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# THE ANIMAL WELFARE ACT IS LACKING: HOW TO UPDATE THE FEDERAL STATUTE TO IMPROVE ZOO ANIMAL WELFARE

REBECCA L. JODIDIO<sup>1</sup>

## I. INTRODUCTION

Visiting the zoo is a beloved national pastime — American zoos attract 183 million people annually.<sup>2</sup> For many Americans, zoos provide the first, and sometimes only, opportunity for individuals to be in the presence of animals outside of domesticated cats and dogs. However, for the animals themselves, zoos can cause suffering.

Two philosophies support the protection of wild animals in captivity: an anthropocentric and ecocentric view. According to the former, anthropocentric view, wild animals hold an extrinsic value and when they cease to be valuable to humans, or conflict with our other values, their interests can be sacrificed.<sup>3</sup> The latter, ecocentric view, holds that wild animals have intrinsic value, can be morally harmed, and how we treat them should not be judged solely by the benefit to humans of a

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<sup>2</sup> *Visitor Demographics*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/partnerships-visitor-demographics> (last visited May 10, 2020); Karin Brulliard, *Zoos are Too Important to Fail*, WASHINGTON POST, Jul. 7, 2016, [https://www.washingtonpost.com/news/animalia/wp/2016/07/07/zoos-are-too-important-to-fail-but-they-can-be-much-better-than-they-are/?utm\\_term=.30496997b28f](https://www.washingtonpost.com/news/animalia/wp/2016/07/07/zoos-are-too-important-to-fail-but-they-can-be-much-better-than-they-are/?utm_term=.30496997b28f).

<sup>3</sup> ROBERT GARNER, ANIMALS, POLITICS AND MORALITY, 163 (Mikael S. Andersen et al. eds., 2nd ed. 2004).

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particular course of action.<sup>4</sup> This article is written from the philosophy that animals have an intrinsic value. It examines how zoos operate under the Animal Welfare Act and how it must be improved to better zoo animal welfare under the ecocentric view.

Part II provides an overview of the Animal Welfare Act, under which all zoos must adhere and are licensed. Part III discusses issues with the Animal Welfare Act, focusing on the lack of enforcement, bare minimum care standards, the United States Department of Agriculture's ("USDA") failure to shut down non-compliant zoos, and the USDA's secrecy regarding Animal Welfare Act violator documentation. Part IV discusses two zoo accreditation organizations that provide additional animal welfare guidance to zoos and offer membership status. Part V examines the problems with zoos, including individual animal psychological suffering in captivity and breeding programs, animal susceptibility to human diseases, exploitation of zoo animals for human entertainment, and potential harm to humans. Part VI examines suggestions for improvement to the Animal Welfare Act and the viability of these recommendations, assessing their practicality and sufficiency. This article concludes that the Animal Welfare Act should be amended with species specific guidelines, a prohibition on public contact with animals, a stricter licensing procedure, and a provision for the creation of USDA facilities to treat and house confiscated animals from non-compliant zoos. Without meaningful changes to the Animal Welfare Act, the animals will continue to suffer in sub-par conditions.

## II. THE ANIMAL WELFARE ACT

The Animal Welfare Act ("AWA"), passed in 1966,<sup>5</sup> is the only federal statute in America that protects the welfare of individual zoo animals<sup>6</sup> and ensures that animals used for exhibition purposes are provided humane care and treatment.<sup>7</sup> The AWA gives authority to the Secretary of Agriculture to "promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities and exhibitors."<sup>8</sup> Animal exhibitors are also required to be licensed

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<sup>4</sup> *Id.*

<sup>5</sup> *Animal Welfare Act*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/ct\\_awa\\_program\\_information](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_program_information), (updated: Sept. 13, 2019).

<sup>6</sup> Kali S. Grech, *Overview of the Laws Affecting Zoos*, ANIMAL LEGAL & HISTORICAL CENTER AT MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, <https://www.animallaw.info/article/overview-laws-affecting-zoos> (last visited May 10, 2020).

<sup>7</sup> 7 U.S.C. § 2131 (2020).

<sup>8</sup> 7 U.S.C. § 2143(a)(1) (2020).

under the AWA.<sup>9</sup> However, the standards described only need to address minimum care and treatment requirements.<sup>10</sup> The AWA also lacks a citizen-suit provision, making it very difficult for private citizens to gain standing to challenge violations under the AWA.<sup>11</sup>

The AWA's scope is greatly limited by the statute's definitions.<sup>12</sup> The definition of "animal" under the AWA only includes "any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal as the Secretary of Agriculture may determine is being used" for exhibition purposes; excluding birds, rats, horses not used for research purposes, and all cold-blooded animals (amphibians and reptiles).<sup>13</sup> Also notably absent is coverage for "farm animals used for food or fiber (fur, hide, etc.) . . . fish . . . [and] invertebrates (crustaceans, insects, etc.)"<sup>14</sup> An "exhibitor," defined by the AWA, "means 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," including zoos, operating for profit or not.<sup>15</sup> For the purpose of this paper, "zoo" includes public and privately owned exhibitors, including roadside menageries, referred to as roadside zoos, often used to entice people to visit other facilities such as a shopping center or service station.<sup>16</sup>

### III. ISSUES ARISING UNDER THE AWA

#### A. LACK OF ENFORCEMENT OF THE AWA

The AWA gives power to the Secretary of Agriculture and the USDA, who further delegate power to the Animal Plant and Health Inspection Service ("APHIS") to administer and enforce the AWA's requirements.<sup>17</sup> There are only about 130<sup>18</sup> APHIS inspectors conducting

<sup>9</sup> 7 U.S.C. § 2133 (2020).

<sup>10</sup> 7 U.S.C. §§ 2143(a)(2), 2133 (2020).

<sup>11</sup> Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, ANIMAL LEGAL & HISTORICAL CENTER AT MICHIGAN STATE UNIVERSITY COLLEGE OF LAW (2004), <https://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos#id-3> (last visited May 10, 2020).

<sup>12</sup> *Id.*

<sup>13</sup> 7 U.S.C. § 2132(g) (2020); *Animal Welfare Act*, *supra* note 5.

<sup>14</sup> *Animal Welfare Act*, *supra* note 5.

<sup>15</sup> 7 U.S.C. § 2132(h) (2020).

<sup>16</sup> *Roadside Zoos are not Zoos*, ANIMAL STUDIES REPOSITORY - THE HUMANE SOCIETY INSTITUTE FOR SCIENCE AND POLICY, 3 (1980), [https://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1027&context=cu\\_reps](https://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1027&context=cu_reps).

<sup>17</sup> Grech, *Overview of the Laws Affecting Zoos*, *supra* note 6.

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yearly inspections of the over 8,000<sup>19</sup> licensees and registrants under the AWA and investigating complaints.<sup>20</sup>

If inspectors find a problem, the zoo is issued a warning and given a time frame to comply.<sup>21</sup> If the problem is serious and not remedied, the zoo may be referred for investigation and potential administrative law proceedings where a judge could impose a fine or license suspension.<sup>22</sup> While USDA investigations often take years to go through the legal process, violators still have their licenses automatically renewed with the payment of a yearly renewal fee.<sup>23</sup> Licenses are renewed even if the facility is currently under investigation, has charges pending, or has recently paid significant fines.<sup>24</sup> From 2016 to 2018, new USDA investigations into captive-animal welfare and safety issues dropped by 92%, from 239 to just 19.<sup>25</sup> There was also a 65% drop in citations, from 4,944 in 2016, to 1,716 in 2018.<sup>26</sup>

In 2016, when People for the Ethical Treatment of Animals (“PETA”) sued the USDA for “rubber-stamping” renewals of licenses rather than conducting thorough investigations, the court found in favor of the USDA based on Chevron deference to the USDA’s interpretation of license renewal under the AWA.<sup>27</sup> In its last audit of controls over APHIS licensing of animal exhibitors, conducted in 2010, the USDA’s Office of the Inspector General criticized APHIS for not aggressively

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<sup>18</sup> *Investigative and Enforcement Services*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, <https://www.aphis.usda.gov/aphis/ourfocus/business-services/ies>, (updated: March 30, 2020).

<sup>19</sup> *Listing of Certificate Holders*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, [https://www.aphis.usda.gov/animal\\_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/List-of-Active-Licensees-and-Registrants.pdf), (updated: March 31, 2020).

<sup>20</sup> Grech, *Overview of the Laws Affecting Zoos*, *supra* note 6.

<sup>21</sup> Justin Jouvenal, *Mauling, escapes and abuse: 6 small zoos, 80 sick or dead animals*, THE WASHINGTON POST, (Sept. 18, 2015), [https://www.washingtonpost.com/local/crime/mauling-escapes-and-abuse-6-small-zoos-80-sick-or-dead-animals/2015/09/18/dff46f10-2581-11e5-b77f-eb13a215f593\\_story.html?utm\\_term=.3913653b1a1f](https://www.washingtonpost.com/local/crime/mauling-escapes-and-abuse-6-small-zoos-80-sick-or-dead-animals/2015/09/18/dff46f10-2581-11e5-b77f-eb13a215f593_story.html?utm_term=.3913653b1a1f).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

<sup>25</sup> Sharon Guynup, *Captive tigers in the U.S. outnumber those in the wild. It’s a problem*, NATIONAL GEOGRAPHIC, Nov. 14, 2019, <https://www.nationalgeographic.com/animals/2019/11/tigers-in-the-united-states-outnumber-those-in-the-wild-feature.html>.

