Pace Environmental Law Review

Volume 16
Issue 1 *Winter 1998*

Article 11

9-1-1998

The Animal Welfare Act and USDA: Time for an Overhaul

Valerie Stanley

Follow this and additional works at: http://digitalcommons.pace.edu/pelr

Recommended Citation
Valerie Stanley, *The Animal Welfare Act and USDA: Time for an Overhaul*, 16 Pace Envtl. L. Rev. 103 (1998)
Available at: http://digitalcommons.pace.edu/pelr/vol16/iss1/11

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

The Animal Welfare Act and USDA: Time for an Overhaul

VALERIE STANLEY*

The United States Department of Agriculture (USDA) is charged, as many of you know, with implementing the Animal Welfare Act (AWA).[1] The AWA is the only federal law that protects animals used in research, exhibitions and sold by animal dealers. The AWA covers animals displayed by zoos, circuses, carnivals, animal acts and educational exhibits.[2]

I will divide my talk into four topics. I will begin by discussing why we need the AWA. Then I will address why the USDA has not been able to protect animals used in exhibition. Third, I will mention some regulatory or administrative changes that the USDA can make to better protect these animals. I will conclude by discussing problems that are specific to primates used in exhibitions and research experiments as well as a case pending in federal court on this subject.

The Animal Welfare Act

The AWA, by regulation, excludes livestock shows, state and county fairs, rodeos, pure bred dog and cat shows, fairs, and exhibits intended to advance agricultural arts.[3] It gov-

---

* Valerie Stanley, Esq., has worked in Animal Protection Law for twelve years. Ms. Stanley co-founded the Washington based firm of Galvin, Stanley and Hazard, which specializes in Animal Protection Law. She has been working as a staff attorney for the Animal Legal Defense Fund since 1993 and is responsible for drafting rule-making petitions to federal agencies as well as developing, briefing and arguing national impact litigation, primarily against state and federal agencies involving statutes enacted to protect animals.

1. 7 U.S.C.A. § 2131 (1970).
2. *See id.*
3. *See* 7 U.S.C.A. § 2132(h) (1970).
   The term exhibitor means any person (public or private) exhibiting any animals which were purchased in commerce or the intended

erns exhibited animals in three ways: (a) while they are on or held for exhibition; (b) while they are being transported for exhibition; and (c) while they are being sold among exhibitors and other entities regulated by the AWA.[4] The AWA and USDA enforcement therefore have been criticized by many opponents.[5] If we did not have the AWA, however, there would be absolutely nothing to protect the animals from the fast paced business world that uses their bodies in every way imaginable, for every possible purpose. The Act is the only protection these animals have. We need to strengthen the Act and make sure that the USDA does its job.

So what are the problems with the USDA and the AWA? As currently interpreted by the USDA, the AWA may as well be called the "Animal Users' Welfare Act." USDA has forgotten that the AWA is a remedial statute that is meant to improve conditions for animals used in exhibition and research and sold for these and other purposes. The Supreme Court has ruled that when you have a remedial statute, you have to interpret it broadly, so as to effectuate its purposes.[6] Unfortunately, USDA's approach is one of not wanting to interfere with business as usual. USDA has forgotten that its constituency is the animals used in exhibition and research. Why is that? I believe the heart of the problem is that USDA has

---

> 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, organizations sponsoring and all persons participating in State and County Fairs, livestock shows, rodeos, purebred dog and cat shows and any other fairs or exhibitions intended to advance agriculture arts and sciences, as may be determined by the Secretary.

Id.

4. *See id.*

5. *See* GARY L. FRANCIONE, ANIMALS, PROPERTY AND THE LAW, 185-233 (1995).

6. Rodriquez v. Compass Shipping Co., 451 U.S. 596, 614 n. 33 (1981). *See also* Strann v. United States, 2 Cl. Ct. 782 (1983). "In addition, a remedial statute ordinarily is construed generously to further its primary purpose, even if doing so requires interpreting terms broader than their common law meanings allow." *Id.* (citing Gomez v. Toledo, 446 U.S. 635, 639 (1980); N.L.R.B. v. Hearst Publications, 332 U.S. 111, 122 (1944)).

been under tremendous pressure from another agency to ignore its true constituency.

OMB Oversight of USDA

That agency is the Office of Management and Budget (OMB). OMB controls almost everything that USDA, as well as every other Agency, does.[7] Even USDA's correspondence in response to Congressional inquiries must first go through the OMB.[8] Therefore, instead of complaining only to USDA about its administration of the AWA, we also need to send our complaints to the OMB.

