



NEW YORK
CITY BAR

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**REPORT ON LEGISLATION BY THE
COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS**

A.1893

M. of A. Rosenthal

This bill, A.1893 (the “proposed bill”), would amend Section 368 of the Agriculture & Markets Law to prohibit the tail docking of cattle.¹ The present law prohibits the tail docking of horses², and the proposed bill would extend this prohibition to cattle. As under the existing law, it would be a misdemeanor to participate in, be voluntarily present for, or knowingly permit the cutting of bone, tissue or muscle tendons or to otherwise operate on it in any manner for the purpose or with the effect of docking, setting, or otherwise altering the natural carriage of the tail. Individuals engaging in such activity would be guilty of a misdemeanor³, and an animal found on the premises with an unhealed wound from the cutting of bone, tissues, muscles, or tendons of a cut tail would constitute *prima facie* evidence of a violation by the owner or user of the premises, or by the person having charge or custody.

THIS BILL IS APPROVED

The Legal Issues Pertaining to Animals committee of the New York City Bar Association recommends passage of the proposed bill because of the inherent cruelty and inhumane nature of the practice of tail docking. Tail docking is the partial amputation of up to two-thirds of a dairy cow’s tail, typically performed without anesthetic.⁴ The tail is severed either by removal with a sharp instrument, or by application of a tight, rubber ring, restricting blood flow to the distal portion of the tail, which atrophies and detaches.⁵ Tails are severed between vertebrae (sometimes leading to serious infections reaching into the spine), and either procedure results in chronic, life-long pain, among other issues.⁶ When performed by slow strangulation of the blood

¹ The proposed legislation would take effect immediately.

² See memo section of Proposed New York State Assembly Bill A01893, at: http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A1893%09%09&Summary=Y&Memo=Y (Accessed May 11, 2010), noting that “[t]ail docking is already illegal in equine herds and this cruel practice should be banned in cattle populations as well.”

³ Punishable by imprisonment for not more than one year or by a fine of not more than five hundred dollars, or both.

⁴ *California Enacts Landmark Bill Banning Tail-docking of Cows*, October 12, 2009, at: http://www.hsus.org/press_and_publications/press_releases/tail_docking_10122009.html

⁵ *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*, citing: Niman NH, 2005. *The unkindest cut*, NY TIMES, March 7, 2005, at: www.nytimes.com/2005/03/07/opinion/07niman.html. (Accessed May 24, 2010).

⁶ *Cows Subjected to tail docking without anesthesia*. December 1, 2008, at: <http://www.pet-abuse.com/cases/16147/NY/US/> (Accessed May 24, 2010); See also: *Tail Docking Dairy Cattle*, Marlene Halverson, Farm Animal Economic Advisor, Animal Welfare Institute, at: <http://www.docstoc.com/docs/4697714/TAIL-DOCKING-DAIRY-CATTLE-Marlene-Halverson-Farm-Animal-Economic> (Accessed May 24, 2010); and: *Welfare Implications of Tail Docking in Dairy Cattle*, AMERICAN

supply (with a rubber band), the procedure itself is also a painful and slow process, presenting the opportunity for gangrene and other infections to set in.⁷ Tail docking in cattle was originally practiced, on occasion, as a method intended to control disease in cattle herds.⁸ Having become more prevalent in recent years⁹, the practice has been widely criticized as providing no health benefits to the animal. Now banned in several European countries, as well as in California, tail docking is opposed by the American Veterinary Association, the Canadian Veterinary Medical Association, and various experts, scientists, and industry representatives.¹⁰

1. The inherent cruelty of tail docking was recently addressed in New Jersey and California.

In 2008, the New Jersey Supreme Court issued a decision that, in pertinent part, declared the practice of tail docking cattle to be inhumane and without reason.¹¹ At issue were regulations promulgated by the New Jersey Department of Agriculture (“NJ Department”) after a legislative decree that the NJ Department would be vested with certain authority relating to the care and welfare of domestic livestock.¹² Specifically, the court reversed and remanded an underlying Appellate Division determination to the extent that the Appellate Division decision upheld the NJ Department’s adoption of a regulation permitting tail docking in cattle.

Acknowledging the well-settled principle that appellate courts generally accord deference to final agency actions, reversing those actions only if they are “arbitrary, capricious, or

VETERINARY MED. ASSN., January 28, 2010, at:

http://www.avma.org/reference/backgrounders/tail_docking_cattle_bgnd.pdf (Accessed May 24, 2010); and:

http://www.mercyforanimals.org/ban_tail_docking_NY.aspx (Accessed May 24, 2010).

⁷ See: *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*

http://www.hsus.org/farm/resources/research/practices/tail_docking_dairy_cows.html (Accessed May 24, 2010).

