but unique in its own right.

http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements (last visited Dec. 13, 2017) [hereinafter AHC, *Standards*].

⁵⁶ Animal Welfare Approved, *Dairy Cattle and Calves Standards*, <https://animalwelfareapproved.us/standards/dairy-cattle-2017/> (last visited Dec. 13, 2017); Animal Welfare Approved, *Pig Standards*, <https://animalwelfareapproved.us/standards/pig-2017/> (last visited Dec. 13, 2017); Accord Humane Farm Animal Care Animal Care Standards March 2013, *Pigs* 17 (2013), http://certifiedhumane.org/wp-content/uploads/Std13.Pigs_2A-2.pdf (Dec. 13, 2017) [hereinafter CH, *Pigs*].

⁵⁷AHC, *Standards*, *supra* note 55.

⁵⁸*See, e.g.* American Humane Certified, *Animal Welfare Standards for Beef Cattle* 17 (2017) http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements (last visited Dec. 13, 2017) [hereinafter AHC, *Beef Cattle*] (requiring local anesthesia for teat removal, disbudding/dehorning, and castration).

⁵⁹AWA, *Laying Hens*, *supra* note 55; CH, *Laying Hens*, *supra* note 55, at 4; AHC, *Standards*, *supra* note 55.

⁶⁰*See, e.g.*, Animal Welfare Approved, *Beef Cattle and Calves Standards*, <https://animalwelfareapproved.us/standards/beef-cattle-2017/> (last visited Dec. 13, 2017) (exemplifying different levels of space requirements based on the weight of the animals); CH, *Pigs*, *supra* note 56, at 17 (discussing space requirements for pigs based on maturity and weight); AHC, *Beef Cattle*, *supra* note 58, at 44.

⁶¹*See, e.g.*, AWA, *Laying Hens*, *supra* note 55 (showing how laying hens are not required outdoor access); Accord CH, *Pigs*, *supra* note 56, at 11 (exemplifying how no outdoor space is required for pigs under CH standards); AHC, *Beef Cattle*, *supra* note 58, at 22 (displaying how outdoor space is not required for beef cattle under AHC standards).

⁶² Animal Welfare Approved, *Animal Welfare Approved Policy Manual* 26, <https://animalwelfareapproved.us/wp-content/uploads/2017/11/AWA-Policy-and-Guidelines-v24.pdf> (last visited Dec. 13, 2017) [hereinafter Animal Welfare Approved, *Policy Manual*]; Certified Humane, *Application Process*, <https://certifiedhumane.org/become-certified/application-process/> (last visited Dec. 13, 2017); American Humane Certified, *Becoming American Humane Certified*, <http://www.humaneheartland.org/our-farm-programs/american-humane-certified> (last visited Dec. 13, 2017).

⁶³Animal Welfare Approved, *Policy Manual*, *supra* note 62, at 88.

The final certification program this paper will discuss is Global Animal Partnership (“GAP”). Although GAP is a multi-species program just like AWA, CH, and AHC, it is highly unique because it piloted the “Step-rated Program,” also known as the 5-Step system.⁶⁴ The 5-Step system provides a range of animal welfare options for producers to choose from.⁶⁵ For example, beak trimming in hens can occur through Step 3.⁶⁶ Another significant example is that animals coming from Steps 3–5 certified farms are required to have access to the outdoors.⁶⁷ Despite the numerous levels of animal welfare, no step allows cages.⁶⁸ Additionally, space requirements vary depending on the age and weight of the animal, just as in the other multi-species programs.⁶⁹ The program audits farms every fifteen months.⁷⁰ While not all aspects of the 5-Step program are ideal, the unique characteristic is that producers may choose which step they want to reach. Even so, the same organization regulates and audits each new level of higher standards. Therefore, the GAP program theoretically enables farmers to gradually improve their welfare standards, one step at a time.

The broad and varying standards outlined here show that the concerns consumers have voiced about animal welfare are heard by the government and third-party organizations. However, the methods to improve animal welfare standards have left many other concerns as well. There are similarities and differences amongst current animal welfare labeling schemes, but it appears that no single existing scheme is sufficient.

⁶⁴Global Animal Partnership, *Our History*, <https://globalanimalpartnership.org/about/> (last visited Dec. 13, 2017).

⁶⁵Global Animal Partnership, *The 5-Step Animal Welfare Program*, <https://globalanimalpartnership.org> (last visited Dec. 18, 2017).

⁶⁶Global Animal Partnership, *5-Step® Animal Welfare Rating Pilot Standards for Laying Hens v1.0 2* (2017), <https://globalanimalpartnership.org/wp-content/uploads/2017/07/5-Step®-Animal-Welfare-Rating-Pilot-Standards-for-Laying-Hens-v1.0.pdf> (last visited Dec. 13, 2017).

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰*Accord* Global Animal Partnership, *GAP Beef Standards*, <https://globalanimalpartnership.org/5-step-animal-welfare-rating-program/beeef-standards-application/> (last visited Dec. 13, 2017).

IV. The inconsistent standards and certification procedures for voluntary animal welfare labeling are leading to the implied market regulation failure

As noted in Section II, there is a strong argument that the market-regulation approach to addressing animal welfare concerns has either failed or is in the process of failing.⁷¹ The reasons for this failure are not attributable to consumers' unwillingness to pay more money for better standards. Rather, the market failure is due in large part to two issues. First, inconsistencies in the approval process and the actual standards of labeling programs. Second, misleading claims that animals come from producers with heightened animal welfare standards when they actually do not. This section highlights these two issues in an effort to crystallize the need for improved and enforceable standards.

The variant animal welfare programs have led to an inconsistent system, where every producer operates under a slightly different set of practices, even if they submit to a voluntary certification process.⁷² USDA-certified programs assure a codified set of practices, but fail to address many objectionable animal production practices. On the other hand, third-party organizations have extensive discretion and little government oversight on the animal welfare claims they make. Further, almost every program for animal welfare certification contains good and bad standards. For example, while AHC has the least stringent welfare standards of a multi-species organization, it also is one of few programs to require local anesthesia for operations. Meanwhile, the USDA cage-free or free-range program for hens does nothing to regulate welfare other than eliminate cages and provide access to the outdoors. However, it is the only program that requires biennial inspections. Table 1 is representative of the inconsistent standards that exist, and the market's failure to create a system that comprehensively addresses the vast array of animal welfare concerns. The table outlines uniquely positive or uniquely negative standards

⁷¹See *supra*, notes 18–19 and accompanying text.

⁷²See *supra* Part III.

devised among some of the certification programs discussed.⁷³ It is exemplary of the inconsistent standards that exist in the industry and how those inconsistent standards affect consumers. One consumer may prefer a program that has biennial farm audits, while another consumer may refuse to purchase from a program which does not use anesthesia for physical operations. The table shows how no single program stands out as the best in its field.

Program	Uniquely Positive Feature	Uniquely Negative Feature
USDA Organic	Extensively detailed and codified requirements ⁷⁵	No explicit space requirements ⁷⁶
USDA Cage-Free/Free-Range	Biennial farm audits ⁷⁷	No required animal welfare standards beyond “cage-free”/“free-range” ⁷⁸
USDA Living/Raising Claims		Unfettered discretion for producers in defining terms ⁷⁹
Animal Welfare Approved	Unannounced audits, in addition to annual on-farm inspections ⁸⁰	
American Humane Certified	Local anesthesia for many physical alterations ⁸¹	
Global Animal Partnership	Step-rated program for all species ⁸²	15-month audits, rather than annual ⁸³

Another key illustration of the varying standards under our current system is the amount of space different programs allot to each animal. Table 2 shows the differences between

⁷³This table is not a comprehensive list of the positive and negative attributes of each animal welfare labeling program, but is representative of each program’s unique aspects.

⁷⁴ The United Egg Producers program and Certified Humane are both omitted from this table because they contain neither uniquely positive nor uniquely negative features.

⁷⁵ 7 C.F.R. § 205.238.

⁷⁶See *id.*

⁷⁷See USDA, *Section 9: Special Gradings*, *supra* note 38, at 10.

⁷⁸See Sheila Rodriguez, *The Morally Informed Consume: Examining Animal Welfare Claims on Egg Labels*, 30 TEMPLE J. SCI. TECH. & ENVTL. L. 51, 67 (2011) (discussing how consumers often purchase cage-free or free-range with the assumption that they actually come from happy farms).

⁷⁹See FSIS, *Labeling Guidelines*, *supra* note 27, at 10.

⁸⁰Animal Welfare Approved, *Policy Manual*, *supra* note 62, at 88.

⁸¹See, e.g., AHC, *Beef Cattle*, *supra* note 58, at 17 (requiring local anesthesia for teat removal, disbudding/dehorning, and castration).

⁸²Global Animal Partnership, *The 5-Step Animal Welfare Program*, *supra* note 65.

⁸³Accord Global Animal Partnership, *Beef Standards*, *supra* note 70.

certification programs for a mature sow.⁸⁴ This table indicates that no program can agree on the amount of space animals need for heightened animal welfare.

USDA Organic	Animal Welfare Approved	Certified Humane	American Humane Certified	Global Animal Partnership
No set space requirements ⁸⁵	32 sq. ft. ⁸⁶	37.6 sq. ft. ⁸⁷	20 sq. ft. ⁸⁸	48 sq. ft. ⁸⁹

The numerous approval and verification processes for certifying programs also contribute to the market failure because there is no set standard to achieve animal welfare certification. One program could require biennial farm visits, while another program could require no on-site visits whatsoever. Table 3 illustrates the broad differences in auditing standards. A program that has low animal welfare standards may have good auditing procedures, while a program with high animal welfare standards may lack effective auditing procedures.

⁸⁴ This example is used for simplicity, because mature sows’ space requirements are not based on weight. *See infra* Table 3. However, there are more complicated examples of the space requirement discrepancies in other examples—such as cattle or market hogs. *See* sources cited in *supra* note 60.

⁸⁵ *See* 7 C.F.R. § 205.239.

⁸⁶ Animal Welfare Approved, *Animal Welfare Approved Standards for Pigs* 18, <https://animalwelfareapproved.us/wp-content/uploads/2017/04/AWA-Pig-Standards-2017-v3.pdf> (last visited Dec. 13, 2017).

⁸⁷ CH, *Pigs*, *supra* note 56, at 8.

⁸⁸ American Humane Certified, *Animal Welfare Standards for Swine* 24 (2017), http://www.humaneheartland.org/index.php?option=com_content&view=article&id=3&Itemid=106&jsmallfib=1&dir=JSROOT/Animal+Welfare+Full+Standards+%2B+Supplements (last visited Dec. 13, 2017).

⁸⁹ Global Animal Partnership, *5-Step® Animal Welfare Rating Standards for Pigs v2.2* 2, 20 (2016), <https://globalanimalpartnership.org/wp-content/uploads/2017/07/5-Step-Animal-Welfare-Rating-Standards-for-Pigs-v2.2.pdf> (last visited Dec. 13, 2017).

Program	Auditing Process
USDA Organic	Annual on-site inspections and unannounced inspections ⁹⁰
USDA Cage-Free/Free-Range	Biennial farm audits ⁹¹
USDA Custom Living/Raising Claims	No on-site inspection ⁹²
United Egg Producers	Annual on-site audits ⁹³
Animal Welfare Approved	Annual on-site audits and additional unannounced “Spot Audits” ⁹⁴
Certified Humane	Annual on-site audits ⁹⁵
American Humane Certified	Annual on-site audits ⁹⁶
Global Animal Partnership	On-site audits every fifteen months ⁹⁷

The differences between animal welfare standards and approval processes illustrates how every organization contrives a different set of principles through which they decide a producer should operate to reach a higher standard of welfare. The positive aspect of this is that farmers who are unwilling to submit to the most stringent organization’s standards may show a willingness to submit to a different organization’s lower level of standards. Even if the lower levels are not ideal, they still provide more welfare than the basic factory farm. However, lack of standardization is a key problem in the current regime for animal welfare certification programs.⁹⁸ Inconsistent standards have led to a system where consumers cannot necessarily believe that they are purchasing a high standard of welfare, even where there is an animal welfare claim on the package.⁹⁹ This requires consumers to research each program individually, in order to find the program that best meets their individual principles. Therefore, to improve animal welfare, the United States should act in some manner to standardize these animal welfare programs.