<sup>26</sup> *Id.*

<sup>27</sup> *People for the Ethical Treatment of Animals v. United States Dep’t of Agric.*, 194 F.Supp.3d 404, 415 (E.D.N.C. 2016)(As the AWA is silent to whether the USDA could renew licenses of animal exhibitors with recent AWA violations, the court deferred to the agency’s judgment and found the agency did not act arbitrarily or capriciously), *aff’d*, 861 F.3d 502 (4th Cir. 2017)(The AWA was ambiguous as to whether the term “issue,” as used in 7 U.S.C.S. § 2133, encompassed license renewal, and the USDA’s interpretation of the renewal process was reasonable).

pursuing violators in the eastern half of the United States.<sup>28</sup> For example, the report found that for six of the forty traveling exhibitors reviewed, APHIS inspectors could not perform timely re-inspections to ensure that serious non-compliant items that were identified had been resolved.<sup>29</sup> APHIS countered that it is in the interest of animals to work with violators, rather than punish them.<sup>30</sup>

#### B. THE AWA ONLY REQUIRES BARE MINIMUM STANDARDS

The AWA sets standards for USDA-regulated zoos at a bare minimum. Lisa Wathne, captive wildlife specialist at The Humane Society of the United States (“Humane Society”), notes that the guidelines are too general and minimal, basically only requiring that animals have enough food and water to stay alive and enough space to stand up and lay down.<sup>31</sup> Guidelines are also frequently vague and leave room for subjective interpretation.<sup>32</sup> For example, the Secretary of Agriculture’s current regulations<sup>33</sup> require *adequate* drinking water on premises<sup>34</sup> and *sufficient* shade for animals kept outdoors if sunlight would likely cause overheating.<sup>35</sup> Without specifics, zoos can interpret regulations to their convenience, potentially resulting in animal discomfort and suffering.

<sup>28</sup> Jouvenal, *supra* note 21. “The audit found the number of suspected violators referred for enforcement in the region dropped from 209 in 2002 to 82 in 2004. More recent figures provided by APHIS show that the number dropped to 32 in 2012. The figure rebounded to 91 in 2013, fell to 53 in 2014 and climbed back to 111 through the first half of 2015.” *Id.*; OIG, Audit Report 33601-10-Ch, Controls Over Animal Plant Health Inspection Service Licensing of Animal Exhibitors, (U.S.D.A. 2010), <https://www.usda.gov/oig/webdocs/33601-10-CH.pdf>.

<sup>29</sup> OIG, *supra* note 28. For example, one exhibitor continued to show its elephants on the road even though it had been cited for the animals being too thin for travelling exhibition. This occurred because APHIS did not require exhibitors to submit travel itineraries so inspectors were unable to locate them for re-inspections. As a result, there was no way for APHIS to determine if serious safety violations had been corrected. *Id.*

<sup>30</sup> Jouvenal, *supra* note 21.

<sup>31</sup> Christina M. Russo, *Don’t Ever Visit Roadside Zoos. Here’s Why*, THE DODO, (Jun. 29, 2015), <https://www.thedodo.com/hey-america-this-is-your-local-zoo-1155061454.html>; See 9 C.F.R. § 3.128 (2020). “Enclosures shall be constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.” *Id.*

<sup>32</sup> Grech, *Detailed Discussion of the Laws Affecting Zoos*, *supra* note 11.

<sup>33</sup> *Id.* (The Secretary of Agriculture’s regulations are found in Title 9 of the Code of Federal Regulations §§ 1.1-4.11.); 9 C.F.R. §§ 1.1-4.11 (The regulations are given authority by 7.U.S.C. § 2143, 7 C.F.R. § 371.7).

<sup>34</sup> 9 C.F.R. § 3.125(b) (2020).

<sup>35</sup> 9 C.F.R. § 3.127(a) (2020).

## C. NON-COMPLIANT ZOOS ARE RARELY SHUT DOWN

As long as zoos meet the minimum standard of care and do not have egregious issues, as subjectively determined by each inspector, any USDA violations issued are essentially meaningless.<sup>36</sup> The USDA inspector does not follow up with violators to confirm their compliance — they simply note the violation again during the next inspection if it continues, leaving captive animals to suffer year over year at facilities.<sup>37</sup> While not all roadside zoos are licensed (though they legally should be), those that are often contain exhibited animals in unnatural environments such as small, dirty cages.<sup>38</sup> For example, the Lupa Zoo in Ludlow, Massachusetts has been cited for at least 13 noncompliance violations since 2012, and in the 15 inspections it received from the USDA from 2005 to 2015, it received a minimum of one USDA citation on all but one inspection.<sup>39</sup> Despite the many citations over the years, Lupa Zoo continues to welcome visitors today.<sup>40</sup>

Even in the rare case where a roadside zoo is shut down, which can take years, the USDA rarely confiscates or supervises re-homing of the animals.<sup>41</sup> The captive animals are left to “languish as the owner’s private pets or are given away to other roadside zoos,” explains Wathne.<sup>42</sup> When a facility is closed down because a license is revoked by the USDA, the animals are still property of the owner; if a state does not allow particular animals as private pets, they may be sold or transferred to another location.<sup>43</sup> Because there is no established facility for captive animals to be sent to if a zoo is shut down by the USDA, the USDA rarely closes such facilities.<sup>44</sup> Even if euthanasia were the most humane action, it is never really an option due to public perception. There is simply no good ending for these animals.<sup>45</sup>

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<sup>36</sup> Russo, *supra* note 31.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Russo, *supra* note 31. Some of the citations include not providing adequate veterinary care, letting animal food get caked in mud, metal spikes exposed in the animal enclosure, etc. *Id.*

<sup>40</sup> LUPA ZOO, <http://www.lupazoo.org/> (last visited May 10, 2020); *See Inspection Reports Search*, UNITED STATES DEPARTMENT OF AGRICULTURE – APHIS – ANIMAL CARE, <https://acis.aphis.edc.usda.gov/ords/f?p=118:203>, (last visited May 11, 2020); *See also Inspection Report – Lupa Game Farm Inc.*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, at 171, [https://www.aphis.usda.gov/animal\\_welfare/downloads/awa/Inspection\\_Reports/E/AWA\\_IR\\_C-MA\\_secure.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/awa/Inspection_Reports/E/AWA_IR_C-MA_secure.pdf), (updated: Apr. 3, 2017).

<sup>41</sup> Russo, *supra* note 31.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

D. USDA SECRECY AND COMPLICATIONS FOR THIRD PARTY  
ADVOCATES

The USDA lacks incentive to increase enforcement of the AWA. Because the courts cannot provide relief for plaintiffs who lack standing without a citizen suit provision in the AWA, public pressure and media exposure helps with AWA enforcement.<sup>46</sup> Since the AWA has proved to be difficult to enforce and the lack of a citizen's suit provision means a concerned citizen cannot sue on behalf of the welfare of a zoo animal, reprieve for these animals is limited.<sup>47</sup>

To bring animal abuse to light, the USDA has two ways for the public to search USDA/APHIS documents: the Animal Care Information Search (“ACIS”) and the Enforcement Actions database (“EA”).<sup>48</sup> In early 2017, the USDA removed thousands of documents from its website, citing privacy concerns as justification.<sup>49</sup> Documents removed included those that detail animal welfare violations, some of which have been posted for decades.<sup>50</sup> Anyone wishing to find information had to submit an official request under the Freedom of Information Act (“FOIA”).<sup>51</sup> However, these requests can take months to process.<sup>52</sup> The removed records publicly revealed many cases of abuse and mistreatment, exposing AWA violators to the public.<sup>53</sup>

The Animal Legal Defense Fund (“ALDF”) and its coalition — Stop Animal Exploitation NOW!, Companion Animal Protection Society, and Animal Folks — brought suit against the USDA for an injunction to the government's removal of the USDA and APHIS documents in the two online databases, which were an online library; the Humane Society similarly filed for declaratory and injunctive relief in March 2018.<sup>54</sup>

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<sup>46</sup> Grech, *Overview of the Laws Affecting Zoos*, *supra* note 6.

<sup>47</sup> *Id.*

<sup>48</sup> *Animal Legal Def. Fund v. United States Dep't of Agric.*, No. 17-CV-00949-WHO WL 2352009 (N.D. Cal., May 31, 2017) (order denying motion for preliminary injunction); *Animal Legal Def. Fund v. United States Dep't of Agric.*, 17-CV-00949-WHO WL 3478848 (N.D. Cal., Aug. 14, 2017) (order granting motion to dismiss), *aff'd in part, rev'd in part*, 935 F.3d 858 (9th Cir. 2019) [hereinafter “*Animal Legal Defense Fund Case*”].

<sup>49</sup> Natasha Daly, *U.S. Animal Abuse Records Deleted – What We Stand to Lose*, NATIONAL GEOGRAPHIC, Feb. 6, 2017, <https://news.nationalgeographic.com/2017/02/wildlife-watch-usda-animal-welfare-trump-records/>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Animal Legal Def. Fund v. United States Dep't of Agric.*, 17-CV-00949-WHO WL 3478848 (N.D. Cal., Aug. 14, 2017) (order granting motion to dismiss), *aff'd in part, rev'd in part*, 935 F.3d 858 (9th Cir. 2019); Complaint at 1-3, *Humane Society v. Animal and Plant Health Inspection Service et al.*, No. 1:18-cv-00646-TNM (BNA)(D.D.C. Mar. 21, 2018); *Press Release: Federal*

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In the ALDF case, the Ninth Circuit of Appeals reversed the United States District Court for the Northern District of California, which dismissed the lawsuit in August 2017, and remanded the case back to district court to determine the legality of the database removal.<sup>55</sup> In the interim, as of August 2017, APHIS reinstated its Public Search Tool; however, APHIS made changes to document availability and claims to be continuing its document review, so some information must still be requested through the lengthy FOIA process.<sup>56</sup> For example, in the past, warning letters, stipulations, pre-litigation agreements, and administrative complaints in which culpability is not assessed were posted unredacted, whereas now, APHIS will only post statistical summaries each calendar quarter.<sup>57</sup> Without access to detailed documents, people cannot easily conduct independent research, and reporters are not able to report animal abuses.<sup>58</sup> In the past, such reporting resulted in the closing of a roadside zoo, increased protections for farm animals being experimented on, exposed the death of thirty eight primates at a pharmaceutical research facility, and the list goes on.<sup>59</sup>

For example, using USDA and APHIS documents as crucial evidence, a 2011 *Mother Jones* investigation shed light on the dire plight of elephants who were living in cramped conditions and being whipped and

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*Appeals Court Reinstates Lawsuit Challenging USDA Secrecy on Animal Welfare Act Records*, ANIMAL LEGAL DEFENSE FUND, Aug. 29, 2019, <https://aldf.org/article/federal-appeals-court-reinstates-lawsuit-challenging-usda-secrecy-on-animal-welfare-act-records/>.