⁸ See memo section of Proposed New York State Assembly Bill A01893, at:

http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A1893%09%09&Summary=Y&Memo=Y (Accessed May 11, 2010).

⁹ For example, a 2001 USDA survey found that 50.5% of dairy operations practiced tail docking (though only 1 in 6 dairy producers docked 100% of the herd’s tails), whereas a Colorado State University 2005-2006 survey of 114 dairy facilities reported that 82.3 percent of dairies surveyed practiced tail docking. See: *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*, *supra* note 7.

¹⁰ See: *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*, *supra* note 7; See also: David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production* (2 Animal Law 1996 123), at 141 (noting that United Kingdom’s The Welfare of Livestock Regulations of 1982 prohibit tail docking of cattle).

¹¹ *New Jersey Society for the Prevention of Cruelty to Animals v. The New Jersey Department of Agriculture*, 955 A.2d 886 (2008).

¹² *Id.* at 888.

In 1996, The New Jersey Legislature, in directing the Department to create and promulgate regulations setting the standards governing the raising, keeping and marketing of domestic livestock, also specified that “the guiding principle to be utilized in establishing those standards was to be whether the treatment of these animals was ‘humane’.” The statute also “established a presumption that compliance with those regulations would satisfy the other statutory standards defining animal cruelty.” Petitioners first challenged the regulations before the Appellate Division in 2005, and the court rejected petitioner’s arguments, sustaining the adopted regulations, relying “on the presumption of reasonableness afforded to acts of administrative agencies,” and further affording deference to the Department, in recognition of its scientific and technical expertise on the subject matter. *Id.* See also: Julie M. McGill, *The New Jersey Supreme court Distinguishes the Humane Treatment of Animals and Routine Husbandry Practices in New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*, KY. J. EQUINE, AG. & NAT. RESOURCES L. (2009-2010) at 91.

unreasonable or unsupported by substantial credible evidence in the record as a whole”,¹³ (and further noting that courts afford an agency “great deference” in implementing its enabling statutes¹⁴), the court nevertheless held the NJ Department’s inclusion of tail docking in cattle as a permitted practice to violate the arbitrary and capricious standard. Notably, the court held:

Although we recognize the considerable expertise that the Department brought to bear in reaching its decision¹⁵ to include tail docking within its list of permitted practices, it is difficult to find in [the] record any support for this particular practice...[t]he record amply demonstrates that, far from being humane, this practice is specifically disparaged by both the AVMA and the CVMA as having no benefit and as leading to distress. The only scientific evidence that even suggests that the practice might have some possible benefit is inconclusive at best.

More to the point, the record in support of the practice is so weak that even the industry trade group, like the Department “discourages” it...[t]he result is, therefore to generally permit a practice for no apparent reason...¹⁶

Although the court clarified that its decision in *New Jersey Society for the Prevention of Cruelty to Animals* does not ban any of the animal husbandry practices discussed therein, it also cautioned that farmers engaging in “any practice, technique or procedure not otherwise prohibited by the regulations” risk that the procedure “will be challenged by an appropriate enforcement authority as inhumane.”¹⁷

In October 2009, California became the first U.S. state to ban the tail docking of dairy cows, with the passage of a law that took effect on January 1, 2010.¹⁸ The legislation enjoyed the support of a diverse group of organization, including the Humane Society of the United States, the California Veterinary Medical Association, the ASPCA, the California Cattlemen’s Association, and the California Farm Bureau Federation.¹⁹

While neither the New York Legislature nor New York case law yet address the practice of tail docking in cattle, it is noteworthy that New York has had a law in place (N.Y. Ag. & Mkts. L. 1047, §3) prohibiting tail docking in equines since 1965,²⁰ although New York’s anti-cruelty laws date back to 1829 (N.Y. Rev. stat. tit. 6, 26 (1829)).

¹³ *New Jersey Society*, note 11 at 897, quoting *Henry v. Rahway State Prison*, 410 A.2d 686 (1980).

¹⁴ *Id.*

¹⁵ The Department undertook a lengthy investigatory process while creating the regulations at issue (including that relating to the tail docking of cattle), during which it received and responded to thousands of comments and objections. *Id.* at 900 (note 11); *See also* 2 KY. J. EQUINE, AG. & NAT. RESOURCES L. (2009-2010) 91 at 92.

¹⁶ *New Jersey Society*, note 11 at 909.

¹⁷ *Id.* at 915.

¹⁸ Rodriguez R. 2009, *New state law bans docking of cow tails*, Fresno Bee, October 12.

<http://www.fresnobee.com/business/story/1671617.html>. Accessed May 7, 2009. *See also*: *California Enacts Landmark Bill Banning Tail Docking of Cows*, October 12, 2009, at:

http://www.hsus.org/press_and_publications/press_releases/tail_docking_10122009.html. Accessed April 11, 2010.