Let me tell you how the OMB works. First of all, it has traditionally been a conduit for industry. Any industry that does not want regulations, that does not want a change in the status quo, runs to the OMB. For each agency, including USDA's Animal and Plant Health Inspection Service (APHIS), which oversees administration of the AWA, there are point people in OMB. They oversee everything the USDA does under the AWA.[9] Their job is not to protect animals. Their business is to know how USDA's actions are going to affect the industries USDA regulates, how the actions affect industry's bottom line, and how they are going to affect dollars and cents. Their job is not to care about animal welfare; their job is to protect business. Despite OMB's involvement, the USDA itself has recognized that cost considerations

7. As former Deputy Administrator of Office of Information and Regulatory Affairs (OIRA) has noted, "The Government works using three things: money, people, and regulations; the agency must get all three from the OMB." *See* Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 Va. J. Nat. Resources L. 1,6 (1984)(quoting J. Tozzi, former OIRA Deputy Administrator).

8. *See* OMB Circ. A-19 (1979); Legislative Coordination and Clearance.

9. *See* Federal Yellow Book, p. I-17-26 (1998); *see generally* Olsen, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 VA. J. NAT. RESOURCES L. 1,6 (1984).

might not be compatible with the Act's goal of a socially acceptable level of animal welfare.[10]

Various Executive Orders have required agencies to submit all proposed regulatory actions to OMB for approval. Before 1993, Executive Orders 12,291[11] and 12,498[12] required federal agencies to go to the OMB first. Currently, Executive Order 12,866 requires this.[13] For example, when the USDA wanted to propose regulations to improve the handling of animals used for exhibition, the regulations had to go through the OMB first.[14] The OMB's reaction was that a proposed regulation was too drastic a step and that USDA needed to gather information on how to handle animals.

Of course, one of the time tested ways to kill legislation or regulations is to study the subject. That is exactly what the OMB has accomplished by having USDA change what it wanted to do — propose regulations — to making a mere request for information. USDA has merely asked for information, and the agency is still studying the issue today. The Request for Information in the Federal Register focuses more on subduing exotic animals and enshrining customary current handling standards for exotic animals instead of seeking information on whether there is an underlying problem with the way animals in zoos and circuses are handled which, in turn, causes them to go on rampages, and present other handling "problems."[15]

---

10. *See* Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993).

11. *See* Final Regulatory Impact and Regulatory Flexibility Analysis of APHIS Animal Welfare Regulations, Part 3, standards, subparts A and D, cited in *Animal Legal Defense Fund v. Sec'y of Agriculture*, 813 F.Supp. 882, 891 (D.D.C. 1993), *vacated*, 29 F.3d 720 (D.C. Cir 1994).

12. *See* Executive Order No. 12,291 46 Fed. Reg. 13,193 (1981) *revoked by* Exec. Order No. 12,866 C.F.R. 638 (1993).

13. Exec. Order No. 12,498, 3 C.F.R. 323 (1985), *revoked by* Exec. Order No. 12,866, 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (1994).

14. *See* 62 Fed. Reg. 39,802 (1997); Documents from USDA and OMB review of this issue are on file with the author. *See also USDA Amends Animal Welfare Act Regulations, Adding Swim with the Dolphin Requirements*, M2 Presswire, Sept. 4, 1998, *available in*, 1998 WL 16521027.

15. *See* 62 Fed. Reg. 39,802 (1997). For example, the request for information seeks information on the handling practices used, both by the majority of performing animal industry and by other groups, and what practices are con-

Regulatory and Other Administrative Changes USDA Could Implement to Improve Conditions for Exhibited and Other Animals under the AWA

USDA needs to interpret the AWA from the animals' perspective so it effectuates the Act's remedial purposes. If exhibitors cannot keep animals in an environment that meets the animals' needs, exhibitors should not have them. Unfortunately, USDA's regulations for exhibited animals only require very bare minimums; while many exhibitors have problems meeting even these bare minimum requirements, many can meet the requirements. Under both scenarios, however, exhibited animals still suffer.

Under USDA's current regulatory scheme for exhibited animals, there are no specific standards for the care of any species of exhibited animal. USDA has non-specific regulations for exhibited animals; these are set forth at sub-part F of the AWA Regulations.[16] They are entitled, "Specification for the Humane Handling, Care, Treatment and Transportation of Warm Blooded Animals Other than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Marine mammals, and Nonhuman Primates."[17] In other words, these regulations generically cover the living conditions for species as diverse as giraffes, zebras, elephants, prairie dogs and polar bears. But they are very basic and very minimal. They address food, water, and sanitation, essentially housekeeping details that have little to do with the quality of wild animals' existence and experiences in captivity. A major step that USDA could take to improve conditions for exhibited animals would be to issue species-specific regulations, including regulations for these animals' psychological well-being, for those wild and exotic animals currently displayed by exhibitors.

Unfortunately, USDA views itself as a promoter of business. Its approach to administering the AWA is often "what

sidered abusive. Certainly, USDA is aware of the handling practices of the performing industry. Based on that knowledge, it decided that regulation on these matters was necessary.