<sup>55</sup> *Id.*

<sup>56</sup> *Animal Care Information System Website Review Chart*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA\\_AWA/acis-table](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_AWA/acis-table) (last visited May 11, 2020); *AWA Inspection and Annual Reports*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa\\_awa/awa-inspection-and-annual-reports](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports) (last visited May 11, 2020); *See Animal Welfare Enforcement Actions*, UNITED STATES DEPARTMENT OF AGRICULTURE – ANIMAL AND PLANT HEALTH INSPECTION SERVICE, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/enforcementactions> (last visited May 11, 2020).

<sup>57</sup> *Id.*

<sup>58</sup> Daly, *supra* note 49.

<sup>59</sup> *Id.* With the use of USDA reports and documents, a *Mother Jones* reporter exposed two decades of poor sanitation conditions, tiny pens for movement, and premature deaths at DEW Haven, a roadside zoo in Maine. The *New York Times* relied heavily on USDA/APHIS welfare records to expose the suffering of farm animals at the U.S. meat Animal Research Center, a USDA facility designed to create meatier and more fertile livestock but resulted in newborns starving or freezing to death and other problematic practices. The report led to the USDA shutting down all experimental projects until welfare standards could be improved and approved. Because of this exposure, then Secretary of Agriculture, Tom Vilsack, appointed the first-ever animal welfare ombudsman to oversee the welfare of animals at USDA-run facilities. These are just a few of the examples of how access to USDA documents resulted in exposure of animal abuse, AWA violations, and improvement in animal welfare. *Id.*

chained by handlers.<sup>60</sup> The story led to “public outcry and petitions calling for the elephants’ removal from the circus.”<sup>61</sup> Ringling Brothers declared in 2016 that it would stop touring elephants.<sup>62</sup> Then in January 2017, it announced that after 146 years, the circus would shut down permanently.<sup>63</sup> James West, who reported on the egregious animal abuses at the roadside zoo in Maine, said he heavily relied on the USDA/APHIS database and pointed out how “cumbersome a task” it is for nonprofit watchdog organizations to discover animal suffering nationwide, expose perpetrators, and find holes in current legislation to improve.<sup>64</sup> These organizations are already overworked and struggling financially.<sup>65</sup> Although it is the government’s responsibility to “be the reservoir of public information,” with the government’s inaction and lack of resources, the responsibility largely falls on third parties.<sup>66</sup> By reducing access to these documents, the lack of transparency makes it difficult for interested parties to keep tabs on violators and expose abuses.<sup>67</sup>

#### IV. ZOO ACCREDITING ORGANIZATIONS

As the AWA provides only minimal guidelines and the USDA does not take significant enforcement actions, zoo accreditation organizations provide further guidance and monitor member adherence.<sup>68</sup> Zoos must adhere to the set-out guidelines to be considered accredited member organizations.<sup>69</sup> This allows the public to make a more informed decision when choosing which animal exhibitor to visit relating to the conditions the animals are kept in and how they are treated overall. While these entities can strip non-conforming facilities of membership, they have no authority to prosecute member institutions for violations of the law, relying on law enforcement and the court system.<sup>70</sup> The Association of Zoos and Aquariums and the Zoological Association of America are two of the

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<sup>60</sup> Daly, *supra* note 49; Deborah Nelson, *The Cruellest Show on Earth*, MOTHER JONES, Nov./Dec. 2011, <http://www.motherjones.com/environment/2011/10/ringling-bros-elephant-abuse/>.

<sup>61</sup> Daly, *supra* note 49.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Rachel Garner, *How to Understand Zoo Accreditation*, WHY ANIMALS DO THE THING, July 4, 2016, <https://www.whyanimalsdothething.com/how-to-understand-zoos-accreditation/>.

<sup>69</sup> *Id.*; *About AZA Accreditation*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/what-is-accreditation> (last visited May 11, 2020).

<sup>70</sup> *Accreditation FAQ*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/accred-faq> (last visited May 11, 2020); See Grech, *Overview of the Laws Affecting Zoos*, *supra* note 6.

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most well-known zoo accrediting organizations.<sup>71</sup> The USDA National Agricultural Library lists both organizations on its references tab for the Animal Welfare Information Center on the USDA website.<sup>72</sup>

The most meaningful of the zoo accreditation organizations is the Association of Zoos and Aquariums (“AZA”).<sup>73</sup> It is supported by the Congressional Zoo and Aquarium Caucus, which is comprised of U.S. House of Representatives members, currently co-chaired by Democratic representative Daniel Lipinski and Republican representative Jeff Fortenberry, who are supportive of the animal welfare cause.<sup>74</sup> As of April 2020, the total number of AZA-accredited zoos and aquariums worldwide is 240, with 217 in the United States.<sup>75</sup> Of the approximately 2,800 animal exhibitors licensed by the USDA in America, less than 10% are AZA-accredited.<sup>76</sup> Member organizations renew accreditation every five years.<sup>77</sup>

The AZA requires a standard for animal welfare including nutrition, comfortable living, physical health, natural coping skills to mimic the wild, chronic stress avoidance, and quality space and social grouping, as appropriate.<sup>78</sup> The AZA also requires member zoos to make conservation a priority by: (1) contributing to long-term species survival in natural ecosystems and habitats, (2) using “green” practices and education programs that emphasize the institution’s and community’s role in stewardship of natural resources and ecosystem conservation, (3) committing to scientific advancement to better understand the individual needs of each species, and (4) providing and justifying financial statements.<sup>79</sup> Jack Hanna, Director Emeritus of the Columbus Zoo and the host of two wildlife shows, is a proponent of the AZA, pointing out that in 2013, the organization donated nearly \$160 million to support about 2,450 conser-

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<sup>71</sup> Rachel Garner, *supra* note 68.

<sup>72</sup> *Organizations: Exhibit Animals*, UNITED STATES DEPARTMENT OF AGRICULTURE NATIONAL AGRICULTURAL LIBRARY, <https://www.nal.usda.gov/awic/organizations-exhibit-animals> (last visited May 11, 2020).

<sup>73</sup> Rachel Garner, *supra* note 68; *See About Us*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/about-us> (last visited May 11, 2020).

<sup>74</sup> *Zoo and Aquarium Caucus*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/zoo-and-aquarium-caucus> (last visited May 11, 2020).

<sup>75</sup> *Current Accreditation List*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/current-accreditation-list> (last visited Jan. 24, 2019); *Zoo and Aquarium Statistics*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/zoo-and-aquarium-statistics> (last visited May 11, 2020).

<sup>76</sup> *Accreditation FAQ*, *supra* note 70.

<sup>77</sup> *Accreditation Basics*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/becoming-accredited> (last visited May 11, 2020).

<sup>78</sup> *The AZA Accreditation Standards & Related Policies: 2020 Edition*, ASSOCIATION OF ZOOS & AQUARIUMS (2020), at 9, <https://www.aza.org/assets/2332/aza-accreditation-standards.pdf>.

<sup>79</sup> *Id.* at 21-24, 28.

vation projects in more than 120 countries.<sup>80</sup> Hanna also credits AZA zoos' commitment to conservation for helping species such as the black-footed ferret and Mexican wolf overcome near-extinction.<sup>81</sup>

The other accreditation most often seen in the United States is from the Zoological Association of America ("ZAA").<sup>82</sup> The ZAA was established in 2005 by combining the International Society of Zooculturists, founded in 1987, and the United Zoological Association, founded in 2000.<sup>83</sup> The ZAA's mission, according to their website, is to promote responsible wildlife management, conservation, and education in publicly and privately-funded facilities."<sup>84</sup> The website also notes the ZAA's intent to provide resources to defend accredited facilities against false allegations and mischaracterizations.<sup>85</sup> Some of the facilities that failed to meet the AZA's accreditation sought, and met, ZAA's less strict standards.<sup>86</sup>

Wayne Pacelle, author of *The Humane Economy* and former President and Chief Executive Officer of the Humane Society, equates the hypocrisy of the ZAA working to block legislation to ban private ownership of dangerous wild animals as the equivalent of the Humane Society giving its blessing to factory farms or trophy hunting.<sup>87</sup> Pacelle also notes how the ZAA "accredits" roadside menageries that promote "trade in wildlife, allow dangerous public contact with juvenile carnivores, and provide deficient care of animals."<sup>88</sup> By re-sequencing the nomenclature of the AZA, the ZAA confuses the public into thinking the facilities are legitimate and received the more stringent AZA approval.<sup>89</sup> This results in giving the public the false assurance that this behavior, such as the public handling of wildlife for feedings or photos, is okay and puts money into the pockets of these unethical businesses.<sup>90</sup>

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<sup>80</sup> Jack Hanna, *Jack Hanna: What Zoo Critics Don't Understand*, TIME, May 15, 2015, <http://time.com/3859186/zoo-defense/>. Hanna hosts "Jack Hanna's Wild Countdown" and "Jack Hanna's Into the Wild." *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Rachel Garner, *supra* note 68.

<sup>83</sup> *History of ZAA*, ZOOLOGICAL ASSOCIATION OF AMERICA, <http://www.zaa.org/about-zaa/history-of-zaa> (last visited May 11, 2020).

<sup>84</sup> *Id.*

<sup>85</sup> *Mission Statement*, ZOOLOGICAL ASSOCIATION OF AMERICA, <https://zaa.org/mission-statement> (last visited May 11, 2020).