⁹⁰7 C.F.R. § 205.402.

⁹¹See USDA, *Section 9: Special Gradings*, *supra* note 38, at 10.

⁹²See FSIS, *Labeling Guidelines*, *supra* note 27, at 10.

⁹³United Egg Producers, *Complete Guidelines for Cage and Cage-Free Housing*, *supra* note 54, at 6.

⁹⁴Animal Welfare Approved, *Policy Manual*, *supra* note 62, at 88.

⁹⁵Certified Humane, *Application Process*, *supra* note 62.

⁹⁶American Humane Certified, *Becoming American Humane Certified*, *supra* note 62.

⁹⁷Global Animal Partnership, *The 5-Step Animal Welfare Program*, *supra* note 65.

⁹⁸Sullivan, *supra* note 13, at 414.

⁹⁹See *id.* at 410.

The concern intertwined with lack of standardization is that many food labels claim a higher standard of animal welfare, but are actually misleading unwitting customers. The USDA has authority to monitor meat and poultry labels to safeguard the truth of their claims.¹⁰⁰ Yet even though the USDA has authority to regulate false or misleading claims, for some time legal commentators, animal rights organizations, and consumers have indicated apprehension that animal welfare labels are potentially misleading.¹⁰¹ These apprehensions arise in large part due to varying and often insufficient regulatory oversight.¹⁰² Since certain labels require far less stringent verification standards, it is difficult for the USDA to properly regulate these claims.¹⁰³

Producers may use claims of heightened animal welfare practices, but these claims do not necessarily encompass the animal welfare values consumers may expect when purchasing their food.¹⁰⁴ For example, if a consumer purchased eggs labeled “cage-free,” that consumer may believe the hens producing those eggs were raised in a happy, healthy, open-spaced environment.¹⁰⁵ Yet, realistically that label offers no guarantee that cage-free hens live in a comfortable environment with ample space.¹⁰⁶ That cage-free label also makes no claim whatsoever to other commonly objected production standards, such as debeaking or lack of

¹⁰⁰ 21 U.S.C. § 601(n)(1) (2012) (stating the term “‘misbranded’ shall apply to any carcass, part thereof, meat or meat food product . . . if its labeling is false or misleading in any particular”); 21 U.S.C. § 457(c) (2012) (articulating that “[n]o article subject to this Act shall be sold or offered for sale . . . under any name or other marking or labeling which is false or misleading”); 21 U.S.C. § 343(a) (2012) (defining a misbranded food as one that carries a false or misleading label); *see also* 7 C.F.R. § 1260.169(d) (2017) (prohibiting deceptive acts or practices in promoting or advertising beef products); 7 C.F.R. § 1230.60(c) (2017) (prohibiting false or misleading claims and statements with respect to pork products); 7 C.F.R. § 1250.341(e) (2017) (prohibiting false, unwarranted, or deceptive advertising claims with regard to egg products).

¹⁰¹ *See, e.g.,* Sullivan, *supra* note 13, at 410 (discussing the lack of credibility in labels due to misleading voluntary labels); Animal Welfare Institute, *A Consumer’s Guide to Food Labels & Animal Welfare*, *supra* note 50 (listing a number of “meaningless or misleading” claims); Cassandra White, *Stop misleading consumers about animal welfare standard*, CHANGE.ORG, <https://www.change.org/p/kroger-stop-misleading-consumers-about-animal-welfare-standards> (last accessed on Nov. 25, 2017) (exemplifying a consumer petition to the Kroger Company to request transparent food production standards).

¹⁰² *See* Sullivan, *supra* note 13, at 410.

¹⁰³ *See id.*

¹⁰⁴ *See id.* (explaining that even when there is an animal welfare claim on the label, “there are not strong reasons for consumers to actually believe these claims”).

¹⁰⁵ *See* Rodriguez, *supra* note 78, at 67.

¹⁰⁶ *See id.*

access to the outdoors.¹⁰⁷ Therefore, the consumer payed more to purchase animal-welfare labeled food and supposedly supported the market regulation process, but actually acquired food which did not meet the consumer's personal principles regarding proper animal welfare. This example shows how numerous animal welfare labels can actually mislead consumers, due to the government's failure to prevent misleading labels.

Compounding the concern of misleading labels, consumers are often unable to discern between credible and non-credible claims. To the "hurried and uninformed" consumer, the differences in animal-welfare standards are not easily apparent.¹⁰⁸ If consumers were aware that certain labels offered little to no animal welfare value, they may choose to purchase different products.¹⁰⁹ Consumers can research the various program standards, but this research is considerably burdensome for the consumers and may decrease the likelihood that they will purchase animal welfare certified food.¹¹⁰ Further, even once a consumer completes their research and chooses a label that matches their individual standards, there is no guarantee that the consumer will find that label on the product they wish to purchase in their own hometown grocery.¹¹¹ Consequently, even well-informed consumers who are aware of the potentially misleading nature of animal welfare claims, may not have the opportunity to purchase labels

¹⁰⁷See *id.*

¹⁰⁸ Sullivan, *supra* note 13, at 412.

¹⁰⁹See Franklin, *supra* note 16, at 297 (using a research project to show how consumers often believe "puffery" claims that make assertions of humane treatment which may in fact be false claims).

¹¹⁰See Animal Welfare Institute, *A Consumer's Guide to Food Labels & Animal Welfare*, *supra* note 50 (explaining that "food labels are confusing" and attempting to summarize many of the current food labels).

¹¹¹See, e.g. Animal Welfare Approved, *Advanced Product Search Results*, https://animalwelfareapproved.us/advanced-product-search-results/?gmw_state&gmw_address%5B0%5D=Winston-Salem%2C%20NC%2027106%2C%20United%20States&gmw_keywords&gmw_distance=15&gmw_units=imperial&gmw_form=2&gmw_per_page=10&gmw_lat&gmw_lng&gmw_px=pt&action=gmw_post&gmw_post=awa-listings&gmw_orderby=distance (last accessed Nov. 28, 2017). For example, if an individual in Winston-Salem, North Carolina, wishes to purchase AWA certified chicken, the individual would only have access to that product seasonally at local farmers' markets. *Id.* The only year-round access to AWA certified products within fifteen miles of Winston-Salem is in select restaurants or one can purchase AWA certified beef products at Whole Foods Market. *See id.*

which fit their values. A combination of inconsistent standards with misleading claims has led to the implied market regulation failure at issue in today's society.

V. Proposed improvements for animal welfare labeling claims

As explained in Section IV, the main issues surrounding animal welfare production claims stem from lack of government regulation and oversight of these claims. This results in two additional problems. First, there is inconsistency and confusion for customers, who must spend a significant amount of time sorting through volumes of information to pick a label that meets their personal values. Second, there is still no guarantee that the label a conscientious consumer chooses will truthfully promote heightened animal welfare. A solution to these issues is to form a centralized system for animal welfare claims. This system could provide for several levels of animal welfare claims, similar to the GAP program. However, it would be regulated entirely through the FSIS and USDA, which has authority to prevent false and misleading claims. The proposed system would use small symbols on packages to alert consumers of the animal welfare practices used by that producer. This system could begin as a voluntary system and eventually become mandatory.

There are three other programs that can offer guidance on how to implement an effective system. First, kosher labels can offer significant assistance in understanding how animal welfare programs, claims, and labels *should* work for maximum usefulness. Second, the Occupational Safety and Health Administration's ("OSHA") Voluntary Protection Program can offer an example of how a voluntary program, regulated by the government, has worked in the past. Third, the Ohio Livestock Care Standards Board can illustrate how to best develop and enforce these new standards. Using examples of other successful programs may offer a glimpse into how our current animal welfare labeling system could become more effective.

A. Modeling animal welfare labels based on kosher labeling techniques

In many ways animal welfare labeling claims are not unlike kosher labels, albeit kosher labels fill an entirely different role in society. Kosher symbols arose out of a need for Jewish families to know whether industrially-produced food was safe to eat, pursuant to the requirements for their religion.¹¹² One hundred years ago, “the kosher food industry was rife with fraud and corruption.”¹¹³ Yet, as the demand for reliable material heightened, slowly the process of kosher certification improved.¹¹⁴ The system evolved through levels of enforcement: reputation-based non-legal sanctions, private law, and public law.¹¹⁵ When companies did not adhere to kosher standards they risked decertification, civil suit from consumers and other kosher producers, or suit under consumer protection statutes.¹¹⁶ Now, decades after the kosher market began to evolve, the number of fraud penalties has significantly decreased even though the kosher market has grown.¹¹⁷ Similar to kosher consumers, food animal consumers seek to purchase products that match their individual moral values. Additionally, just as kosher labels once were misleading, animal welfare labels are fraught with misleading claims.¹¹⁸ Thus, the transformation of kosher food labeling should offer hope to consumers who wish to transform the food animal industry.

Not only has the kosher market evolved dramatically, but its symbol system has as well. There are now hundreds of kosher certified symbols and each one means something different for

¹¹²See Shayna M. Sigman, *Kosher without Law: The Role of Nonlegal Sanctions in Overcoming Fraud within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 515–16(2004).

¹¹³See Timothy D. Lytton, *Kosher Certification: A Model for Improving Private Food Safety Audits*, FOOD SAFETY NEWS (March 20, 2013), <http://www.foodsafetynews.com/2013/03/kosher-certification-a-model-for-improving-private-food-safety-audits/#.WiSfQTOZOgS>.

¹¹⁴See *id.*

¹¹⁵ Sigman, *supra* note 112, at 547.

¹¹⁶*Id.* at 547–552.

¹¹⁷*Id.* at 576.

¹¹⁸See *supra* Part III.

an individual looking for kosher certified food.¹¹⁹ The symbols are small, unobtrusive, and placed adjacent to nutrition labels on one-third to one-half of the processed foods sold in the United States.¹²⁰ Even so, many individuals “buy kosher products [and] are simply oblivious to the tiny symbols on the packages”¹²¹ The kosher system shows how the United States has a capacity to improve animal welfare labels and create an unobtrusive labeling system.¹²²

For animal welfare labels, the USDA could devise a set of small, unobtrusive symbols similar to those identifying kosher products. These symbols could alert customers about the production practices a farmer used in producing a food animal product. Consumers could familiarize themselves with the various claims by visiting a single website which comprehensively lists the different labels available and the practices that fall under each symbol. Additionally, for consumer ease, producers could also place a small digital link on the back of labels to quickly direct customers to the website.¹²³ Because of the unobtrusive nature of the symbols, producers could not allege that there is too much emphasis placed on animal welfare labels. Yet, this system would enable a consumer who is unfamiliar with the current standards to easily access information about the various symbols and claims.

¹¹⁹See DIRECTORY OF KOSHER CERTIFYING AGENCIES, http://www.crcweb.org/agency_list.php (last visited Dec. 3, 2017) (listing over 1,100 different kosher certified labels and showing pictures of each label); Mjl Staff, *Ask the Expert: Kosher Symbols*, <https://www.myjewishlearning.com/article/ask-the-expert-kosher-symbols/> (last visited Dec. 3, 2017) (explaining what the different labels mean to individuals shopping for kosher food).

¹²⁰Rebecca J. Rosen, *Food Police*, 34 WILSON QUARTERLY 109 (2010).