16. 9 C.F.R. § 3.125-3.142 (1997).

17. *See id.*

are the least stringent requirements that we can impose on an exhibitor to have animals so that we can keep these exhibitors in business, so that they can continue to earn money from animals?" USDA needs to change its focus. Instead, USDA needs to say "what do we need to do to make the exhibitors provide better for the animals?" USDA is too deferential to exhibitors. For example, USDA needs to make it harder for exhibitors to become licensed initially. Right now, an exhibitor can have up to three pre-licensing inspections.[18] I say let's knock that down to two.

USDA needs to protect animals from being transferred merely because the animal has matured or become too difficult to handle. Acquisition and disposition records of transfers of animals need to be available to the public so we can see where exhibitors are getting their animals and where they are sending them. The exotic and wild animal trade is a huge business.[19] Many animals no longer wanted by zoos go to canned hunts, they go to other zoos, and they go for various other uses of their bodies.

Unfortunately, also, USDA often only acts after animals experience harm and often such administrative action is slow or not forthcoming at all. One notable exception to this was USDA's action against the King Royal Circus after the death of Heather, an eight-year-old elephant. During the summer of 1997, Heather was being transported along with other animals in a trailer that was left in a parking lot in New Mexico. Luckily, local police were there and opened the trailer. Inside, the temperature was reported to be between 90°–120° and police found that Heather had died.

As a result of public pressure, USDA got on the ball and the prosecuted King Royal Circus in an unusually fast time frame.[20] USDA took very drastic action. They revoked King Royal Circus' license. As Pat Derby with the Performing

18. 9 C.F.R. § 2.3(b)(1997).

19. For an expose of this trade, *see Surplus Animals: A Study of Captive Wildlife in the United States*, Performing Animal Welfare Society (1997).

20. USDA has estimated that on average it takes 540 days from notice of a violation to a hearing before an administrative law judge for violations of the AWA.

Animal Welfare Society can tell you, USDA had notice a long time ago how King Royal Circus was treating their animals but they had not acted. USDA had not acted soon enough. They waited until an animal was dead and then they took action.

USDA's administrative enforcement of the Act suffers from several basic problems. USDA only keeps inspection records for three years. It therefore often does not have a true compliance record of the exhibitors or other entities it regulates. If an inspector has not been with the agency for longer than three years, his or her only knowledge of the type of entity he or she is dealing with is limited by the three year paper trail the agency keeps.

Another serious problem with the USDA's ability to rigorously enforce the Act is that it routinely enters into Stipulation Agreements or Consent Decrees with entities it alleges have violated the AWA. Under such agreements, the only admission the charged entity makes is that USDA has jurisdiction over it. It neither admits nor denies liability. Therefore, any entity that has entered such agreements with USDA can never truly be declared to have ever violated the Act. Obviously, then the entity has no true record that an administrative law judge can use to assess more severe penalties under 7 U.S.C. § 2149(b).

Furthermore, USDA only has 87 inspectors for the entire country and there at least 10,000 entities it regulates. USDA's response to this, with the involvement of the OMB, has been to turn over its job of regulating to the entities it regulates; for the animals, this is the worst response it could make. More logical — and animal protective — responses would be to limit the number of entities it licenses, raise the quality of the animal environment those entities provide, raise the license fee to exhibit animals,[21] and require that exhibitors applying to become licensed meet USDA's requirements and pass a pre-licensing inspection in two attempts.

21. Current annual license fees for exhibitors range from $30.00 to $300.00. *See* 9 C.F.R. § 2.6(c) (1997).

Litigation Surrounding USDA's Primate Regulations

I would like to talk a little bit about USDA's primate regulations. This battle has been going on for thirteen years; I have been involved with it for ten years. In 1985, Congress amended the Animal Welfare Act to require, *inter alia*, that USDA establish standards, including minimum requirements, for "a physical environment adequate to promote the psychological well-being of nonhuman primates," 7 U.S.C. § 2143(a)(2)(b). When, by 1988, USDA still had not even proposed regulations in compliance with this mandate, we sued the agency under the Administrative Procedure Act, 5 U.S.C. § 706(1), to compel agency action "unreasonably delayed."[22] Our suit also named as defendants the Office of Management and Budget and the Department of Health and Human Services because we had evidence that they were responsible in part for the delay. At the court's first status call, USDA announced that it planned to issue proposed regulations. Those regulations were proposed on March 15, 1989.[23]

The proposed regulations for nonhuman primates set forth specific requirements and acknowledged that nonhuman primates were very intelligent and social beings who needed companionship. They set forth detailed requirements for the physical environment that had to be provided to primates. The biomedical research industry, led by the National Association for Biomedical Research (NABR), objected strenuously to being told what to do and took their complaints to OMB. Opposition to animal protective legislation and regulations were not new efforts for NABR. NABR and its predecessor organizations had not only opposed passage of the first version of the AWA, but each and every amendment to the AWA since 1966.[24] NABR's complaints with USDA's proposed regulations were that since they were the experts with regard to primate well-being, USDA should leave the setting of stan-

22. Animal Legal Defense Fund v. Yeutter, No. 88-3640 (D.D.C. 1988)

23. 49 Fed. Reg. 10822, 10913 (1989).