<sup>86</sup> Wayne Pacelle, *HSUS, Top Zoos Can Together Be a Force for Good*, A HUMANE NATION, Sept. 11, 2017, <https://blog.humanesociety.org/wayne/2017/09/hsus-top-zoos-force-for-good.html>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; See Kat Eschner, *The Big Unsexy Problem With Tiger Selfies*, SMITHSONIAN MAGAZINE, Aug. 15, 2017, <https://www.smithsonianmag.com/science-nature/the-big-unsexy-problem-with-tiger-selfies-180964489/> (Organizations that market tiger photo ops often give sedatives to tigers to

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Both the AZA and ZAA accredited facilities are held to AWA license requirements and subject to USDA inspections, though they have differing standards otherwise. For example, enforced as of September 2014, the AZA established a safety policy that prohibits keepers from sharing the same physical space with elephants except for certain, limited exceptions.<sup>91</sup> Conversely, the ZAA adopted Elephant Husbandry Resource Guide standards that are used by the Elephant Managers Association, believing that the decision regarding protected contact with elephants should be left to the governing body of each organization, effectively providing no oversight.<sup>92</sup> In another example, AZA zoos do not allow public contact with tigers and use only purebred tigers for conservation purposes.<sup>93</sup> By contrast, some ZAA accredited zoos allow cub petting.<sup>94</sup> While ZAA's accreditation standards and related policies are under revision according to their website and have not been updated since 2016, AZA's standards and policies are up to date as of 2020.<sup>95</sup>

## V. THE PROBLEMS WITH ZOOS

Examples in this section will focus primarily on AZA accredited facilities. While the AZA is considered to have the most stringent requirements for its members, even those zoos subject to AZA and AWA standards, have room for improvement.

## A. ZOOCHOSIS AND OTHER ANIMAL SUFFERING IN ZOOS

It is difficult to assess the “moral validity” of modern zoos and their non-entertainment functions, because each species has different needs, and the conditions in which animals are kept vary greatly between zoos,

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protect the public); *See also Schedule a Tour*, EXOTIC FELINE BREEDING COMPOUND'S FELINE CONSERVATION CENTER, <http://www.cathouse-fcc.org/tours.html> While the website provides little information, the Feline Conservation Center, accredited by the ZAA, offers “Assisted Tiger Feeding” starting at \$300 per group. *Id.*

<sup>91</sup> Ed Stewart, *No Ethical Way to Keep Elephants in Captivity*, NATIONAL GEOGRAPHIC SOCIETY NEWSROOM, May 3, 2013, <https://blog.nationalgeographic.org/2013/05/03/no-ethical-way-to-keep-elephants-in-captivity/>; *The AZA Accreditation Standards & Related Policies: 2020 Edition*, *supra* note 78, at 68.

<sup>92</sup> *Animal Care & Enclosure Standards and Related Policies*, ZOOLOGICAL ASSOCIATION OF AMERICA (2016), 23, <https://zaa.org/resources/Documents/membership%20and%20applications/ZAA%20Accreditation%20Standards%202016.pdf>.

<sup>93</sup> Guynup, *supra* note 25.

<sup>94</sup> *Id.*

<sup>95</sup> *Animal Care & Enclosure Standards and Related Policies*, *supra* note 91; *ZAA Accreditation Standards*, ZOOLOGICAL ASSOCIATION OF AMERICA, <https://zaa.org/standards>; *The AZA Accreditation Standards & Related Policies: 2020 Edition*, *supra* note 78; *2020 Accreditation Standards and Related Policies*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/accred-materials>.

especially when considering roadside zoos.<sup>96</sup> On top of varying standards between zoo accreditation agencies, it is difficult to measure the suffering of wild animals in captivity.<sup>97</sup> While physical pain and poor health are easier to detect, animal suffering may not be accompanied by visible signs.<sup>98</sup> Animals cannot verbally communicate their emotional discomfort to humans but occasionally express psychological pain through repetitive behaviors.<sup>99</sup> These repetitive behaviors that almost never occur in the wild are so common in captivity, that they were given a name, zoochosis, or “psychosis caused by confinement.”<sup>100</sup>

Many species cannot thrive in captive settings, particularly the large animals that people come to see such as elephants, big cats, dolphins and whales.<sup>101</sup> Due to their large size, the complexity of their social lives, or their instinctive need to hunt over long distances, minor habitat adjustment will do little to improve their situation.<sup>102</sup> For example, polar bears, tigers, and foxes are known to travel hundreds of miles in the wild in search for food which cannot be replicated in captivity.<sup>103</sup> Instead, these zoo animals often live in cramped conditions, different from their natural environment, resulting not only in zoochosis, but also depression.<sup>104</sup> Zoos frequently drug them with antipsychotics, because it is much less expensive than redoing already expensive exhibits to stop these behaviors.<sup>105</sup>

For example, in the mid-1990s, a polar bear named Gus in the Central Park Zoo would compulsively swim figure eights in his pool, sometimes up to 12 hours a day.<sup>106</sup> The zoo nicknamed him the “bipolar bear,” gave him a dose of Prozac, and spent \$25,000 worth of behavioral therapy to calm his neuroses.<sup>107</sup> Laurel Braitman, who documented Gus and other mentally unstable animals, described how being forced to live in unnatural habitats, on display, in zoos, caused zoochosis that serves no

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<sup>96</sup> ROBERT GARNER, *supra* note 3 at 94.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Laura Smith, *Zoos Drive Animals Crazy*, SLATE, June 20, 2014, [http://www.slate.com/blogs/wild\\_things/2014/06/20/animal\\_madness\\_zoochosis\\_stereotypic\\_behavior\\_and\\_problems\\_with\\_zoos.html](http://www.slate.com/blogs/wild_things/2014/06/20/animal_madness_zoochosis_stereotypic_behavior_and_problems_with_zoos.html).

<sup>100</sup> Smith, *supra* note 98.

<sup>101</sup> Karin Brulliard, *Zoos are Built for People. Animals Need Sanctuaries Instead*, WASHINGTON POST, Jul. 8, 2016, [https://www.washingtonpost.com/news/animalia/wp/2016/07/08/zoos-are-built-for-people-animals-need-sanctuaries-instead/?utm\\_term=.23074142c109](https://www.washingtonpost.com/news/animalia/wp/2016/07/08/zoos-are-built-for-people-animals-need-sanctuaries-instead/?utm_term=.23074142c109).

<sup>102</sup> ROBERT GARNER, *supra* note 3 at 95.

<sup>103</sup> *Id.*

<sup>104</sup> *See* Smith, *supra* note 99.

<sup>105</sup> Smith, *supra* note 99.

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

<sup>107</sup> *Id.*

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obvious purpose such as bar biting, hair plucking, and regurgitation and reingestion of food and vomit.<sup>108</sup>

Braitman noted that the industry is secretive about the issue as they do not want the public to know the “gorillas, badgers, giraffes, belugas, or wallabies on the other side of the glass are taking Valium, Prozac, or antipsychotics to deal with their lives as display animals.”<sup>109</sup> To combat zoonosis, enrichment activities, such as distracting toys, puzzles, or food that takes longer to eat, reduce stereotypic behavior 53% of the time.<sup>110</sup> While these programs are better than nothing, Braitman says they are only “a band aid” because when an animal is in an enclosure, regardless of how good it is, it’s still an enclosure.<sup>111</sup> Like Gus, other zoo animals are given drugs to subdue them, however, few medications are approved for administration to zoo animals and if appropriate data is not available, drug administrators try to extrapolate the proper dosage by looking at known parameters in other species.<sup>112</sup> Hoping to avoid organ toxicity in a group of animals, a “guinea pig” is selected and if no adverse effects are seen, the rest of the group is given the medication.<sup>113</sup>

#### B. BREEDING PROGRAMS MAY CAUSE INDIVIDUAL ANIMAL SUFFERING

Zoos’ breeding programs exchange animals to preserve genetic diversity of each species through Species Survival Plans.<sup>114</sup> These programs, overseen in AZA zoos by their Taxon Advisory Groups,<sup>115</sup> disrupt family or pack units, adding additional stress to animals, particularly to species that live in close-knit groups such as gorillas and elephants.<sup>116</sup> The Milwaukee County Zoo, for example, continuously shifts

<sup>108</sup> Smith, *supra* note 99.

<sup>109</sup> *Id.* Many zookeepers are bound by non-disclosure agreements, preventing them from sharing concerns with anyone outside the zoo. *Id.*

<sup>110</sup> *Id.*; Ronald R. Swaisgood and David J. Shepherdson, *Scientific Approaches to Enrichment and Stereotypies in Zoo Animals: What’s Been Done and Where Should We Go Next?*, 24 *Zoo Biology* 499, 513 (Nov./Dec. 2005).

<sup>111</sup> Smith, *supra* note 99.

<sup>112</sup> Michael R. Loomis, *Clinical Care Programs for Zoo Animals – Drug Administration*, MERCK MANUAL: VETERINARY MANUAL, <https://www.merckvetmanual.com/exotic-and-laboratory-animals/zoo-animals/clinical-care-programs-for-zoo-animals> (last visited May 11, 2020).

<sup>113</sup> *Id.*

<sup>114</sup> *About Us – How New Animals Come to the Zoo*, ZOOLOGICAL SOCIETY OF MILWAUKEE, <http://www.zoosociety.org/About/AcquiringAnimals.php> (last visited May 11, 2020); *See Species Survival Plan Programs*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/species-survival-plan-programs> (last visited May 12, 2020).

<sup>115</sup> *Taxon Advisory Groups*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/taxon-advisory-groups> (last visited May 12, 2020).

<sup>116</sup> Smith, *supra* note 99.

its animal population to keep collections “fresh and exciting.”<sup>117</sup> Proponents of breeding programs argue that animals must be moved in order to pair genetically suitable mates for species survival.<sup>118</sup>

However, this argument fails to account for the impact on the animals themselves when they are moved.<sup>119</sup> For example, Tom, a gorilla observed by Braitman, was moved hundreds of miles to a new zoo for his genetic match to another gorilla.<sup>120</sup> At his new zoo, he was abused by other members of his species until he lost a third of his body weight and was sent back to his original zoo to be nursed back to health.<sup>121</sup> He was then sent back out again to another location for breeding.<sup>122</sup>

From a conservation perspective, endangered zoo animals bred in captivity are frequently viewed as an “insurance policy” for the gene pool.<sup>123</sup> While in some cases zoos do great work in preserving animal species that are on the brink of extinction in the wild, it raises the ethical question, “bred for what?” — particularly for animals that still have some healthy populations in the wild.<sup>124</sup> In the majority of cases, the animals are being bred for another generation to live in a zoo, never to be introduced back into the wild.<sup>125</sup>

While zoos do participate in conservation, research, breeding, and reintroduction programs for animal benefit, their portrayal of themselves as the guardians of the future of biodiversity is not the whole picture.<sup>126</sup> What about the rest of the animal species that do not need these programs because they are not endangered?<sup>127</sup> Even in the most animal friendly accredited zoos, of the self-reported 6,000 species being kept by AZA member organizations, only 1,000 species, about 17%, are threatened or endangered.<sup>128</sup> With over 800,000 animals in the care of AZA-accredited zoo and aquarium professionals,<sup>129</sup> the release of non-threatened or endangered species has the potential to affect hundreds of thousands of animals.