¹²¹*Id.*

¹²²The distinguishable feature between kosher and animal welfare claims is that kosher labels are primarily privately regulated because they pertain to a religious product. See TIMOTHY D. LYTTON, KOSHER: PRIVATE REGULATION IN THE AGE OF INDUSTRIAL FOOD 72 (1965) (explaining how the kosher certification process operates entirely through private industries). Thus, since FSIS already regulates animal welfare labeling claims this indicates that, unlike the kosher food industry, animal welfare proponents have an opportunity to rely on government assistance to improve the reliability and consistency of animal welfare claims.

¹²³This proposal is similar to the electronic or digital links proposed in the new Bioengineered Food Disclosure Act. See 7 U.S.C.S. § 1639(b) (LexisNexis 2016) (mandating labeling for genetically engineered foods). Because electronic or digital links will be mandatory for other food disclosure, using them for animal welfare claims should also be feasible.

To exemplify this labeling proposal, consider a small list of objectionable practices that a certain consumer wishes to avoid when purchasing food animal products. The imaginary consumer is looking for eggs produced by a hen that has access to the outdoors, space to flap her wings, and is not subjected to painful surgical alterations. The consumer is researching the various symbols that exist in order to find one that most fits his or her values. Each symbol indicates a different set of production practices that can help the consumer get closest to his or her personal values. Now, see Table 4 for the options that consumer could have.

Table 4—Sample Animal Welfare Symbols

		
<ul style="list-style-type: none"> • No access to outdoors • No space to move wings • Conducts surgical procedures without anesthesia 	<ul style="list-style-type: none"> • No access to outdoors • Space to move wings • Conducts surgical procedures with localized anesthesia 	<ul style="list-style-type: none"> • Access to outdoors • Space to move wings • Conducts surgical procedures only when necessary and with localized anesthesia

Based on the label options, the imaginary consumer could easily pick the circle as the symbol which most closely represents his or her personal animal welfare values because it gives hens access to the outdoors, space to move their wings, and provides anesthesia for surgical procedures. Further, objectionable practices like those the triangle symbol encompasses are far less likely to survive under a centralized system where consumers visit just *one* website that comprehensively compares *all* available sets of standards. Consumers would more quickly notice and choose not to support the triangle’s standards. At the same time, producers could hardly object to implementing such an unobtrusive system—designed to aid conscientious consumers, yet discrete enough to leave indifferent consumers oblivious. Thus, this system would lead to the least opposition from producers, protect consumers’ principles, facilitate the market regulation system, and encourage better animal welfare.

B. Enforcing the new labeling proposal

The last consideration for this proposal is how to regulate the new system. As noted in Section III, another concern of the present system is the government's failure to enforce rules against misleading claims. The following section will consider how the federal government could enforce animal welfare labels more effectively.

Standardizing animal welfare claims through a continued voluntary labeling system is most likely to garner support and we can look to OSHA's Voluntary Protection Program ("VPP") as an example of an effective voluntary scheme. In 1982, OSHA formally announced its VPP to "promote effective worksite-based safety and health."¹²⁴ Under the VPP, OSHA has invited worksites to apply for onsite inspections that determine achievement in preventing health and safety hazards, as well as improving health and safety.¹²⁵ In return for voluntary efforts to improve health and safety, the employers are removed from OSHA's programmed inspection lists and are not subject to citations for health and safety violations.¹²⁶ To induce employers to comply with the program, they are contacted and warned prior to being placed on the primary inspection list.¹²⁷ Today, the statistical evidence of the program's success is very impressive.¹²⁸ Thus, the VPP shows that a voluntary program can lead to effective results.

The VPP exemplifies how even a voluntary program could have lasting impacts on health and safety for animals as well. Applying this new voluntary symbol system could effectively begin to standardize animal welfare labeling claims without risking the objections from

¹²⁴ United States Department of Labor, *All About VPP*, https://www.osha.gov/dcsp/vpp/all_about_vpp.html (last visited Dec. 3, 2017).

¹²⁵*Id.*

¹²⁶ Susan Bisom-Rapp, *What We Learn in Troubled Times: Deregulation and Safe Work in the New Economy*, 55 WAYNE L. REV. 1197, 1225 (2009).

¹²⁷*Id.* at 1226.

¹²⁸ United States Department of Labor, *Industries in the VPP Federal and State Plans*, <https://www.osha.gov/dcsp/vpp/sitebyaics.html> (last visited Dec. 3, 2017) (showing that 2,195 sites participate and, in sites that participate, days away due to injuries and illness are fifty-two percent below industry averages).

producers that would arise from a mandatory program. As long as a producer submits to the voluntary program they would not be subject to any further inspections or sanctions for poor animal welfare standards. To convince them to participate, producers known to use poor animal welfare standards could be warned of impending inspections if they did not improve standards. Thus, a program similar to the VPP could incentivize better animal welfare without officially mandating it. Notably, this proposed component does require greater animal welfare enforcement than is occurring now. Regardless, beginning with a voluntary standard similar to the VPP's is likely the most effective way to encourage industry participants and improve animal welfare.

A final matter of import is considering who would oversee this proposed labeling system. Ideally, a coalition of individuals with diverse areas of experience would form these animal welfare labeling standards. One example of a coalition formed under statute to improve animal welfare comes from the Ohio Livestock Care Standards Board (“Board”).¹²⁹ It was created with overwhelming voter support through a constitutional amendment in 2009.¹³⁰ The Board was fashioned to design a set of standards to which producers must adhere in order to improve animal welfare.¹³¹ It was broadly supported by consumers and producers because a variety of individuals with differing professions and perspectives are appointed to serve on the Board.¹³² These individuals have collaborated to improve animal welfare standards in Ohio and include a food safety representative, veterinarians, family farmers, consumers, and a humane society representative.¹³³ Eight years since the Board's inception, it continues to improve animal welfare

¹²⁹Ohio Department of Agriculture, *Ohio Livestock Care Standards*, <http://www.agri.ohio.gov/LivestockCareStandards/> (last accessed Dec. 3, 2017). A number of other states have created their own boards as well. See Lindsay Vick, *Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151, 166 (2011) (referencing New Jersey, Illinois, Indiana, Kentucky, Louisiana, Utah, Vermont, and West Virginia).

¹³⁰*Id.*

¹³¹*Id.*

¹³²*Id.*

¹³³OHIO REV. CODE ANN. § 904.02 (2010).

for livestock around Ohio.¹³⁴ For example, a statewide ban against docking dairy cattle tails will begin in January, 2018.¹³⁵ Under the Board's supervision, heightened standards similar to those consumers request nationwide are continually addressed.

If the USDA created a similar board, it could most effectively ensure that federal labeling standards are accurate, truthful, and beneficial for animals. Such a board would enable individuals with broadly different views on animal welfare to collaborate and reach compromises that are better for animals and consumers. Further, it would substantiate scientific *and* sympathetic standards. The board would also aid in cultivating accountability and enhanced enforcement for the new standards. Ultimately, this board would decrease the number of misleading claims, lead to improved animal welfare, and promote peace of mind for consumers.

VI. Conclusion

In conclusion, as family farms have evolved into factory farms, food animals have suffered the consequences. Recently, enlightened consumers have sought to affect a change in production standards. Their efforts to pay more for higher animal welfare standards have failed to provide food animals with better lives because animal welfare labeling programs are inconsistent and misleading. Thus, consumers often mistakenly pay more money for products that do not actually meet their individual principles for animal welfare.

There is much room for improvement within the animal welfare labeling system. A centralized labeling system, regulated entirely through the USDA and FSIS, could create a new system to improve animal welfare claims and provide ease in purchasing decisions for conscientious customers. To meet the least resistance, this system could continue as voluntary, but contain greater incentives to improve animal welfare. Meanwhile, the FSIS could appoint a

¹³⁴See Chris Kick, *Dairy and veal farmers face new rules*, Farm and Dairy (Dec. 14, 2017), <https://www.farmanddairy.com/news/dairy-and-veal-farmers-face-new-rules/461375.html>.

¹³⁵*Id.*

board with members from many perspectives to create and enforce new animal welfare standards. Although the progression toward a new system would actuate slowly, other successful programs indicate that it is possible to effectively improve the current system. However, in order to do so, consumers must collaborate with producers to encourage action and continue to speak up for higher animal welfare standards.

Urban Chickens—Neighbors Cry “FOWL!”

By Lisa M. Cobb

In September 2009, the *New Yorker* magazine published an article by Susan Orlean about raising backyard chickens entitled “The It Bird.”¹ The article describes Ms. Orlean’s personal journey to owning chickens but also provides interesting background information on the backyard chicken movement.

Among other things, the article describes the founding of the McMurray Hatchery which Ms. Orlean described in 2009 as “the largest rare-breed poultry hatchery in the world.” The McMurray Hatchery caters to people with backyard flocks, evidencing the growing importance of this trend. In 1917, Murray McMurray (no [sic] required) was a banker who sold chickens out of the back of the bank as a hobby. When the Depression hit, the banking business was in trouble but the chicken business soared. Ms. Orlean quotes the president of the company, Bud Wood, as saying: “When times are tough, people want chickens.”

Which brings us to today. Times are tough and people want chickens.

The Grassroots Movement: “Give Peeps a Chance”

One of the more interesting aspects of many of the websites devoted to backyard chicken-keeping was the advice on how to have local laws changed to allow the keeping of fowl in a municipality. For example, an article on “So Po Chickens” (for South Portland, Maine) offers a link to the materials they used in their 2007 campaign to legalize urban chicken-keeping.² The pro-chicken FAQs page of their website asserts that hens are typically more quiet than dogs and that, unlike dogs and cats which can carry ticks, chickens eat ticks and mosquitoes.

The challenge for municipal attorneys and planners is to parse the vast amounts of available information and misinformation to make reasoned decisions about the optimal regulation of chickens,³ should the governing body choose to permit them. This article reviews existing laws and offers guidance toward that end.

Municipal Budget Concerns

In the current economic climate, particularly in light of the recently enacted municipal budget cap in New York, added levels of complexity exist, including the cost of evaluating a proposed law prior to its enactment and the cost of monitoring the chicken-keepers if a law is enacted.

At least one municipality has banned the keeping of chickens in part because the city council concluded

that it would be too expensive to enforce the ordinance. In January 2011, the officials of Springville, Utah, voted against a proposal that would have allowed the keeping of chickens in the city.⁴ Two neighboring communities already allowed the residential coops, and “several” citizens of Springville wanted the same opportunity.⁵ Springville had a planning commission review the proposal and its members expressed two concerns: cost and pests.⁶ The city council agreed, and voted 3-1 not to enact the ordinance that would permit the keeping of chickens.⁷

“Times are tough and people want chickens.”

In Riverdale, Utah, the city council also had a planning commission review the proposed chicken ordinance. Like the other, this commission also was not in favor of the idea, citing the “threat” of having farm animals in a residential neighborhood.⁸ I am not aware of many municipalities in New York that have the available resources to form and fund a commission to parse through the often anecdotal evidence concerning, for example, the noise or smell associated with the keeping of chickens. If such a commission already exists in the municipality, it probably has bigger chickens to fry, and will choose to spend its resources on more pressing concerns.

The suggestions below offer examples for streamlining the process of adopting local ordinances to regulate the potential problems of backyard chicken-keeping.

Proponents and Opponents

Those in favor of keeping chickens cite the fresh eggs (reputed to be higher in nutrients and better tasting than store-bought), the free, eco-friendly fertilizer, the “green” weed and bug control, and the entertainment value. The 2007 book *The 100-Mile Diet: A Year of Eating Local* by Canadian writers Alisa Smith and J.B. MacKinnon describes the growing preference for eating food grown locally.⁹ Owning laying hens allows someone to add a local source of protein to his or her diet without having to kill it first.