24. *Animals and their Legal Rights, A Survey of American Laws from 1641-1990*, Animal Welfare Institute, at 69-82 (1990). In addition, NABR petitioned USDA in 1987 to decrease the amount of space USDA regulations provided for breeder guinea pigs. *See* 54 Fed. Reg. 10909 (1989).

dards up to their research facility members by allowing them to develop their own "plans" for the psychological well-being of primates. USDA adopted this approach and reproposed the regulations.[25] USDA maintained this approach in the final regulations but also provided that the plans would not need to be sent into the agency because doing so would make them available to the public under the Freedom of Information Act, 5 U.S.C. § 552.[26]

When the USDA came out with these regulations, we knew that they were a sham and we sued USDA, OMB and HHS in 1991.[27] The lower court ruled that the regulatory regime had not established standards.[28] Unfortunately, the case was thrown out at the appellate level for lack of standing.[29] We sued again with different plaintiffs in 1996.[30] The plaintiffs were going to zoos and seeing highly intelligent and social animals kept in solitary confinement with no interaction with other primates. We won at the district court level.[31] The district court judge said: "At the outset the Court shall state the following: this case involves animals, a subject that should be of great importance to all humankind. It also involves the failures of our system of government, another subject of great concern."[32] "Furthermore, this case illustrates the need for congressional reform. All too often Congress enacts generalized legislation and thus passes to an executive agency the responsibility to interpret and fill in gaps that Congress itself could not or would not specifically legislate."[33] Special interests groups transferred their efforts from the Legislative Branch to the Executive Branch to effect their goals and were successful in achieving delay or inaction.[34]

25. 55 Fed. Reg. 33448, 33525 (1990).
26. 9 C.F.R. § 3.81 (1997).
27. Animal Legal Defense Fund v. Yeutter, No. 88-3640 (D.D.C. 1988).
28. Animal Legal Defense Fund v. Sec'y of Agriculture, 813 F. Supp. 882 (D.D.C. 1993).
29. Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994).
30. *See* Animal Legal Defense Fund v. Glickman, 943 F. Supp. 44 (D.D.C. 1996).
31. *See id.*
32. *See id.* at 50.
33. *See id.* at 51.
34. *See id.* at 51.

"Were either Executive or Legislative Branches of government more successful in the lawful exercise of their responsibilities, it would be necessary for courts to intervene."[35]

But the District Court intervened and ruled that the regulations were illegal.[36] The case went to the Court of Appeals. Two weeks after our briefs were due, we were told that the panel we were assigned to was switched. The two judges that were now on our panel had previously ruled we did not have standing in other cases. One of these judges wrote the majority opinion and stated: "This appeal is but the latest chapter in the ongoing saga of the Animal Legal Defense Fund effort to enlist the courts in its campaign to influence the USDA's administration of the Animal Welfare Act."[37] The Court went on to hold that none of the plaintiffs had standing.[38] There was, however, a wonderful dissenting opinion in that case from Judge Wald. She wrote "this case hardly requires us to recognize the independent standing of animals.[39] Mr. Jurnove's allegations fall well within the requirement of our existing precedent. But it is striking, particularly in a world in which animals can not sue on their own behalf, how far the majority opinion goes towards making governmental action which regulates the lives of animals and determines the experience of people who view them in exhibitions unchallengeable. Because such a result offends the compassionate purposes of the statute and our precedents do not require it, I respectfully dissent."[40]

We filed a petition for rehearing. We had asked for a rehearing by the panel and a rehearing by the full court of eleven judges. Our petition for rehearing by the panel was denied, but we were granted a rehearing by the full court.

---

35. *See id.*

36. *See* Animal Legal Defense Fund, 943 F. Supp. at 64.

37. Animal Legal Defense Fund, Inc. v. Glickman, 130 F.3d 464, 466 (D.C. Cir. 1997).

38. *See id.* at 471.

39. *Id.* at 476 (Wald, dissenting).

40. *See id.*

The earlier appellate opinion was vacated and eleven judges will rehear the case. The hearing is scheduled for mid-May.[41]

41. On September 1, 1998, in a 7-4 decision, the D.C. Circuit held that one of the plaintiffs, Marc Jurnove, had standing to contest USDA's primate regulations. *See* Animal Legal Defense Fund v. Glickman, 154 F.3d 426 (D.C. Cir. 1998). The issue of whether USDA's regulations are illegal still has not been decided.