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<sup>117</sup> *Id.*; *About Us – How New Animals Come to the Zoo*, *supra* note 114.

<sup>118</sup> Smith, *supra* note 99.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Karin Brulliard, *What Harambe’s Death Means for a Critically Endangered Species of Gorilla*, THE WASHINGTON POST, Jun. 2, 2016, [https://www.washingtonpost.com/news/animalia/wp/2016/06/02/what-harambes-death-means-for-a-critically-endangered-species-of-gorilla/?utm\\_term=.028c7d4ceb45](https://www.washingtonpost.com/news/animalia/wp/2016/06/02/what-harambes-death-means-for-a-critically-endangered-species-of-gorilla/?utm_term=.028c7d4ceb45).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Smith, *supra* note 99.

<sup>127</sup> *Id.*

<sup>128</sup> *Zoo and Aquarium Statistics*, *supra* note 75.

<sup>129</sup> ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/> (last visited May 11, 2020).

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Critics of any wild animal captivity say that animals belong in the wild, but those areas are shrinking every day due to global warming or human commandeering.<sup>130</sup> Truly wild parts remain in Antarctica, parts of the Amazon, and some of Africa.<sup>131</sup> Left on its own in the wild, the white rhino has been driven to near extinction by poachers; the last male (in the wild or in captivity), Sudan, died in early 2018 and now only his daughter and granddaughter remain of the species.<sup>132</sup>

Aside from protection of vulnerable populations, some good zoos, do in fact, do good. An example of this good is the story of Przewalski's horses.<sup>133</sup> The last truly wild horses were declared extinct in the wild forty some years ago, wiped out from their native lands in China and Mongolia by habitat loss, over-hunting, and livestock encroachment."<sup>134</sup> At the time, fourteen Przewalski horses survived in zoos, and thanks to breeding and conservation efforts, there were enough offspring to begin reintroduction to the wild in the 1990s, resulting in the species being upgraded from extinct to endangered in 2008.<sup>135</sup> It is a difficult balance to strike between the inevitable restrictions placed on wild animals, the security they receive in captivity, and the continuation of their species.<sup>136</sup>

## C. CERTAIN SPECIES ARE SUSCEPTIBLE TO HUMAN DISEASES

While the research done on the spread of pathogens from humans to animals has been somewhat limited, reporting is increasing.<sup>137</sup> Certain animals, particularly penguins and chimpanzees, are highly susceptible to human diseases.<sup>138</sup> Based off a survey done of penguin diseases in captivity, as far back as 1947, there have been reports of Salmonella, E.

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<sup>130</sup> Hanna, *supra* note 80.

<sup>131</sup> *Id.*

<sup>132</sup> Hanna, *supra* note 80; Max Bearak, *Sudan, the world's last male northern white rhino, has died, putting his species on the brink of extinction*, THE WASHINGTON POST, March 20, 2018, [https://www.washingtonpost.com/news/worldviews/wp/2018/03/20/sudan-the-worlds-last-male-northern-white-rhino-has-died-putting-his-species-on-the-brink-of-extinction/?utm\\_term=.4a8ffc867ab3](https://www.washingtonpost.com/news/worldviews/wp/2018/03/20/sudan-the-worlds-last-male-northern-white-rhino-has-died-putting-his-species-on-the-brink-of-extinction/?utm_term=.4a8ffc867ab3).

<sup>133</sup> Hanna, *supra* note 80; Russell McLendon, *Once Extinct in the Wild, Rare Horse Species Welcomes New Filly*, MOTHER NATURE NETWORK, (Aug. 1 2013, 1:54PM), <https://www.mnn.com/earth-matters/animals/blogs/once-extinct-horse-species-welcomes-new-filly>.

<sup>134</sup> McLendon, *supra* note 133.

<sup>135</sup> *Id.*

<sup>136</sup> ROBERT GARNER, *supra* note 3 at 94.

<sup>137</sup> Ali M. Messenger, Amber N. Barnes & Gregory C. Gray, *Reverse Zoonotic Disease Transmission (Zooanthroponosis): A Systematic Review of Seldom-Documented Human Biological Threats to Animals*, PLOS ONE, 2014, available at <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0089055>.

<sup>138</sup> Penny Sarchet, *Antarctic Tourism May Pose Disease Threat to Penguins*, NEWS SCIENTIST, Dec. 19, 2014, <https://www.newscientist.com/article/dn26725-antarctic-tourism-may-pose-disease-threat-to-penguins/#.VJSDG8AA8>; Messenger, *supra* note 137.

Coli, West Nile virus, and Avian Pox virus infections.<sup>139</sup> The study also found evidence of mass penguin mortality events in Antarctica since 1969; Avian Pox killed more than 400 Gentoo penguins in 2006 and caused 60% mortality rates in another breakout in 2008.<sup>140</sup> While it is possible that some diseases may have arrived via migrating birds, some pathogenic bacteria may have come from visiting humans.<sup>141</sup> Unfortunately, there is not enough evidence in this scenario to conclusively test the possibilities.<sup>142</sup>

Pathogen spread from humans to animals can come from a zoo visitor with an illness, a sick caretaker, contamination of shared enclosures or food, or from the spread of disease through animal relocation.<sup>143</sup> There have been reports of human metapneumovirus (“HPMV”) outbreaks, a respiratory infection, in wild ape populations.<sup>144</sup> In Tanzania, a fatal outbreak of HPMV in wild chimpanzees was believed to be from researchers and tourists visiting a national park that was once the chimpanzees’ territory.<sup>145</sup> In 2009, staff members at a Chicago great ape facility experienced coughing and nasal discharge, which coincided with peak HPMV season in the United States.<sup>146</sup> One week later, all seven previously HPMV-negative chimpanzees, who had periodic contact with caretakers during daily feeding, cage cleaning, and training sessions, showed symptoms of moderate-to-severe respiratory disease, and one chimpanzee died.<sup>147</sup>

#### D. ANIMAL EXPLOITATION FOR HUMAN “EDUTAINMENT”<sup>148</sup>

Whistleblowers in zoos have shared with the Humane Society, “an abhorrence for the sorry approaches to animal care that persist in substandard roadside zoos and other settings,”<sup>149</sup> a symptom of the varying standards to zoo accreditation and lack of AWA enforcement by the USDA or law enforcement.<sup>150</sup>

<sup>139</sup> Sarchet, *supra* note 138.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Messenger, *supra* note 137.

<sup>144</sup> Owen M. Slater et. al, *Human Metapneumovirus Infection in Chimpanzees, United States*, 20 EMERGING INFECTIOUS DISEASES 2115 (2014) available at <https://wwwnc.cdc.gov/eid/article/20/12/pdfs/14-0408.pdf>.

<sup>145</sup> Messenger, *supra* note 137.

<sup>146</sup> Slater, *supra* note 144.

<sup>147</sup> *Id.*

<sup>148</sup> *Edutainment*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/edutainment> (last visited May 12, 2020).

<sup>149</sup> Pacelle, *supra* note 86.

<sup>150</sup> See Grech, *Detailed Discussion of the Laws Affecting Zoos*, *supra* note 11.

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Zoos teach children that animals exist on an extrinsic level, caged for their benefit and entertainment. Even when well meaning, our human desire for amusement and to connect to other species does not justify life-long animal frustration.<sup>151</sup> Tom, the gorilla moved between zoos for the sake of breeding, ran to his zookeepers when they visited him at his new zoo; visibly sobbing and following the zookeepers around “until visitors complained that the zookeepers were ‘hogging the gorilla.’”<sup>152</sup>

While zoos claim to offer humans the chance to connect with other species, the result is that the animals are ogled as they wither in a foreign habitat, sometimes drugged. The Smithsonian National Zoo displays for visitors a pair of owls in a small glass enclosure, next to a placard ironically stating that owls’ natural habitat is actually open spaces.<sup>153</sup> Zoo visitors want to be able to not only see, but also form a connection with the animals, which is impossible within the structural limitations of a zoo.<sup>154</sup> Forced displays of wildlife can foster visitors to feel separation and even a sense of alienation from nature.<sup>155</sup>

At its worst, zoos are edutainment: claiming to offer visitors a connection to other species, while stripping animals from their natural surroundings for the benefit of “commerce, voyeurism and ultimately anthropocentrism — the ideology that construes human beings as the most important living creatures.”<sup>156</sup> In reality, “ecology is a complex web of interconnection, not a hierarchy”<sup>157</sup> and zoos should be encouraging “kinship with nature” for a sustainable future.<sup>158</sup>

AZA sponsored studies claimed visitor attendance at accredited zoos would translate to visitor environmental conservationism and action.<sup>159</sup> However, a 2010 study by researchers from Emory University,

<sup>151</sup> Karin Brulliard, *Zoos Will ‘Look and Act Radically Different in 20 Years’*, WASHINGTON POST, Jul. 5, 2016, [https://www.washingtonpost.com/news/animalia/wp/2016/07/05/zoos-will-look-and-act-radically-different-in-20-years/?tid=A\\_inl&utm\\_term=.6b07fcac8b3c](https://www.washingtonpost.com/news/animalia/wp/2016/07/05/zoos-will-look-and-act-radically-different-in-20-years/?tid=A_inl&utm_term=.6b07fcac8b3c).

<sup>152</sup> Smith, *supra* note 99.