Those opposed to the trend of allowing “farm” animals such as chickens in non-farm zoning districts cite noise and smell, the concerns that unwanted predators such as coyotes and foxes will be attracted to the neighborhood, and the fear pests such as mice will be attracted to the coops. Opponents of permitting chickens to be kept in residential zones also fear that having chicken

coops in their neighborhoods will decrease their property values. They also cite the “slippery slope” of allowing farm animals into residential neighborhoods: chickens today, pot belly pigs and goats on the front lawn tomorrow. The phrase “Beverly Hillbillies” was used more than once by opponents of the enactment of various chicken ordinances.

The mandate for municipal legislators is to balance the desires and rights of all property owners to achieve the optimal use of the land for all concerned. When it comes to keeping chickens, there are as many viewpoints as there are breeds.

Chicken Ordinances—Does Your Municipality Need One?

As Patty Salkin correctly noted in her article entitled “Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens,”¹⁰ there exists little state or federal regulation of the keeping of chickens by individuals on their property for their personal use. The regulation of whether, where and how many chickens may be kept by property owners for their own use has been left largely to the local municipalities.

One doctoral student who did her dissertation on people’s attitudes about urban livestock surveyed the zoning codes of American cities and concluded that cities are much more tolerant of domestic livestock than suburbs.¹¹ That trend is not evident in New York. Interestingly, New York City permits the keeping of any number of chickens while the cities of Albany, Amsterdam, Middletown, Plattsburgh and Syracuse currently ban the practice entirely.¹² In fact, the Albany ordinance proclaims that the purpose of the regulations relating to “farm animals and fowl” is to “protect the residents of the City of Albany from nuisance by animals usually known as farm animals or fowl.”¹³ The keeping or harboring of farm animals within the City of Albany is incompatible with urban life.¹⁴ Any person violating this provision is subject to a maximum fine of \$315.00.¹⁵

In New York City, a permit is required to keep “poultry” or rabbits for sale, and they must not be allowed to roam at large.¹⁶ The coop must be white-washed or “treated in a manner approved by the Department” (of Health) at least once per year, and “shall be kept clean.”¹⁷ However, no regulations whatsoever were found for poultry that is not kept for sale other than a ban on the keeping of roosters more than four months old. This means that backyard chicken-keepers in New York City may keep as many hens as they choose, wherever they choose, in whatever they choose, provided that the chickens do not become a nuisance.

Regulating Chickens Under Nuisance Laws

Many municipalities such as New York City do not regulate the details of keeping of poultry in urban areas; rather, they seek only to ensure that the practice does not constitute a nuisance. Interestingly, only one of the ordinances that I found addressing the keeping of chickens was located in the municipality’s property maintenance code. The majority of the others were under the generic heading “Animals” in the code book, often lumped together with the laws on keeping dogs.

In the Town of Islip, the ordinance generally provides that “[a]ny person may keep, maintain, or house poultry, provided that such poultry does not constitute a nuisance or create a hazard to public health.”¹⁸ In one of the broader definitions, “poultry” is defined in the code as including “chickens, turkey, geese, ducks, pheasant or other domestically-maintained fowl.”¹⁹ However, the ordinance then specifies precisely what constitutes a nuisance, including how many fowl may be kept, where, how their food will be stored, etc. The specifics of these provisions are discussed in more detail below. The Town of Huntington similarly mandates that the birds not be a nuisance, but then specifies additional requirements for their care and maintenance.²⁰

During a city council meeting in Riverdale, Utah in February 2011, the city attorney pointed out that, under the current law, chickens were neither expressly permitted nor prohibited. After a heated debate with several viewpoints represented both by residents of the city and members of the City Council, the Council decided not to enact the proposed chicken ordinance, concluding that their existing nuisance laws adequately addressed the chicken situation, at least for the time being.²¹ This result appears to be as much a function of not wanting to alienate any portion of the constituency as a belief that the current ordinance was sufficient. Regardless of the reason, the examination of a municipality’s existing nuisance provisions is a good first step in determining what additional regulation might be required, if any.

The City of Rochester prohibits as a nuisance only the accumulation of feces on the property, mandating that the feces of all animals not create a nuisance, attract insects or animals, or facilitate the spread of disease.²² It does not address any other possible nuisance issues, such as the noise created by the hens. A more encompassing nuisance ordinance would be preferable.

The City of Beacon Code expressly grants to the Dog Control Officer the power to abate nuisances arising from the keeping of chickens and provides that the Dutchess County Department of Health shall be the sole judge as to whether coops shall require cleaning or disinfecting.²³ If your governing body chooses to enact

an ordinance, review your municipality's code to ensure that someone actually has the authority to enforce the new provisions. If the power is not presently there, grant it.

It also would be beneficial for the consultants to the municipal governing body to review the penalties associated with a determination that a particular group of chickens constitutes a nuisance. Penalties in the existing chicken laws ranged from \$25.00 to \$1,000.00 per offense. Unless the punishment is sufficient to deter the unwanted practice, the cost of enforcing the law may outweigh any benefit therefrom. Attention also should be paid to the continuing nature of the offense, such that penalties accrue for each day that the violation continues unabated after notice. The Saratoga Springs Code at § 101-22 provides an example of a continuing offense.

If Your Municipality Decided to Enact Such an Ordinance, What Should It Include?

A Bird of a Different Color

An initial determination should be made concerning what types of birds will be regulated by the ordinance, and how they will be referenced. If the ordinance is to apply only to chickens, no more need be said. But many municipalities regulate turkey, geese, guinea hens and other birds as well. The definitions of "fowl" and "poultry" in the various ordinances differ widely. In addition, some municipalities regulate "livestock" or "farm animals" and expressly include or exclude various birds.

The majority of the ordinances reviewed for this article differentiate between roosters and hens, prohibiting the former and permitting the latter, for obvious reasons. The sound of a 4 a.m. wakeup call from a rooster travels farther and is more likely to be found to be a nuisance than that of a laying hen. In New York City, for example, roosters (and ducks, geese and turkeys) are banned from the "built-up portion of the City."²⁴ While this phrasing leaves room for debate concerning whether a particular section of the City is "built-up," most areas likely would fall within this definition, thus effectively banning roosters from the five boroughs, with the noteworthy exception of Decker Farms on Staten Island. In Saratoga Springs, no person shall harbor a crowing cock, the crowing of which disturbs neighbors between the hours from 12:00 midnight to 7:00 a.m. In my limited experience with roosters, they do not keep to such a tight schedule. An outright ban is probably easier and less costly to enforce, and the absence of a rooster does not impact upon a hen's ability to lay eggs.

Distance from Buildings or Lot Lines

Several ordinances regulate the distance that coops must be kept from property boundaries or buildings, or mandate that the location of the coop be in a rear yard.²⁵ In addition, in Huntington, the coop must be screened from the view of surrounding streets and residences.²⁶ In addition to aesthetics, these requirements help to insure that any unwanted noise or odor is not observed on adjacent properties.

In New York City, no permit for the keeping of chickens (for sale) will be issued unless the coops and runways are more than 25 feet from an inhabited building, unless the building is a single-family residence occupied by the applicant seeking the permit or the applicant submits the written consent of the owner of the lot on which the poultry are to be kept.²⁷ Similarly, in Buffalo, chickens shall not be kept less than 20 feet from any door or window of a dwelling other than the applicant's dwelling.²⁸

Proponents of keeping chickens complain that a substantial setback requirement will significantly decrease the number of properties that contain sufficient room to put a coop. As chickens are not native to urban environments, this restriction does not seem unreasonable. In addition, as with other setback requirements, variances may be sought. That process allows neighbors to express their concerns and zoning boards to impose any necessary conditions.

In my opinion, setting the minimum distance from a neighbor's property, and/or requiring screening is justified both aesthetically and for quiet enjoyment purposes. I submit, however, that an applicant should not be barred from keeping fowl because, due to the size or configuration of the lot, the coop would be located too close to the *applicant's* dwelling. That should be a choice left up to the applicant.

As a final note on this point, some municipalities in other states have "permitted" no chickens, by requiring that any chickens be kept at least 150 feet, or in one case, at least 300 feet, from any residence, a mandate that excludes most, if not all lots in these urban areas.²⁹ In these times of fiscal conservatism, the time and money spent enacting a permissive prohibition could be put to better use.

Noise

If noise is the concern, then limiting the number of hens and barring roosters entirely should alleviate that concern. In addition, the setback requirements discussed will help to alleviate unwanted noise from traveling beyond property boundaries. In Islip, no noise is permitted to be heard beyond the property line

between the hours of 11 p.m. and 7 a.m.³⁰ The Binghamton Code provides that no “disturbing” noise is permitted beyond the property line at any time.³¹ Both of these approaches should appease neighbors with concerns about the noise of the flock, and prevent the housing of birds where the property is too small to insure that the neighbors are not disturbed.

Regulating the Number of Chickens That May Be Kept

In Saratoga Springs, as in New York City, there is no limit on the number of fowl that may be kept, only the requirement that they not be permitted to “run at large.”³² In Huntington, owners may keep up to eight “chickens or ducks or any combination thereof.”³³ In Buffalo, it is five chickens³⁴ and in Binghamton it is four chickens or rabbits.³⁵

The determination of whether to establish a maximum number of birds or a maximum amount of space to be devoted to these animals must be analyzed on a municipality-by-municipality basis. The determination is a function of the type, size and nature of the properties in the municipality.

Regulating for the Good of the Chickens

Other ordinances take a more “pro-chicken” approach by mandating minimum square footage per chicken. In the City of Rochester, for example, not more than 30 fowl may be kept in an open area of 240 square feet.³⁶ In Islip, no more than 15 birds may be maintained for every 500 square feet of rear yard space being used for the keeping of poultry.³⁷ In Huntington, the requirement is for not less than 2 square feet and not more than 5 square feet of floor space per bird.³⁸ Again, this analysis should be undertaken in light of the type, size and nature of the properties in the municipality and is not subject to a hard and fast rule.

Keeping Chickens “Cooped Up”

Several ordinances mandate that the chickens be kept either in enclosed yards, with clipped wings so that they cannot escape the enclosure, or in enclosed coops and runways. The City of White Plains mandates that fowl be “securely enclosed in such a manner as to prevent them from straying from the premises of the person owning them.”³⁹ The penalty for violating this ordinance is \$25 per occurrence.⁴⁰ In Islip, poultry is required to be confined to the premises on which its owner resides.⁴¹ In addition, each structure housing poultry is classified as an accessory building requiring a building permit.⁴²

These provisions are easily enforceable and help to insure that the birds do not become a nuisance to neighbors. Another advantage of this requirement is less readily apparent. In one municipality, a complaint

against the purported owners of the chickens was dismissed for failure to assert and prove the required element of ownership. It could not conclusively be determined by the evidence before the Court that the chickens belonged to the individuals charged. Requiring that the chickens be maintained in an enclosure potentially eliminates this issue.

If predators such as coyotes and foxes are the concern, then keeping the chickens in an enclosed structure is an obvious response. However, drafters should note that the imposition of this requirement would eliminate two of the benefits sought by many chicken owners, namely weed control and garden pest control. Requiring that the chickens be kept in an enclosed area such as a fenced-in yard offers a compromise position. Again, this determination should be made on a municipality-by-municipality basis, with the optimal outcome being a solution that adequately addresses the concerns of those on both sides of the fence.

Smell/Sanitation

The City of Rochester requires that “[a]ll coops, runways and premises where fowl are kept shall be at all times clean and sanitary.”⁴³ The Code also requires that “[a]ll premises where fowl are kept shall at all times be subject to inspection....”⁴⁴ However, the code does not specify the frequency of cleaning required.

Similarly, the Beacon City Code mandates that flocks shall be kept in “suitable” coops “properly cleaned.”⁴⁵ This approach makes the enactment of the ordinance easier but its enforcement more subjective and therefore more difficult.

In contrast, in Islip, “[t]he area in which poultry are kept shall be cleaned regularly (at least once each day) and shall always be maintained in a sanitary condition.”⁴⁶ Similarly, in Huntington, the coops are required to “be cleaned once each day and maintained in a sanitary condition.”

The “fowl” odor associated with chicken coops is the most frequent objection I have heard to permitting this use in residential neighborhoods. Backyard chicken supporters claim that their coops are cleaned on a sufficiently regular basis so that this is not a problem.

Municipal budgets being what they are, requiring regular inspections of chicken coops, whether annual or at other intervals, may not be feasible. But neighbors being what *they* are, a truly odiferous coop is likely to be reported. It is difficult to conceive of a cost-effective policing mechanism for determining whether a coop is being cleaned on a daily or frequent basis, but any accumulation of dirt and feces would be a good indication that it is not. The requirement that inspections be permitted is a good enforcement tool as well as a possible deterrent to lax cleaning habits.

The Saratoga Springs Code has an interesting provision relating to the keeping of swine that could be of benefit to the drafters of chicken ordinances. In that municipality, odors from a swine enclosure offensive to passers-by or neighbors “shall be presumptive evidence of the unsanitary condition” of the enclosure.⁴⁷

Some municipalities require that the coops be “whitewashed” on a periodic basis. This assumes that the coops are made of wood or other material that may be whitewashed. With the advent of dyed plastic coops,⁴⁸ and the increasing use of other materials for the pens, a better practice would be to simply mandate that the coop be cleaned, disinfected and maintained on a regular basis.

Neighbor Consent

Some ordinances require the consent of the neighbors to the keeping of fowl.⁴⁹ I generally am not in favor of this approach, as it may have more to do with the popularity (or lack thereof) of the individual seeking to keep the birds than it does with responsible planning practices. However, Buffalo also requires the consent of all residents of multi-family buildings and duplexes, and all tenants in the building other than the applicant. This requirement is critical as it gives a voice to those who would be living on the same lot with the birds.

Exceptions

In discussions on the topic, in municipalities that did not permit the keeping of any chickens, exceptions were sought for the keeping of fowl for certain purposes, such as 4-H competitions. No ordinances were found that contained this exception, unless such competitions are encompassed within an educational use. For example, in the City of Albany, an exception is made from the outright ban on fowl for not-for-profit organizations, upon proof that the farm animals are being kept for educational purposes “in such a manner so as to not disturb the health and safety of the surrounding neighborhood.”⁵⁰

Food Storage

Finally, the requirement that feed be stored in metal or rodent-proof containers should be included in every ordinance.⁵¹ The benefit of this action to the community significantly outweighs the minimal cost to the owner of the fowl. The requirements contained in the Buffalo ordinance are unusual in their specificity. They mandate that the food be kept in fastened containers, opened only during feeding time and immediately closed thereafter, and ban the practice of scattering feed on the ground, requiring the chickens to eat out of a trough.⁵² Again, each municipality should determine whether this level of detail is required within its boundaries.

Accessory Use, Special Use Permit, or Other Permit or License?

Depending upon the scope of the regulation that is enacted, some level of review by the municipality is probably called for prior to permitting the use to commence.

If a municipality has chosen to enact an all-encompassing chicken law, such that every concern is regulated, then making the use an as-of-right accessory use may be warranted. In that situation, the municipality has undertaken a comprehensive review of all potential situations, making further review of each specific situation unnecessary.

In the absence of such a global ordinance, then review of applications by either the code enforcement officer or a municipal board is warranted. The determination of what individual or entity that will undertake the review is impacted by the municipality’s budget and past practices.

Some municipalities require that a Special Use Permit be obtained before the use can commence. This avenue allows review by the municipal board, usually either the Planning Board or the Zoning Board of Appeals, that is tasked with the review of such applications, and has the added advantage that neighbors are often required to be notified of the application, thereby giving them a forum in which to express their concerns.

But not every municipality will want board involvement prior to allowing the keeping of a chicken. If review by a code enforcement officer is preferred to board review, then requiring a building permit for the installation of a coop, or requiring a permit for the keeping of any chickens, becomes an attractive alternative. Both Special Use Permits as well as building or other permits have the added benefits of advising the municipality, in advance, of the proposed chicken use as well as generating additional fees for the municipality. In addition, requiring the periodic renewal of permits offers a built-in opportunity for the municipality to review the condition of the coop and the complaints of neighbors, if any.

Buffalo requires a license before one can keep chickens. As part of the licensing process, all property owners within 50 feet of the applicant’s property are notified of the pending application.⁵³ If written comments are received in opposition to the application, it must be forwarded to the Common Council for review and approval.⁵⁴ Buffalo also requires inspection by the Office of Animal Control following the issuance of license.⁵⁵ The licenses are renewed annually.⁵⁶

As with any other application, perhaps more so in this case, if the applicant is not the owner of the property, the written consent of the owner for keeping the fowl should be required to be submitted with the application.⁵⁷

Endnotes

1. Susan Orlean, *The It Bird*, THE NEW YORKER, Sept. 28, 2009, available at http://www.newyorker.com/reporting/2009/09/28/090928fa_fact_orlean (last visited December 8, 2011).
2. So Po Chickens, available at <http://www.sailzora.com/SoPoChickens.htm> (last visited December 8, 2011).
3. For the most part, this article is limited to the keeping of chickens, which are included in the definition of "poultry" in some municipalities and in others simply as "fowl."
4. See *No Backyard Chickens for Springville Residents*, THE ASSOCIATED PRESS (2011) available at <http://www1.whdh.com/news/articles/bizarre/12003379711615/no-backyard-chickens-for-springville-residents/> (last visited December 8, 2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. See Katie M. Ellis, *Riverdale Can't Decide if Home is Where the Hens* (Jan. 20, 2011) available at <http://www.standard.net/topics/city-government/2011/01/20/riverdale-cant-decide-if-home-where-hen> (last visited December 8, 2011).
9. See, Alisa Smith, J.B. MacKinnon, *The 100-Mile Diet* (2007).
10. See, Patricia E. Salkin, *Feeding the Locavores, One Chicken at a Time: Regulating Backyard Chickens*, 34 ZONING & PLAN. L. REP. 1 (2011).
11. Peter Applebome, *Envisioning the End of 'Don't Cluck, Don't Tell'*, THE N.Y. TIMES (April 29, 2009), at A21, available at <http://www.nytimes.com/2009/04/30/nyregion/30towns.html?ref=nyregion> (last visited December 8, 2011).
12. See *Backyardchickens.com*, available at www.backyardchickens.com/laws (last visited December 8, 2011).
13. CITY OF ALBANY, N.Y., CODE § 115-30.
14. *Id.*
15. *Id.* at § 115-33.
16. NEW YORK CITY, HEALTH CODE § 161.19.
17. *Id.*
18. TOWN OF ISLIP, N.Y., CODE § 12-31.
19. *Id.* at § 12-32.
20. TOWN OF HUNTINGTON, N.Y., CODE § 78-25.
21. See *City of Riverdale, UT, Minutes of Regular Meeting of the Riverdale City Council* (February 1, 2011) available at http://www.riverdalecity.com/meetings_events/meetings/council/minutes/2011/020111cc_min.pdf (last visited December 8, 2011).
22. CITY OF ROCHESTER, N.Y., CODE § 30-34.
23. CITY OF BEACON, N.Y., CODE § 99-7.
24. CITY OF NEW YORK, HEALTH CODE § 161.19.
25. TOWN OF ISLIP, N.Y., CODE § 12-33 (must be kept in rear yard); TOWN OF HUNTINGTON, N.Y., CODE § 78-25 (must comply with setback and side-yard requirements); CITY OF BEACON, N.Y., CODE § 99-6 (not less than 15 feet from the nearest dwelling); CITY OF BUFFALO, N.Y., CODE §§ 341-11.1, 341-11.2 (rear or backyard, and at least 20 feet from any door or window, but only 18 inches from the rear property line).
26. TOWN OF HUNTINGTON, N.Y., CODE § 78-25.
27. NEW YORK CITY, HEALTH CODE § 161.09.
28. CITY OF BUFFALO, N.Y., CODE § 341-11.2.
29. See, William C. Singleton III, *Homewood Hens Fly the Coop, Move to Shelby County*, THE BIRMINGHAM NEWS (July 7, 2010) available at http://blog.al.com/spotnews/2010/07/homewood_hens_fly_the_coop_mov.html (last visited December 7, 2011).
30. TOWN OF ISLIP, N.Y., CODE § 12-33.
31. CITY OF BINGHAMTON, N.Y., CODE § 410-19.
32. CITY OF SARATOGA SPRINGS, N.Y., CODE § 101-19.
33. TOWN OF HUNTINGTON, N.Y., CODE § 78-25.
34. CITY OF BUFFALO, N.Y., CODE § 341-11-1(A).
35. CITY OF BINGHAMTON, N.Y., CODE § 410-19(C).
36. CITY OF ROCHESTER, N.Y., CODE § 30-19(C).
37. TOWN OF ISLIP, N.Y., CODE § 12-33.
38. TOWN OF HUNTINGTON, N.Y., CODE § 78-25.
39. CITY OF WHITE PLAINS, N.Y., CODE § 5-2-1.
40. *Id.*
41. TOWN OF ISLIP, N.Y., CODE § 12-33.
42. *Id.*; *Accord* TOWN OF HUNTINGTON, N.Y., CODE § 78-25; City of Binghamton, N.Y., Code § 178-2.
43. CITY OF ROCHESTER, N.Y., CODE § 30-19(E).
44. *Id.* Please note that the author offers no opinion on the constitutionality of such provisions.
45. CITY OF BEACON, N.Y., CODE § 99-6.
46. TOWN OF ISLIP, N.Y., CODE § 12-33.
47. CITY OF SARATOGA SPRINGS, N.Y., CODE § 101-21.
48. See, e.g., *Chicken Houses and Beehives* (2010) available at <http://www.omlet.us/homepage> (last visited December 8, 2011).
49. See, e.g., CITY OF BUFFALO, N.Y., CODE § 341-11-1 (requiring "the express written consent of all residents residing on property adjacent to that of the applicant.>").
50. CITY OF ALBANY, N.Y., CODE § 115-32.
51. See, e.g., TOWN OF ISLIP, N.Y., CODE § 12-33.
52. CITY OF BUFFALO, N.Y., CODE § 341-11.3.
53. CITY OF BUFFALO, N.Y., CODE § 341-11.4.
54. *Id.*
55. *Id.*
56. *Id.*
57. (*The author sheepishly apologizes for the flock of animal references and puns in the preceding pages, pleading "herd mentality" as a defense, citing such erudite sources as Catherine Price, "A Chicken on Every Plot, a Coop in Every Backyard," September 19, 2007, available at http://www.nytimes.com/2007/09/19/dining/19yard.html?pagewanted=all* (last viewed on September 26, 2011), and Peter Applebome, *Envisioning the End of 'Don't Cluck, Don't Tell'*, THE N.Y. TIMES, April 29, 2009, at A21 available at <http://www.nytimes.com/2009/04/30/nyregion/30towns.html?ref=nyregion> (last viewed on September 26, 2011).

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A CASE FOR ANIMAL WELFARE ACT (“AWA”) REGULATION OF CAPTIVE HUNT FACILITIES

BY: ALEXANDRA MONSON

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INTRODUCTION

Captive hunt facilities are an extreme version of the adage “shooting fish in a barrel” come to life. Wild and exotic animals are held captive in enclosed properties where customers pay to shoot them. The facility gets paid per animal killed, so it will do everything it can to make sure each customer goes home with a dead animal to mount on their trophy wall. The facility will make sure it’s as easy as shooting fish in a barrel.