<sup>153</sup> *Id.*

<sup>154</sup> MARGO DEMELLO, *ANIMALS AND SOCIETY: AN INTRODUCTION TO HUMAN-ANIMAL STUDIES*, 112 (Columbia Univ. Press, 2012); Smith, *supra* note 99.

<sup>155</sup> STEPHEN R. KELLERT, *KINSHIP TO MASTERY: BIOPHILIA IN HUMAN EVOLUTION AND DEVELOPMENT*, 100 (Island Press, 1997).

<sup>156</sup> Randy Malamud, *The Destructive Lie of American Zoos: How We’ve Blinded Ourselves to the Truths of the Natural World*, SALON (Aug. 15, 2015, 10:59PM), [http://www.salon.com/2015/08/18/the\\_destructive\\_lie\\_of\\_american\\_zoos\\_how\\_weve\\_blinded\\_ourselves\\_to\\_the\\_truths\\_of\\_the\\_natural\\_world/](http://www.salon.com/2015/08/18/the_destructive_lie_of_american_zoos_how_weve_blinded_ourselves_to_the_truths_of_the_natural_world/). “Zoos and aquariums . . . provide [ ] the opportunity to ogle caged otherness, and to feel superior to all the exotic wild animals whose exoticism and wildness their captors have stripped away in the service of ‘edutainment’ . . .” *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Smith, *supra* note 99.

<sup>159</sup> John H. Falk, Eric M. Reinhard, Cynthia L. Vernon, Kerry Bronnenkant, & Joe E. Heimlich, *Why Zoos & Aquariums Matter: Assessing the Impact of a Visit to a Zoo or Aquarium*, RESEARCH GATE, Jan. 2007, available at [https://www.researchgate.net/profile/Cynthia\\_Vernon/](https://www.researchgate.net/profile/Cynthia_Vernon/)

Georgia State University, Morehouse College, and Arizona State University found that those results were “exaggerated, noting that ‘there is no compelling or even particularly suggestive evidence for the claim that zoos and aquariums promote attitude change, education, and interest in conservation in their visitors.’”<sup>160</sup> Supporting this conclusion, additional research found the average visitor spends under two minutes at each enclosure and most do not read any of the exhibit labels.<sup>161</sup> For the small minority of visitors that do gain an appreciation and concern for wildlife, this occurs primarily at zoos that focus on natural zoo and habitat design, native wildlife, and a greater diversity of species.<sup>162</sup> To have more of a lasting impact, zoos need to find innovative ways to connect the natural world to visitors’ lives, “emphasizing how natural diversity can enhance the possibilities for people to achieve a richer existence both emotionally and intellectually.”<sup>163</sup>

Like humans, animals can get bored, resulting in stoic and quiet dispositions. Zoos however, need lively animals to keep visitors engaged and coming back. At the Denver Zoo, zookeepers spray a little perfume, cologne, or essential oils inside enclosures to encourage animals to replicate behaviors in the wild and explore more of their environment.<sup>164</sup> At the Bronx Zoo, staff motivate confined tigers to be curious by spraying Calvin Klein’s ‘Obsession for Men’ on rocks, trees, and toys.<sup>165</sup>

Visitor carelessness and error at zoos can also lead to animal death. For example, in 2016, Harambe, a seventeen-year-old, 400 pound, Western lowland gorilla was killed when a child fell into his enclosure at the Cincinnati Zoo (an AZA zoo).<sup>166</sup> A special zoo response team was forced to shoot Harambe when he grabbed the four year old boy who fell

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publication/253004933\_Why\_Zoos\_Aquariums\_Matter\_Assessing\_the\_Impact\_of\_a\_Visit\_to\_a\_Zoo\_or\_Aquarium/links/5705627a08ae44d70ee342a8/Why-Zoos-Aquariums-Matter-Assessing-the-Impact-of-a-Visit-to-a-Zoo-or-Aquarium.pdf; *Conservation Education*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/conservation-education> (last visited May 11, 2020); Smith, *supra* note 99.

<sup>160</sup> Smith, *supra* note 99; Lori Marino, Scott O. Lilienfeld, Randy Malamud, Nathan Nobis & Ron Broglio, *Do Zoos and Aquariums Promote Attitude Change in Visitors? A Critical Evaluation of the American Zoo and Aquarium Study*, ANIMAL STUDIES REPOSITORY, 2010, available at [http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1007&context=acwp\\_zoae](http://animalstudiesrepository.org/cgi/viewcontent.cgi?article=1007&context=acwp_zoae).

<sup>161</sup> Smith, *supra* note 99; DEMELLO, *supra* note 154.

<sup>162</sup> KELLERT, *supra* note 155 at 99.

<sup>163</sup> *Id.* at 100.

<sup>164</sup> Bobbi Sheldon, *How Denver Zoo uses perfumes, essential oils for animal enrichment*, 9NEWS, (May 9, 2017, 3:02PM), <https://www.9news.com/article/life/how-denver-zoo-uses-perfumes-essentials-oils-for-animal-enrichment/438250743>.

<sup>165</sup> Ellen Byron, *Big Cats Obsess Over Calvin Klein’s ‘Obsession for Men’*, THE WALL STREET JOURNAL, (June 8, 2010, 12:01AM), <https://www.wsj.com/articles/SB10001424052748704513104575256452390636786>.

<sup>166</sup> *Cincinnati Zoo Kills Gorilla After Child Falls Into Exhibit*, CBS NEWS, (Jun. 1, 2016, 4:22PM), <https://www.cbsnews.com/news/cincinnati-zoo-kills-gorilla-after-child-falls-into-exhibit/>.

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into his exhibit.<sup>167</sup> This was particularly devastating, as the Western lowland gorilla is a critically endangered species with a high risk of extinction and a population decline of more than 60% in the past 25 years.<sup>168</sup> The species is hunted for meat and body parts and captured as babies to be pets.<sup>169</sup> With nearly one-third of the African population killed by Ebola, the rest of the population is losing its habitat to logging and mining.<sup>170</sup>

## E. ZOOS CAN BE HARMFUL TO VISITORS

Zoos can also harm people. Zoonotic diseases (“zoonoses”) can be spread from animals to humans, such as Salmonella from reptiles and Avian Flu from birds, though unlikely if there is no direct contact with the animal.<sup>171</sup> Some zoos offer animal rides or petting zoos, which can transmit Salmonella, E. Coli and other diseases, that usually result in mild abdominal pain and discomfort for visitors, but can be more dangerous for those with weaker immune systems.<sup>172</sup> Human injuries and deaths from zoo animals have happened as well.

Born Free USA, an organization whose mission is to end the suffering of wild animals in captivity, rescue animals in need, protect wildlife in their natural habitats, and encourage conservation globally,<sup>173</sup> keeps a running list of animal escapes and attacks that have resulted in human injury and death.<sup>174</sup> Users can organize results by facility type, category (what occurred), species, and time frame.<sup>175</sup> Within the last ten years at AZA accredited zoos alone, 354 incidents were recorded.<sup>176</sup> For example, a female gorilla threw a block of wood, hitting a pregnant woman and sending her to the hospital, a three year old child fell into a jaguar

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<sup>167</sup> *Id.*

<sup>168</sup> Brulliard, *What Harambe’s Death Means for a Critically Endangered Species of Gorilla*, *supra* note 123.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Zoonotic Diseases & Birds/Poultry*, OREGON VETERINARY MEDICAL ASSOCIATION, <https://www.oregonvma.org/care-health/zoonotic-diseases/zoonotic-diseases-birds> (last visited May 12, 2020).

<sup>172</sup> *Stay Healthy at Animal Exhibits*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/healthypets/specific-groups/stay-healthy-animal-exhibits.html> (last visited May 12, 2020); *Staying Safe at Petting Zoos and Fairs*, MINNESOTA DEPARTMENT OF HEALTH, <https://www.health.state.mn.us/diseases/animal/animal.html> (last visited May 12, 2020).

<sup>173</sup> *Keep Wildlife in the Wild*, BORN FREE USA, <https://www.bornfreeusa.org/about-us/> (last visited May 11, 2020).

<sup>174</sup> *Exotic Animal Incidents*, BORN FREE USA, <https://www.bornfreeusa.org/exotic-incidents-database/> (last visited May 11, 2020).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

exhibit, sustaining a skull fracture and puncture wounds, and a first-grader, scaling a leopard enclosure to get a better view, sustained lacerations to his head and neck when the animal swiped at him.<sup>177</sup>

## VI. SUGGESTIONS FOR IMPROVEMENT TO THE AWA TO COMBAT PROBLEMS IN ZOOS AND ANALYSIS OF THEIR VIABILITY

### A. ADD SPECIES SPECIFIC GUIDELINES TO THE AWA

The AWA offers little in specifics to guide zoos, or inspectors that are searching for violations, on species specific needs in captivity; inspectors are bound to report violations solely within the AWA framework.<sup>178</sup> To illustrate the shortcomings of the AWA in this area, anthropologist and author Barbara J. King analyzed captive bears.<sup>179</sup> There are 2,800 bears held in captivity, including accredited and non-accredited zoos.<sup>180</sup> Bears tend to suffer the most in roadside zoos as they experience severe discomfort in heat, proactively seeking out cool baths or shade in the warmer months; discomfort is compounded if they are in concrete enclosures that can radiate heat or burn their paws.<sup>181</sup> The AWA offers no bear-specific guidance (with the exception of the Secretary of Agriculture's regulations for polar bears)<sup>182</sup> that takes into account their needs for space or thermoregulation.<sup>183</sup> When King asked Tanya Espinosa, public affairs specialist at the USDA-APHIS, why zoos are not required to offer bears water features in the summer to cool off, or non-concrete enclosures, Espinosa said that the AWA does not require it and the USDA's job is to enforce the AWA.<sup>184</sup>

After receiving a petition from PETA in 2013, APHIS opened up to public comment a proposed rule to "promulgate standards for bears under the Animal Welfare Act regulations."<sup>185</sup> Amongst the 8,700 com-

<sup>177</sup> *Id.*

<sup>178</sup> See Barbara J. King, *Bears Can Face Summer Challenges in Roadside Zoos*, NPR, Aug. 17 2017, <https://www.npr.org/sections/13.7/2017/08/17/543682389/bears-can-face-summer-challenges-in-roadside-zoos>.