In 2001, there were over 2,000 captive hunt facilities in the United States.¹ The cost of an animal at a captive hunt facility can range from \$400 to \$20,000 depending on the species and aesthetics of the animal.² However every hunt comes with the cost of cruelty.

Captive hunt facilities are cruel because the animals are held in captivity where they suffer from fast-spreading diseases, fighting amongst the cramped animals, lack of veterinary care, and exposure to the extreme natural elements. Further, the practices at these captive hunt facilities cause the animals to suffer because they are raised to not fear humans, they are trained to get their food from feeding stations where they are lured for easy-kills, the killing methods are inhumane, customers are often inexperienced shooters, and unregulated breeding takes places at these facilities.

¹ Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned “Hunting,”* 8 Animal L. 223 (2001), <https://www.animallaw.info/article/canning-canned-hunts-using-state-and-federal-legislation-eliminate-unethical-practice-canned>.

²*Id.*

Since the animals are enclosed on the property, they are not able to escape their predators—the shooters. These “hunts” lack the “fair chase” that most hunters pride themselves of in the wild. Therefore, even some hunters oppose captive hunt facilities.³

The captive environment lends itself to the spread of dangerous and deadly diseases such as tuberculosis and chronic wasting disease.⁴ Accurate testing can only be done for chronic wasting disease once the animal is deceased, so any animal believed to be exposed to the disease is killed and tested. This leads to the unnecessary death of animals simply because they were transported from or to a facility with a case of chronic wasting disease.⁵

Most of these captive animals are also familiar with people and thus do not have the instinct to run and protect themselves from shooters, like their counterparts in the wild. This is because animals at captive hunt facilities are sourced from breeders, dealers, zoos, and circuses.⁶ Further, the animals at captive hunt facilities usually rely on humans for their meals and therefore grow to trust and depend on humans. According to the Humane Society of the United States, “[i]n many facilities, the animals expect to be fed at regular times by familiar people—a setup that guarantees a kill for trophy hunters.”⁷

Another way that captive hunting is especially egregious is the killing methods. Most shooters have paid a hefty price to bring home a trophy of the animal they killed that day. That means that the shooter does not want to hit the animal in the head with the arrow or bullet and

³ Ryan Sabalow, *State Senate Chief David Long Calls for Study of Trophy Deer Industry’s Disease Risks*, The Indianapolis Star (April 26, 2014, 9:13 PM), <https://www.indystar.com/story/news/2014/04/26/state-senate-chief-david-long-calls-study-trophy-deer-industrys-disease-risks/8230463/>.

⁴ Ryan Sabalow, *Buck Fever: Chapter 2*, The Indianapolis Star, <https://www.indystar.com/story/news/investigations/2014/03/27/buck-fever-chapter-two/6867301/> (last viewed April 25, 2018).

⁵*Id.*

⁶ Humane Society of the United States, *Captive Hunts Fact Sheet: The Unfair Chase*, http://www.humanesociety.org/issues/captive_hunts/facts/captive_hunt_fact_sheet.html (last viewed April 25, 2018).

⁷*Id.*

risk ruining the trophy they plan to mount on their wall. Therefore, shooters will aim for other parts of the body that do not kill the animal instantly. This leaves the animal to suffer for an unknown period before collapsing and having their body retrieved for processing.

In addition to ineffective and cruel killing methods, the shooters aiming at these sentient beings are typically inexperienced. All someone needs to do is pay the price and they are in. They could have never held a gun before in their life. On many captive hunt facilities' websites, there are even images of young children smiling over the carcasses of killed animals.⁸

A facility that exemplifies the problems of fighting, lack of veterinary care, exposure to the natural elements, and improper breeding is the 777 Ranch located in Hondo, Texas.⁹ This captive hunt facility maintains and sells the killing of endangered species and thus is required to have Captive-Bred Wildlife Permits and Culling Permits under the Endangered Species Act.¹⁰ The 777 Ranch's ESA permits faced a notice-and-comment period for their renewal in late 2017.¹¹ After viewing the captive hunt facility's application materials, People for the Ethical Treatment of Animals ("PETA") posted a public comment on November 22, 2017.¹² In this comment, PETA pointed out that in response to the U.S. Fish and Wildlife Service's concerns about genetic vitality, the facility stated that "[i]t is our opinion having raised these species for over 30 years that we have a good idea of what mix of males versus females is needed to enhance the breeding of the species. At this point we have too many males of each specie and we need the freedom to selectively cull some males. If the males are not selectively culled, there will be an increase in the number of males that die do [sic] to infighting."¹³ This comment shows that

⁸See, e.g., Priour Ranch, *Gallery*, <http://www.priourranch.com/gallery.html> (last viewed April 25, 2018).

⁹ 777 Ranch Home page, <http://www.777ranch.com> (last viewed April 25, 2018).

¹⁰ 16 U.S.C. §§ 1531-1544.

¹¹See 82 F.R. 49041 (Oct. 23, 2017)

¹² People for the Ethical Treatment of Animals, *Comment Opposing PRT-013008 and PRT-017404*, Federal Register (Nov. 22, 2017), <https://www.regulations.gov/document?D=FWS-HQ-IA-2017-0064-0041>.

¹³*Id.* (quoting Ex. 12, 777 Ranch Letter to FWS providing additional information (Nov. 23, 1999)).

there can be deadly fighting among the animals and improper breeding methods since the facility is merely relying on its prior experience and not scientific evidence. There was also no evidence of genetic monitoring in the breeding management and no explanation of how the facility corrects for a skewed sex ratio since males are more desirable trophies and therefore killed more often.¹⁴ The facility also had 12 animals freeze to death between the years of 2010 and 2016.¹⁵ This indicates that there is not sufficient shelter from the natural elements at the facility. Finally, the facility did not provide any information indicating that animals are provided routine veterinary care.¹⁶

Though 777 Ranch is just one example, many of the problems occurring at this Texas captive hunt facility are present throughout the industry. Animals are suffering at captive hunt facilities every day. But because they “fall into a regulatory gap between agriculture and natural resource agencies,” these facilities currently operate with no oversight and no regulations.¹⁷

This “regulatory gap” is present because current laws do not provide adequate protection for the animals owned by captive hunt facilities. The only federal law offering protection to the animals at captive hunt facilities is the Endangered Species Act (“ESA”).¹⁸ The ESA only applies to “endangered” or “threatened” species.¹⁹ Most animals available at captive hunt facilities are not listed as endangered or threatened. However, even the animals that are listed as endangered or threatened are still not adequately protected by the ESA because of improperly granted blanket permits that allow these animals to be killed.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Id.*

¹⁷ Ryan Sabalow, *Buck Fever: Intro*, The Indianapolis Star, <https://www.indystar.com/story/news/investigations/2014/03/27/buck-fever-intro/6865031/> (last viewed April 25, 2018)

¹⁸ 16 U.S.C. §§ 1531-1544.

¹⁹ 16 U.S.C. § 1531.

Under the ESA, permits may be granted to allow acts otherwise prohibited if the act “enhance[s] the propagation or survival of the affected species.”²⁰ These permits are typically granted without thorough review of the facility’s breeding program, shelter from the elements, veterinary care plan, and overall management practices. Granting a blanket permit to a captive hunt facility that kills its animals is antithetical to the purpose of the ESA, which is to protect the endangered or threatened animals. Thus, even the few animals at captive hunt facilities that are regulated under the ESA are not adequately protected.

However, it is time to hold these commercial facilities accountable and responsible for the suffering they impose on the vulnerable animals under their control. Captive hunt facilities should be recognized as exhibitors under the Animal Welfare Act (“AWA”) and thereby required to obtain an operational license from the United States Department of Agriculture (“USDA”) and to meet the minimum animal care requirements of the AWA.

Part I of this Article discusses the legislative history of the AWA and how it demonstrates Congress’ intent to regulate facilities such as captive hunt facilities under the AWA’s definition of “exhibitor.” Part II considers the plain language of the AWA and how captive hunt facilities meet the textual requirements to be an exhibitor. Part III considers the applicable regulations enforcing the AWA and concludes that the regulations also support captive hunt facilities being exhibitors. Part IV analyzes case law to determine that court opinions further support this conclusion. The implications of this proposition are discussed before the Article concludes.

I. LEGISLATIVE HISTORY OF THE AWA²¹

²⁰ 16 U.S.C. § 1539.

²¹ For a complete history of the AWA, see Henry Cohen, *The Animal Welfare Act*, 2 J. Animal L. 13 (2006).

The AWA’s legislative history suggests that captive hunt facilities should be recognized as exhibitors because they conduct precisely the type of activities that the AWA intends to protect. The AWA was first enacted in 1966.²² Its original purpose was 1) to prevent the theft of pet dogs and cats for research purposes; and 2) to regulate the treatment of dogs, cats, monkeys, guinea pigs, hamsters, and rabbits used in research.²³

Merely four years after the enactment of the AWA, it was amended for the first time in 1970.²⁴ This amendment expanded the definition of “animal” to include not only the previously listed species, but also “such other warm-blooded animal[.]”²⁵ In addition, the amendment added the term “exhibitor” to the AWA.²⁶ Included in the definition of “exhibitor” were examples such as “carnivals, circuses, and zoos exhibiting animals whether operated for profit or not[.]”²⁷ Further, the Congressional statement of policy was updated to state the AWA’s purpose as “insur[ing] that certain animals intended for . . . exhibition purposes . . . are provided humane care and treatment” by “regulat[ing] the transportation, purchase, sale, housing, care, handling, and treatment of such animals by persons or organizations engaged in using them for . . . exhibition purposes[.]”²⁸

Captive hunt facilities are like zoos in many ways. Both types of facilities maintain enclosed private properties that house different species of animals. In addition, both types of facilities are typically commercial enterprises that profit from the animals they hold captive. Therefore, when Congress expanded the definition of “animal” to broadly include “warm-

²² Pub. L. No. 89-544, 80 Stat. 350 (1966).

²³*Id.*

²⁴ Pub. L. No. 91-579, 84 Stat. 1560 (1970).

²⁵*Id.*

²⁶*Id.*

²⁷*Id.*

²⁸*Id.*

blooded” animals and added the regulation of “exhibitors” such as zoos, Congress intended similar facilities, such as captive hunt facilities, to be regulated under the AWA.

II. PLAIN LANGUAGE OF THE AWA: EXHIBITOR

Captive hunt facilities should be recognized as exhibitors under the AWA because they meet the AWA’s definition of “exhibitor.” The AWA defines exhibitor as:

any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.²⁹

This definition can be summarized into two requirements: 1) that the person exhibits animals to the public for compensation; and 2) that the animals were either purchased in commerce *or* the intended distribution of the animals affects commerce or will affect commerce. Included in this definition are three other terms that are defined by the AWA: “person,” “animal,” and “commerce.” This Part will first discuss how captive hunt facilities meet these three definitions individually and then how captive hunt facilities meet the exhibitor definition. This Part will conclude with a discussion of why captive hunt facilities do not fall under any of the statutory exceptions.

²⁹ 7 U.S.C. § 2132(h) (2014).

The AWA defines “person” as “includ[ing] any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.”³⁰ Captive hunt facilities are privately owned commercial businesses³¹ and therefore are legal entities. Thus, captive hunt facilities are “persons” as defined by the AWA and can be exhibitors.

The AWA defines “animal” as:

any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.³²

The species of animals at each captive hunt facility range, but these animals are typically warm-blooded antelope species. Most captive hunt facilities boast about their stock of axis deer, barasingha, elds deer, whitetail deer, red lechwe, and a variety of other species in the wild sheep, oryx, and deer families.³³ Thus, captive hunt facilities have “animals” as defined by the AWA at their facilities and can be exhibitors. This Part will later discuss why captive hunt facilities do not fall into any of the exceptions in this definition.

The term “commerce” also applies to captive hunt facilities. The AWA defines “commerce” as:

³⁰ 7 U.S.C. § 2132(a) (2014).