<sup>179</sup> *How Animals Grieve*, BARBARA J. KING, <http://www.barbarajking.com/books/how-animals-grieve/> (last visited May 12, 2020); King, *supra* note 178.

<sup>180</sup> King, *supra* note 178.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*; 9 C.F.R. §§ 3.103, 3.104 (2020).

<sup>183</sup> King, *supra* note 178.

<sup>184</sup> *Id.*

<sup>185</sup> Petition to Promulgate Standards for Bears Under the Animal Welfare Act Regulations, 78 Fed. Reg. 70515, proposed Nov. 16, 2013, <https://www.federalregister.gov/documents/2013/11/26/2013-28312/petition-to-promulgate-standards-for-bears-under-the-animal-welfare-act-regulations>; *Petition for Rulemaking to Establish Bear-Specific Standards*, REGULATIONS.GOV, <https://www.regulations.gov/docket?D=APHIS-2012-0106>.

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ments submitted (including those from an additional 30 day submission period allowed by APHIS), the New York City Bar, which represents more than 23,000 lawyers, law professors, and government officials, submitted a nine page proposal urging the USDA to address bear-specific needs in captivity.<sup>186</sup> The proposal recommended clear criteria to meet the “behavioral, social and psychological requirements” of captive bears to help eliminate USDA enforcement challenges from a lack of inspector guidance.<sup>187</sup>

The New York City Bar also urged APHIS to employ a full-time bear specialist “with knowledge, background, and experience in the proper husbandry and care of bears in order to oversee the proper implementation and enforcement of these regulations.”<sup>188</sup> Employing a full-time bear specialist, and other species specialists, however, may not be a realistic option due to limited resources.

The USDA has roughly one inspector per 56 licensed facilities. Any funding would be better utilized by increasing the number of inspectors to monitor USDA licensed facilities, rather than employing species specific specialists. Instead, as there is no shortage of animal advocates and organizations, including those already mentioned in this article, the USDA could likely utilize species experts, including zookeepers from fully compliant AZA zoos, to amend AWA guidelines; some experts would likely be willing to volunteer their services pro bono to make a lasting impact on such an important federal statute.

Despite limited resources, one of the best ways to ensure animal welfare in zoos is for the AWA to have animal species specific guidelines. USDA inspectors are bound to the confines of the AWA, so to make progress in captive animal welfare, the AWA must be updated. This change would provide clarity for inspectors searching for violations and zoo operators trying to help wild animals thrive to avoid zoochosis. Species specific guidelines could also minimize individual animal suffering for those used in breeding programs, as zoos can make more informed decisions in animal housing and meeting social grouping needs. “Happy” animals, or those whose welfare needs are met, are likely a more interesting attraction to visitors as well, as they partake in their natural behaviors, rather than remaining stoic or showing symptoms of zoochosis.

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<sup>186</sup> Christine L. Mott & Lori A. Barrett, *RE: Petition To Promulgate Standards For Captive Bears Under The Animal Welfare Act Regulations*, Docket ID: APHIS-2012-0106, NEW YORK CITY BAR, 1, Jan. 22, 2014, <https://www2.nycbar.org/pdf/report/uploads/20072647-CommentonAWAStandardsforCaptiveBears.pdf>.

<sup>187</sup> *Id.* at 8.

<sup>188</sup> *Id.* at 9.

While AZA zoos have their shortcomings, the AZA has by far the most stringent standards of all the accrediting agencies, giving the USDA a blueprint for an AWA update. By adhering to stricter guidelines, as well as species specific guidelines, many roadside zoos would be eliminated, as they would lack the funding and space to be up to code. Robert Garner, author of *Animals, Politics and Morality*, noted that “the United States, in particular, has some very good zoos where large ‘naturalistic’ environments have been created. . . suggest[ing] that the public are increasingly turning their back on the old-style urban zoos with limited space and unimaginative displays.”<sup>189</sup>

If zoos are forced to comply with stricter AWA standards, many will likely procure AZA member status, a symbol to the public of how that zoo approaches animal care and conservation, as well as a commitment to adhere to strict AZA standards. Considering that 54% of AZA member organizations are non-profit, 35% are public, and the AZA already has robust guidelines and programs in place, the AWA adopting their standards is a natural fit.<sup>190</sup> However, the less stringent ZAA could still license those zoos that do not conform to AZA standards. To combat public confusion between the AZA and the ZAA, and allow consumers to make an informed choice, the USDA should distance itself from the ZAA by, at the very least, removing the ZAA from its National Agricultural Library reference list.

The current AWA does not extend protection to horses not used for research purposes and cold-blooded animals such as reptiles and amphibians, many of whom like crocodiles, turtles, and chameleons are housed at zoos.<sup>191</sup> To truly be an animal welfare act, rather than the current focus on warm-blooded animals, the AWA should protect any and all animals that may be in a zoo.<sup>192</sup>

#### B. PROHIBIT PUBLIC CONTACT WITH ANIMALS UNDER THE AWA

Jennifer Jacquet, a New York University (“NYU”) Associate Professor and Ph.D. in Natural Resource Management and Environmental Studies,<sup>193</sup> advocates for a complete ban on visitor-animal interaction.<sup>194</sup> In a report conducted by Jacquet and her colleagues at New York Uni-

<sup>189</sup> ROBERT GARNER, *supra* note 3 at 95.

<sup>190</sup> *Zoo and Aquarium Statistics*, *supra* note 75.

<sup>191</sup> 7 U.S.C. § 2132(g).

<sup>192</sup> Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 491 (1999). The AWA needs to include cold-blooded animals, birds, rats, and horses. *Id.*

<sup>193</sup> *Jennifer Jacquet*, NYU ARTS & SCIENCE, <http://as.nyu.edu/content/nyu-as/as/faculty/jennifer-jacquet.html> (last visited May 12, 2020).

versity for the Humane Society, the group searched online and found 77 distinct facilities in the United States that allow human interaction with endangered wildlife such as tigers, lions, primates, and bears.<sup>195</sup> Important to note is that reptiles are currently exempt from protection under the AWA, so a visitor to a roadside zoo can pay to get a photograph with an alligator with its mouth taped shut, without triggering any concern under the AWA.<sup>196</sup> Roadside zoos bring in funds from ticket sales, photographs, and private encounters that allow humans to feed, pet, or play with animals; removing this opportunity would make these animals less valuable to exhibitors.<sup>197</sup> The USDA received over 21,000 comments from the public after the Humane Society, World Wildlife Fund, The Global Federation of Animal Sanctuaries, The International Fund for Animal Welfare, Born Free USA, The Fund for Animals, Big Cat Rescue, and Detroit Zoological Society submitted a petition to prohibit public contact with big cats, bears, and nonhuman primates.<sup>198</sup>

Prohibiting public contact with animals would protect both humans and animals and remove the attraction of many roadside zoos. This policy would protect susceptible species from contacting human diseases and humans from potential bites by an overwhelmed wild animal. Roadside zoos bring in income from visitor-animal interaction, and without this revenue, some roadside zoos may be forced to close. Not being able to interact with zoo animals, the way the public would with domesticated pets, would also dissuade society, particularly children, from viewing animals as edutainment.<sup>199</sup>

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<sup>194</sup> Jennifer Jacquet, *America, stop visiting roadside zoos – they make money from the inhumane treatment of animals*, THE GUARDIAN, Nov. 27, 2016, <https://www.theguardian.com/sustainable-business/2016/nov/27/roadside-zoos-america-animal-cruelty-welfare>.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* Banning these dangerous interactions, therefore decreasing the animals' value to exhibitors, would also make them less likely to be "bred, mistreated and commoditized." *Id.*

<sup>198</sup> Petition to Amend Animal Welfare Act Regulations To Public Contact With Big Cats, Bears, and Nonhuman Primates, 81 Fed. Reg. 41257, proposed June 24, 2016, <https://www.federalregister.gov/documents/2016/06/24/2016-14976/petition-to-amend-animal-welfare-act-regulations-to-prohibit-public-contact-with-big-cats-bears-and>; *Animal Welfare; Petition to Develop Regulations to Prohibit Public Contact with Potentially Dangerous Animals*, REGULATIONS.GOV, June 24, 2016, <https://www.regulations.gov/docket?D=APHIS-2012-0107>; *Amended Petition for Rulemaking to Prohibit Public Contact with Big Cats, Bears, and Nonhuman Primates*, REGULATIONS.GOV, Jan. 7, 2013, <https://www.regulations.gov/document?D=APHIS-2012-0107-0001>.

<sup>199</sup> Malamud, *supra* note 156.

C. AMEND LICENSING PROCEDURES UNDER THE AWA AND ADD A PROVISION FOR THE CREATION OF USDA FACILITIES TO HOUSE CONFISCATED ANIMALS FROM NON-COMPLIANT ZOOS

The USDA does not currently require AWA compliance as a prerequisite for license renewal.<sup>200</sup> As a result of the USDA renewing a license for the Cricket Hollow Zoo, now the Cricket Hollow Animal Park (“Cricket Hollow”), despite its over 100 violations over five years, the ALDF filed a suit against then Secretary Vilsack and the USDA.<sup>201</sup> The court found in the USDA’s favor, “holding that the agency lawfully adopted and applied a license renewal scheme that does not condition renewal on an exhibitor’s compliance with the AWA’s animal welfare standards.”<sup>202</sup> One year later, in ALDF’s lawsuit concerning current Secretary Perdue’s and the USDA’s licensing of Cricket Hollow, the Court of Appeals remanded to the District Court to remand to the USDA with instructions that “the agency must, at a minimum, explain how its reliance on the self-certification scheme in this allegedly ‘smoking gun’ case did not constitute arbitrary and capricious action.”<sup>203</sup> In December 2017, the USDA revoked Cricket Hollow’s license and issued a \$10,000

<sup>200</sup> *ADFL v. Vilsack*, 169 F.Supp3d 6, 8 (D.D.C. 2016), *summ. aff. den.*, No.16-5073, 2016 U.S. App. LEXIS 20254 (D.C. Cir. 2016), *aff’d in part, vacated in part*, *ALDF v. Perdue*, 872 F.3d 602 (D.C. Cir. 2017); *ALDF v. Vilsack*, 237 F.Supp.3d 15 (D.D.C. 2017). The “USDA has bifurcated its approach to licensing: For initial license applications, an applicant must agree to comply with the agency’s prescribed standards and regulations, pay an application fee, keep its facilities available for agency inspection, and pass an agency compliance inspection of its facilities before the license may be issued. 9 C.F.R. §§ 2.1-2.12. For license renewals, an applicant must submit an annual report, pay the appropriate application fee, certify compliance and agree to continue to comply with agency standards and regulations, *id.*, and agree to keep its facilities available for inspection by the agency ‘to ascertain the applicant’s compliance with the standards and regulations.’” *ALDF v. Perdue*, 872 F.3d 602, 606 (D.C. Cir. 2017).