³¹ See Diana Norris et al., *Canned Hunts: Unfair at Any Price*, The Fund for Animals (2002), <https://www.animallaw.info/article/canned-hunts-unfair-any-price>; see also The Humane Society of the United States, *Captive Hunts Fact Sheet: The Unfair Chase*, http://www.humanesociety.org/issues/captive_hunts/facts/captive_hunt_fact_sheet.html (last visited April 25, 2018).

³² 7 U.S.C. § 2132(g) (2014).

³³ See, e.g., Priour Ranch, *Trophy List*, <http://www.priourranch.com/trophy%20list.html> (last visited April 23, 2018); Deep Creek Ranch, *Species*, <http://deepcreekgameranch.com/species/> (last visited April 23, 2018); 777 Ranch, *Species: Complete List*, http://www.777ranch.com/species_all.html (last visited April 23, 2018).

trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).³⁴

The broad coverage of paragraph (2) applies to “activities that take place entirely within one State, as well as to those that involve traffic across state lines.”³⁵ Though captive hunt facilities are in a single State, they are commercial businesses that affect the trade, traffic, transportation, or other commerce. Part IV will further argue that captive hunt facilities affect commerce by analyzing case law concerning “commerce” under the AWA.

Since it has been established that captive hunt facilities are “persons” that have “animals” and affect “commerce,” we may now return to the complete definition of an “exhibitor” under the AWA. Captive hunt facilities meet the first exhibitor requirement—that the person exhibits animals to the public for compensation—because they charge customers fees to enter their private properties and view the animals. In addition to paying a fee to access the premises and kill an animal, customers can also pay for activities such as wildlife viewing³⁶ and toured photo safaris.³⁷

Captive hunt facilities also meet the second exhibitor requirement—that the animals were either purchased in commerce *or* the intended distribution of the animals affects commerce or will affect commerce. Though the AWA requires one or the other, captive hunt facilities typically do both. Many captive hunt facilities will purchase animals in commerce to introduce genetic diversity to the herd on their property or to resell as a valuable trophy hunt. In the

³⁴ 7 U.S.C. § 2132(c) (2014).

³⁵ *Animal Welfare Act (7 U.S.C. S 2131 et Seq.)-Commerce-Application to Intrastate Activity*, 3 U.S. Op. Off. Legal Counsel 326, 328 (1979).

³⁶ See KJC Ranch Homepage, <http://www.kjcranch.com> (last viewed April 23, 2018).

³⁷ See, e.g., KJC Ranch, *Summer Lodging*, <http://www.kjcranch.com/texas-summer-vacation.html> (last viewed April 23, 2018); 777 Ranch, *Photo Safaris*, http://www.777ranch.com/hunting_photo_safaris.html (last viewed April 23, 2018).

alternative, these captive hunt facilities will sell their animals, either dead or alive,³⁸ which distributes the animals and affects commerce. The captive hunt facilities will sell animals that are alive to other ranches to augment their genetic diversity or at auctions to the highest bidder. The captive hunt facilities also distribute dead animals when they allow paying customers to take home the trophies of the animals.

There are four exceptions that could apply to captive hunt facilities that would cause them not to be exhibitors under the AWA. Those exceptions are for: farm animals,³⁹ breeders,⁴⁰ animals used only for food or fiber,⁴¹ and de minimis businesses.⁴²

The animals at captive hunt facilities are not farm animals. As discussed previously, the definition of animal in the AWA excludes “other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.”⁴³

Congress delegated authority to the USDA to enforce the AWA.⁴⁴ Within the USDA, the Animal and Plant Health Inspection Service (APHIS) is responsible for ensuring the enforcement of the AWA.⁴⁵ In so doing, APHIS promulgated the Animal Welfare Regulations (“Regulations”).⁴⁶ The Regulations define farm animal as:

³⁸See 7 U.S.C. § 2132(g) (2014) (the definition of “animals” includes “warm-blooded animals” that are “live or dead”).

³⁹ 7 U.S.C. § 2132(g).

⁴⁰ 9 C.F.R. § 2.1(a)(3)(iii).

⁴¹ 9 C.F.R. § 2.1(a)(3)(vi).

⁴² 7 U.S.C. § 2133.

⁴³ 7 U.S.C. § 2132(g).

⁴⁴See 7 U.S.C. §§ 2132-33 (2014); *see also* USDA Animal Care, *Animal Welfare Act and Animal Welfare Regulations*, 1 (January 2017), https://www.aphis.usda.gov/animal_welfare/downloads/AC_BlueBook_AWA_FINAL_2017_508comp.pdf.

⁴⁵*Id.*

⁴⁶ 9 C.F.R. §§ 1.1-4.11 (2001).

any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.⁴⁷

Though it is concerning that species of sheep and goats are included in the definition, it is important to note that the animals must also be used or intended for use as food or fiber or for breeding.

There is one case, *Knapp v. U.S. Dep't of Agric.*, that talks about the farm animal exception.⁴⁸ In *Knapp*, the Judicial Officer “[gave] Mr. Knapp the benefit of the doubt” and assumed that his cattle, sheep, swine, goats, and llamas were farm animals.⁴⁹ However, Mr. Knapp sought review arguing that his aoudad, alpaca, camels, and miniature donkeys were also farm animals and therefore exempt from the AWA.⁵⁰

Mr. Knapp waived his argument regarding camels but the Administrative Law Judge (“ALJ”) initially agreed that the aoudad and alpaca in this case were farm animals.⁵¹ The ALJ’s reasoning for the aoudad was that they “are goats which are considered farm animals and which exist in significant numbers on farms in the United States and are raised for both food, hunting, and breeding purposes.” The ALJ’s reasoning for the alpaca was that they “exist[] in significant numbers on farms in the United States and [are] raised for . . . wool, food, work, and breeding purposes.”⁵²

⁴⁷ 9 C.F.R. § 1.1 (2001).

⁴⁸ *Knapp v. U.S. Dep't of Agric.*, 796 F. 3d 445 (5th Cir. 2015).

⁴⁹ *Id.* at 459.

⁵⁰ *Id.*

⁵¹ *Id.* (The ALJ found that the miniature donkeys did not violate the AWA under the “personal use” exemption and therefore did not need to determine if they were farm animals. *Id.*)

⁵² *Id.*

However, upon review, the Judicial Officer concluded that aoudad, alpaca, and miniature donkeys were animals under the AWA and not farm animals.⁵³ Since the Judicial Officer did not provide any reasoning for this conclusion, the Fifth Circuit remanded for the agency to “set out more fully the facts and reasons bearing on [this decision].”⁵⁴

Knapp leads to the conclusion that the ALJ’s reasoning for classifying the animals as “farm animals” because they were for “food, hunting, and breeding” or for “wool, food, work, and breeding” was not sufficient in the eyes of the Judicial Officer. The animals at captive hunt facilities are primarily used as trophies with secondary uses for food, hunting, and breeding. Therefore, because captive hunt facilities fail to even meet the insufficient standard laid out in *Knapp*, the animals are in fact “animals” and not “farm animals” under the AWA.

The second exception, for breeders, also does not apply to captive hunt facilities. The Regulations exempt from licensing:

[a]ny person who maintains a total of four or fewer breeding female dogs, cats, and/or small exotic or wild mammals, such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, and jerboas, and who sells, at wholesale, only the offspring of these dogs, cats, and/or small exotic or wild mammals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively maintains a total of more than four breeding female dogs, cats, and/or small exotic or wild mammals, regardless of ownership, nor to any person maintaining breeding female dogs, cats, and/or small exotic or wild mammals on premises on which more than four breeding female dogs, cats, and/or small exotic or wild mammals are maintained, nor to any person acting in concert with others where they collectively maintain a total of more than four breeding female dogs, cats, and/or small exotic or wild mammals regardless of ownership⁵⁵

This breeder exception does not apply to captive hunt facilities because not only do most facilities have more than four breeding females, this exception only applies to “small

⁵³*Id.*

⁵⁴*Id.* at 468.

⁵⁵ 9 C.F.R. § 2.1(a)(3)(iii).

exotic or wild mammals, such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, and jerboas . . .”⁵⁶ The animals being exhibited at captive hunt facilities are not small exotic mammals or small wild mammals. Therefore, captive hunt facilities do not qualify for the breeder exemption.

In *Knapp*, Mr. Knapp tried to argue that because most of his animals were used for breeding, they fell into the “farm animal” exception of the AWA. However, the Court held that “[w]hile an animal’s use for breeding is relevant to the determination of whether that animal is a farm animal, there is no separate categorical exception for all animals purchased for breeding purposes.”⁵⁷ For captive hunt facilities, though they may allow most of their animals to breed, that does not mean the animals are exempt from AWA regulation.

The third exception, animals used for food or fiber, is both an exception found in the Regulations and an exception to the definition of “animal” in the AWA. The Regulations explicitly state that exempt from licensing requirements is “[a]ny person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used *only* for the purposes of food or fiber (including fur)[.]”⁵⁸ At captive hunt facilities, the animals are not only used for the purposes of food or fiber. They are used for viewing, killing, breeding, selling, and processing into trophies. That means that captive hunt facilities do not qualify for this exemption in the Regulations.

The final exception for de minimis businesses is found in the AWA which states that “[t]he Secretary shall issue licenses to dealers and exhibitors . . . [p]rovided, however, [t]hat a dealer or exhibitor shall not be required to obtain a license as a dealer or

⁵⁶*Id.*

⁵⁷*Knapp*, 796 F. 3d at 460.

⁵⁸ 9 C.F.R. § 2.1(a)(3)(vi) (emphasis added).

exhibitor under this chapter if the size of the business is determined by the Secretary to be de minimis.”⁵⁹ There is little guidance on the Secretary’s interpretation of de minimis, but given the large acreage of captive hunt facilities, the large quantities of animals they own, and the large profit they receive, it would be unreasonable for the Secretary to determine that captive hunt facilities are de minimis in size.

Given the plain language of the AWA and its definitions of “exhibitor,” “person,” “animals,” and “commerce,” captive hunt facilities should be recognized as exhibitors under the AWA. The next Part supports this conclusion by analyzing regulations relating to exhibitors.

III. REGULATIONS ENFORCING THE AWA

APHIS distributed Guidelines for the AWA in 1997.⁶⁰ These Guidelines specifically address “Animal Preserves” and state that:

[g]ame preserves, hunting preserves, and similar enterprises that keep animals in the wild state are exempt. However, if you maintain special exhibits for compensation or promotional activities, you must be licensed or registered as an exhibitor. If you sell animals to exhibits, research, or the pet trade, you must be licensed as a dealer.⁶¹

Captive hunt facilities do not keep animals in the wild state because the animals are enclosed on their property and are not able to leave the property in search of food or safety. Captive hunt facilities should therefore be considered as maintaining special exhibits for compensation and subject to regulation as exhibitors under the AWA.

In addition, APHIS also published a form for new license applicants in 2011.⁶²

There is a section only for exhibitors that asks the applicant to “list the largest number of

⁵⁹ 7 U.S.C. § 2133.

⁶⁰ Animal and Plant Health Inspection Service, *Licensing and Registration Under the Animal Welfare Act: Guidelines for Dealers, Exhibitors, Transporters, and Researchers* (July 1997).

⁶¹ *Id.* at 16.

⁶² Animal and Plant Health Inspection Service, *Form 7003A – Application for New License* (August 2011), <https://www.aphis.usda.gov/library/forms/pdf/aphis7003a-eastern.pdf>.

animals that you have held, owned, leased, or exhibited at any one time during the previous business year.”⁶³ The section lists 14 possible species categories.⁶⁴ Applicable to captive hunt facilities are the categories “wild/exotic hoofstock” and “wild/exotic mammals.”⁶⁵ This confirms that the animals at captive hunt facilities are the type that are regulated by the AWA since many facilities call their animals “wild” and/or “exotic.”