<sup>201</sup> *ALDF v. Vilsack*, 237 F.Supp. at 18-19.

<sup>202</sup> *ALDF v. Vilsack*, 237 F.Supp. at 19 (citing *ALDF v. Vilsack*, 169 F.Supp.3d 6, 8 (D.D.C. 2016)); In *ALDF v. Perdue*, the court found for the government on the issue of the agency’s interpretation of license renewal under the AWA and concluded that Congress “implicitly delegated the authority to establish the procedure for demonstrating compliance to [the] USDA,” and the agency’s conclusion “that self-certification and availability for inspection are sufficient to demonstrate compliance in a license renewal” was not inconsistent with the Act. *ALDF v. Perdue*, 872 F.3d at 617-618. What an AWA licensee “applicant must demonstrate when seeking the issuance of an initial license is different from what an applicant must demonstrate in order to qualify for the issuance of a renewal.” *Id.* at 618. However, on the claim that the agency’s decision to issue a license renewal to Cricket Hollow Zoo was arbitrary and capricious (considering APHIS’s documented 77 violations at the zoo over 14 inspections from December 16, 2013 to August 15, 2016, with one violation allegedly occurring the same day in 2015 that APHIS renewed the zoo’s license), the Court of Appeals remanded to the District Court with instructions to remand to the agency. *Id.* at 620.

<sup>203</sup> *ALDF v. Perdue*, 872 F.3d at 620.

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fine to the owners, on appeal as of July 2018.<sup>204</sup> Animal welfare agencies removed over 400 animals, taking them to be treated, rehabilitated, and prepared for adoption or sanctuary placement.<sup>205</sup> As of January 2020, 110 animals were still missing, prompting ALDF to file a contempt of court motion against the Cricket Hollow owners to secure the animals' return.<sup>206</sup>

The USDA currently has the authority to shut down non-compliant zoos like Cricket Hollow but frequently chooses not to despite many repeated violations, partially because there is no USDA facility to hold confiscated animals.<sup>207</sup> If the AWA added a provision for the creation of facilities to house animals, even temporarily prior to their transfer to compliant zoos, such a policy, if enforced, would go a long way in ending the prolonged suffering of animals in non-compliant zoos.<sup>208</sup> While current regulations allow for animals to be transferred to other organizations for care, these persons or facilities are not required to be licensed.<sup>209</sup> Unfortunately, as animals are still viewed as property in the United States, the USDA would likely find itself defending law suits.

Animal welfare advocates have long accused the USDA of “rubber-stamping” licenses for facilities with clear violations. The Cricket Hollow law suits lead the USDA to solicit public comments on potential revisions to the licensing requirements under the AWA to reduce regulatory burden and provide efficiency with licensee compliance.<sup>210</sup> Suggestions offered by commenters included: reductions in license fees, strengthening existing safeguards to prevent individuals with former revoked licenses from applying again under a different name, reducing the

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<sup>204</sup> *Challenging the USDA for Reissuing Roadside Zoo's License*, ANIMAL LEGAL DEFENSE FUND, Dec. 27, 2019, <https://aldf.org/case/challenging-the-usda-for-reissuing-roadside-zoos-license/>.

<sup>205</sup> Philip Joens, *Mountain lions, grizzly bears among 110 animals missing from Iowa roadside zoo, group says*, DES MOINES REGISTER, (Jan. 9, 2020, 2:49PM), <https://www.desmoinesregister.com/story/news/2020/01/09/cricket-hollow-animal-park-animals-missing-iowa-roadside-zoo-animal-legal-defense-fund-claims/4420426002/>. Confiscated animals include more than a dozen llamas, seven mini horses, three donkeys, and an assortment of sheep, skunks, pigs, birds, rats and other animals. *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> Russo, *supra* note 31.

<sup>208</sup> 9 C.F.R. § 2.129 (2020). Current APHIS regulations allow confiscated animals to be (1) placed, by sale or donation, with other licensees or registrants, that comply with the standards and regulations and can provide proper care; or (2) placed with persons or facilities that can offer a level of care equal to or exceeding the standards and regulations, as determined by APHIS, even if the persons or facilities are not licensed or registered with APHIS; or (3) Euthanized. *Id.*; See Animal Welfare; Confiscation of Animals, 66 Fed. Reg. 236, Feb. 2, 2001, <https://www.federalregister.gov/documents/2001/01/03/01-57/animal-welfare-confiscation-of-animals>.

<sup>209</sup> *Id.*

<sup>210</sup> Animal Welfare; Procedures for Applying for Licenses and Renewals, 82 Fed. Reg. 40077, proposed Aug. 24, 2017, <https://www.federalregister.gov/documents/2017/08/24/2017-17967/animal-welfare-procedures-for-applying-for-licenses-and-renewals>.

number of opportunities for an applicant to correct deficiencies, a mandatory license expiration date, and streamlining procedures for denying a license application and terminating or suspending a license.<sup>211</sup>

Imposing stricter penalties on violators would also aid in deterring AWA non-compliance.<sup>212</sup> If penalties exceed potential profit, exhibitors “will be more motivated to consider the welfare of animals when making their business decisions.”<sup>213</sup> Chronic AWA violators also cost taxpayers money, as an average inspection costs \$1,363.<sup>214</sup> Proponents of AWA reform want to make it as difficult as possible for AWA violators to receive or renew licenses and are calling on the USDA to improve their policy and policing.

Stricter penalties on violators will not be a sufficient remedy on its own if alleged “rubber-stamping” of license renewals continues, as violations will not be found without thorough inspection. The AWA should be amended to give new licenses only after thorough background checks to make sure prior AWA or animal cruelty violating individuals and businesses are not seeking licenses under a new name. License renewals should not be given to facilities with outstanding violations until they are remedied. Mandatory license expiration dates would also encourage facilities to stay up to code with the AWA as inspectors would not issue a renewal without full compliance. The USDA must be vigilant in upholding the AWA to protect captive animals from needless suffering.

## VII. CONCLUSION

The current AWA standards are not strict enough and the USDA is lacking in its enforcement of the act. By updating its guidelines to include species specific language, potentially using existing AZA policies as a blueprint, zoos will know what is required for individual species welfare and inspectors will know exactly what to look for, and what they can cite as a violation. The AWA also needs to expand its protection to include currently missing species, such as cold-blooded animals including turtles and alligators - animals already living in zoos without any federal statute to protect them.

The AWA needs to prohibit public contact with animals for both human and animal benefit. This would help stop the spread of disease

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<sup>211</sup> *Id.*

<sup>212</sup> Nowicki, *supra* note 192.

<sup>213</sup> *Id.*

<sup>214</sup> Delcianna J. Winders, *Animal Welfare Act could protect animals and taxpayers – if it’s enforced*, USA TODAY, Dec. 26, 2017, <https://www.usatoday.com/story/opinion/2017/12/26/enforce-animal-welfare-act-protect-animals-humans-taxpayers-delcianna-winders-column/953069001/>.

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and encourage respect for animals as existing outside of human entertainment. Such a policy would also effectively force many roadside zoos to shut down as private encounters with animals are how they receive a significant portion of their operational funds. Amending the AWA licensing procedure would ensure only compliant zoos receive licenses, and non-compliant zoos fix their violations prior to receiving a license or having their license renewed. Further, the USDA should change its policy to release all violation and investigation documents on its website for accountability and transparency, which would allow third party animal advocates to pursue AWA violation cases that the USDA does not.

Adding a provision to the AWA to require at least one USDA run facility to house confiscated animals from non-compliant zoos would allow for greater control over the well-being of these animals who have already suffered. Hopefully, it would also increase the shutdown of non-compliant zoos and lower rates of animal euthanasia if other organizations or facilities are not able to care for confiscated animals.

The United States is comparatively lacking to other countries in its pursuit of animal protection and has substantial room for improvement. The Animal Protection Index, run by the group World Animal Protection, ranks 50 countries around the world according to their animal welfare policy and legislation with the goal of promoting stronger animal protection laws.<sup>215</sup> Indicators include recognizing animal protection, governance structures and systems, animal welfare standards, and providing humane education.<sup>216</sup> The United States has a “D” score for protection of animals in captivity, surpassed by Sweden, Spain, and the United Kingdom’s “B” scores.<sup>217</sup>

The AWA needs to be updated to effectively protect zoo animals. Zoo staff, veterinarians, and any animal loving concerned citizens should contact their congressional representatives to let them know that meaningful change to the AWA is needed to protect zoo animals. Celebrities, particularly those with animal knowledge, such as television hosts of animal topic shows, should use their influence to educate the public about zoo animal plight. Without our action, zoo animals will continue to languish under a substandard AWA.

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<sup>215</sup> *About the Animal Protection Index*, WORLD ANIMAL PROTECTION, <https://api.worldanimalprotection.org/about> (last visited May 11, 2020).

<sup>216</sup> *Indicators*, WORLD ANIMAL PROTECTION, <https://api.worldanimalprotection.org/> (last visited May 11, 2020).

<sup>217</sup> *Comparing countries in the index*, WORLD ANIMAL PROTECTION, <https://api.worldanimalprotection.org/compare> (last visited May 11, 2020).