IV. CASE LAW INTERPRETING THE AWA: EXHIBITOR

This Part will analyze three cases that further interpret the term “exhibitor” under the AWA. The first case, *Haviland v. Butz*, illustrates that though the definition of “exhibitor” in the AWA includes examples, that is not an exhaustive list of exhibitors.⁶⁶ The second case, *907 Whitehead St., Inc. v. Sec’y of U.S. Dep’t of Agric.*, interprets the requirement of “distribution . . . which affects commerce.”⁶⁷ Finally, the third case, *In Re: Lloyd A. Good, Jr.*, provides an example of a permanent facility that the Court found affected commerce.⁶⁸ All three cases support the conclusion that captive hunt facilities should be recognized as exhibitors under the AWA.

In *Haviland*, the plaintiff owned and operated a traveling animal act that performed in front of live audiences and occasionally on television.⁶⁹ The USDA determined that the plaintiff was an “exhibitor” under the AWA and gave the plaintiff notice that he was in violation of the AWA’s licensing provisions.⁷⁰ The plaintiff brought suit challenging the judgment that he was an exhibitor and subject to regulation under the AWA.⁷¹

⁶³*Id.* at Block 9.

⁶⁴*Id.*

⁶⁵*Id.*

⁶⁶*Haviland v. Butz*, 543 F.2d 169 (D.C. Cir. 1976).

⁶⁷*907 Whitehead St., Inc. v. Sec’y of U.S. Dep’t of Agric.*, 701 F.3d 1345 (11th Cir. 2012).

⁶⁸*In Re: Lloyd A. Good, Jr.*, 49 Agric. Dec. 156 (U.S.D.A. June 22, 1990).

⁶⁹*Haviland*, 543 F.2d at 171.

⁷⁰*Id.*

⁷¹*Id.*

The plaintiff argued that the AWA, as written, did not include animal performances—only the specified “carnivals, circuses and zoos”⁷²—and that the Secretary of Agriculture was not authorized to add animal performances.⁷³ The Court looked at the text of the AWA and the report of the House Committee on Agriculture which stated “exhibitors (*such as* circuses, zoos, carnivals and road shows)”⁷⁴ The Court found that because the list is preceded by “includes” in the AWA and “such as” in the report of the House Committee on Agriculture, the list of exhibitors in the AWA definition “was intended to be but partial and illustrative.”⁷⁵

Therefore, though captive hunt facilities are not listed in the definition of exhibitors in the AWA, like animal acts in *Haviland*, the Secretary of Agriculture may still regulate them as exhibitors.

The definition of an exhibitor in the AWA requires that the “distribution of [animals] affects commerce, or will affect commerce[.]”⁷⁶ This phrase was fully analyzed by the United States Court of Appeals for the Eleventh Circuit in the 2012 case *907 Whitehead*. In this case, the Court found that the Ernest Hemingway Home and Museum (“Museum”) was an exhibitor because its activities—exhibiting polydactyl cats—substantially affected interstate commerce.⁷⁷

The first polydactyl cat was given to Ernest Hemingway by a friend between 1931 and 1938.⁷⁸ Since that time, polydactyl cats have been present at the Hemingway property even through ownership changes.⁷⁹ The cats live and roam freely on the property but are enclosed by a brick fence surrounding the property.⁸⁰ At the time of the trial, the cats had never been bought or

⁷² 7 U.S.C. § 2132(h) (2014).

⁷³ *Haviland*, 543 F.2d at 173.

⁷⁴ *Id.* at 174 (quoting H.R. Rep. No. 1651, 91st Cong., 2d Sess. 2 (1970)).

⁷⁵ *Id.*

⁷⁶ 7 U.S.C. § 2132(h) (2014).

⁷⁷ *907 Whitehead*, 701 F.3d at 1351.

⁷⁸ *Id.* at 1347.

⁷⁹ *Id.*

⁸⁰ *Id.*

sold.⁸¹ However, the Court notes that the Museum did charge admission to tour the property and the tour included seeing and discussing the polydactyl cats.⁸² The Museum also featured the cats predominately in print advertisements.⁸³

The USDA regional director for animal care determined the Museum was an exhibitor because the Museum: 1) exhibited the cats for the cost of an admission fee; and 2) the cats were used in promotional advertising.⁸⁴ The Museum challenged this determination by arguing that: 1) the Museum was not an exhibitor; 2) there was no effect on interstate commerce; 3) the AWA only regulated animals physically moving in interstate commerce; and 4) the AWA does not authorize federal regulation if there is already applicable local and state animal welfare laws.⁸⁵

Since the Museum did not argue that it exhibited the cats to the public for compensation, the question for the Court became whether the Museum's exhibition of the cats is a "distribution . . . which affects [interstate] commerce."⁸⁶ Though the cats were never transported anywhere, the Court found that the Secretary of Agriculture interpreted the phrase more liberally and that that interpretation is entitled to *Chevron* deference.⁸⁷ The District Court found that the cats in this case were "distributed" in two ways: 1) when the Museum allegedly gave away cats; and 2) when the Museum broadcasted images of the cats online and used them to attract visitors through promotional advertising materials.⁸⁸ The Eleventh Circuit further stated that "the most obvious means of exhibiting the Hemingway cats" was the Museum's act of displaying the cats to the public for compensation.⁸⁹

⁸¹*Id.*

⁸²*Id.*

⁸³*Id.* at 1348.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 1349 (*quoting* 7 U.S.C. § 2132(h) (2014)).

⁸⁷907 *Whitehead*, 701 F.3d at 1349-50.

⁸⁸*Id.* at 1350.

⁸⁹*Id.*

The Court also concluded that “[t]he Museum ‘distributes’ the cats in a manner affecting commerce every time it exhibits them to the public for compensation.”⁹⁰ Though the cats never leave the Museum’s property, the Court noted that “when local businesses solicit out-of-state tourists, they engage in activity affecting interstate commerce.”⁹¹ Since the exhibition of the cats was “integral to the Museum’s commercial purpose,” the Court held that the exhibition of the cats affects interstate commerce, and therefore Congress has the power to regulate the Museum as an exhibitor under the AWA.⁹²

Captive hunt facilities are similar to the Museum in *907 Whitehead*. Like the cats at the Museum, animals at captive hunt facilities are usually free to roam but are enclosed along the perimeter of the property. In addition, captive hunt facilities also charge a fee for customers to enter the property and to view the animals like the Museum did. Captive hunt facilities, like the Museum, “broadcast[] images of the [animals] online and use[] them to attract visitors through promotional advertising materials.”⁹³ Most importantly, captive hunt facilities display the animals to the public for compensation. This not only meets the “distribution” requirement, but also “affects commerce,” as required by the AWA.

Another example of a permanent facility that qualified as an exhibitor under the AWA is the resort complex in *Good*.⁹⁴ The facility in *Good* included, among other things, facilities for overnight lodging and food service and a dolphin exhibit.⁹⁵ The Court found that “the dolphin act was used to attract business” to the resort.⁹⁶ Further, the Court concluded that “[a]lthough it is true that no fee, as such, is charged for viewing the dolphin’s performance, the exhibition is

⁹⁰*Id.*

⁹¹*Id.* at 1351 (citing *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 573 (1997)).

⁹²*907 Whitehead*, 701 F.3d at 1351.

⁹³*Id.* at 1350.

⁹⁴*Good*, 49 Agric. Dec. 156.

⁹⁵*Id.* at 162.

⁹⁶*Id.*

maintained with the expectation of economic benefit to the resort.”⁹⁷ More generally, the Court held that “there may be a ‘distribution’ of animals at a fixed-site exhibition, through the display of the animals by television or *simply by making them available to the public*[.]”⁹⁸

Unlike the resort in *Good* which merely had animals that were “used to attract business” and were “maintained with the expectation of economic benefit,” the animals at captive hunt facilities *are* their business. This makes the argument that captive hunt facilities should be regulated as exhibitors even stronger than the resort’s in *Good*. Further, like the resort in *Good*, most captive hunt facilities also offer overnight lodging and meal services which strengthens the proposition that these facilities should also be regulated as exhibitors under the AWA.

IMPLICATIONS

Regulation under the AWA is just the first step in improving the conditions at captive hunt facilities. Current enforcement of the AWA has shown that meaningful regulation of exhibitors by APHIS is lacking. It would most likely take a complete structural change of APHIS to effectively license and regulate the captive hunt industry.

APHIS’ mission is “[t]o protect the health and value of American agriculture and natural resources.”⁹⁹ First, this mission does not address animal welfare. Though the AWA and Regulations address animal welfare, it is not a top priority for the agency. Second, this gives APHIS a broad range of regulation. APHIS regulates most of the industries under its control by conducting inspections. Adding over 1,000 captive hunt facilities to APHIS’ already overwhelmed docket would greatly hinder the effectiveness of the regulations.

⁹⁷*Id.* at 163.

⁹⁸ *Id.* at 174 (emphasis added).

⁹⁹ Animal and Plant Health Inspection Service, *About APHIS*, <https://www.aphis.usda.gov/aphis/banner/aboutaphis> (last modified Aug. 3, 2016).

There are also concerns that once a facility is licensed as an exhibitor, APHIS simply rubber-stamps renewal licenses even if the facility has been cited as noncompliant in multiple inspections.¹⁰⁰ Unfortunately the Fourth Circuit in *PETA v. USDA* held that the USDA's policy of renewing licenses for animal exhibitors with violations of AWA regulations was reasonable and thus afforded the policy *Chevron* deference.¹⁰¹ The Eleventh Circuit came to the same conclusion in a 2015 case brought by the Animal Legal Defense Fund.¹⁰² However, the D.C. Circuit held in 2017 that though the USDA's decision to renew the license in question was not inconsistent with the AWA, the Court could not evaluate whether the renewal was arbitrary and capricious given the prior AWA violations. The Court thus remanded for the USDA to explain why the renewal was warranted.¹⁰³ Hopefully other circuits follow this persuasive precedent of forcing the USDA to explain why they are renewing licenses for exhibitors that continue to violate the AWA.

Another problem with facilities that are regulated by the AWA is the lack of a private cause of action.¹⁰⁴ This means that when individuals or organizations want to challenge the license of an exhibitor, the individual or organization cannot challenge the license in court. The individual or organization may only petition to the USDA to act. This is a problem because the USDA is afforded great deference in its decisions to act or refrain from acting.

¹⁰⁰See *People for the Ethical Treatment of Animals v. United States Dep't of Agric.*, 861 F.3d 502 (4th Cir. 2017).

¹⁰¹*Id.*

¹⁰²*Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1211 (11th Cir. 2015).

¹⁰³*Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 608 (D.C. Cir. 2017).

¹⁰⁴See *Zimmerman v. Wolff*, 622 F. Supp. 2d 240 (E.D. Pa. 2008).

CONCLUSION

Captive hunt facilities should be regulated as exhibitors under the AWA and thereby required to obtain an operational license from the USDA and to meet the minimum animal care requirements of the AWA. Animals at captive hunt facilities are currently suffering immensely every day at the hands of men, women, and children seeking to profit off their death. This industry is inadequately regulated and will only improve once it is under the federal regulation of the AWA.

Regulation of captive hunt facilities by the federal government will send the signal that the American people care deeply about the treatment of animals who are used and abused for commercial profit. Though captive hunt facilities will most likely still be killing innocent animals for “sport,” regulation under the AWA would improve their quality of life before they are killed.

When regulated, captive hunt facilities would need to comply with the AWA licensing, reporting, inspection, and animal care requirements. This would lessen the suffering of the animals at the facilities. Though these are only minimum animal care requirements and do not ensure completely humane treatment of the animals, it is a start in the right direction. Captive hunt facilities meet the requirements of exhibitors under the AWA and therefore should be regulated as such.



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