¹⁹ *Id.*

²⁰ *See*: N.Y. Ag. & Mkts. L. §368 (Operating upon tails of horses unlawful) (Added L.1965, c. 1047, §3.) *See*: http://www.animallaw.info/statutes/stusnyag_mkts332_379.htm (Accessed May 12, 2010); *See also* : Curnutt, Jordan, *Contemporary Legal Issues Animals and the Law: A Sourcebook*, 2001, at p. 72.

Moreover, in a 1986 federal case, somewhat analogous to the above-discussed New Jersey case - *Humane Soc. of Rochester and Monroe County for Prevention of Cruelty to Animals, Inc. v. Lyng United States of America*, 633 F. Supp. 480 (W.D.N.Y. 1986) - the Court enjoined defendants from enforcing hot-iron branding facial provisions of the U.S. Department of Agriculture notice LD 249 because freeze-branding presented a more humane alternative, and because “the predominant concern of defendants with the length of time taken to freeze-brand appears to be based more on inconvenience to farmers than on inconvenience to cows.”²¹ A preliminary injunction (pending a hearing on the merits²²) was entered, enjoining defendants from enforcing the hot-iron facial branding provisions. The court cited to the U.S.’s long-standing public policy of “avoid[ing] unnecessary cruelty to animals,” beginning with New York’s adoption of anti-cruelty laws in 1829.

2. Tail docking is a serious mutilation, causing pain and distress, and leaving the animals more vulnerable to fly attacks.

Scientific studies have shown tail docking to cause serious welfare problems for animals, including behavioral and psychological signs of ongoing distress and pain, as well as an inability to ward off fly attacks.²³ For example, a study published in the *Journal of Dairy Science* demonstrated that tail-docked cows exhibit behaviors showing discomfort, including increased standing (something cows do more often when uncomfortable), and fly-avoidance behaviors such as foot-stomping and head-turning.²⁴ And, a study on Holstein cows found that on the sixth day after tail docking, the rubber-ringed groups spent more time with their tails pressed to their bodies.²⁵ Animals can experience prolonged pain after tail docking, due to inflammation and the onset of infection at the lesion.²⁶ Additionally, the formation of abnormal growths of nerve fibers (neuromas) in the post-amputation stump can lead to chronic pain and have been found in numerous other species after similar amputations (including lambs, chickens and most recently calves).²⁷ In the case of pigs, the animals tails are actually docked “...in an effort to make them *more sensitive to pain*” (emphasis added) to encourage pigs in crowded conditions to resist attacks by other pigs.²⁸

http://books.google.com/books?id=p2p0MptGeBkC&pg=PA72&lpg=PA72&dq=new+york+1828+anti+cruelty+law&source=bl&ots=oq_zRQ3mac&sig=sYz8tO0YlvY4eVfWGqLp1oUJiM&hl=en&ei=kGkITJcDNoWclgfvq_3_Dg&sa=X&oi=book_result&ct=result&resnum=4&ved=0CCcQ6AEwAw#v=onepage&q=new%20york%201828%20anti%20cruelty%20law&f=false (Accessed June 2, 2010).

²¹ *Id.*

²² No subsequent decisions were issued in this matter.

²³ See: *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*, *supra* note 7.

²⁴ *Id.* See also: Eicher SD, Morrow-Tesch JL, Albright JL, and Williams RE. 2001. Tail docking alters fly numbers, fly avoidance behaviors, and cleanliness, but not physiological measures, *J. DAIRY SCIENCE* 84:1822-8. <http://jds.fass.org/cgi/reprint/84/8/1822.pdf>. (Accessed May 11, 2010).

²⁵ See: *An HSUS Report: Welfare Issues With Tail-Docking of Cows in the Dairy Industry*, *supra* note 7.

²⁶ *Id.*

²⁷ Englsman, Stephanie J. “World Leader” – At What Price? Look at Lagging American Animal Protection Laws”, *PACE ENVTL. L. REV.*, Fall 2005) at 351

²⁸ See: Ibrahim, Darian M., *The Anticruelty Statute: A Study In Animal Welfare*, *J. ANIMAL L. & ETHICS* (May 2006), at FN 85.

3. Recent studies, including many by those affiliated with the dairy industry, demonstrate that tail docking provides no benefit to the animal and invalidate claims that the practice assists in preserving the health of animals or farm workers.

Proponents of tail docking have argued that the practice improves udder health, milk quality, and worker health; however, the industry journal *Dairy Herd Management* revealed these claims to have been based on personal observations by farmers and not scientific research.²⁹ Moreover, a large body of research, including that by parties aligned with the dairy industry, has demonstrated that these claims are unsupported.

A practice known as switch-trimming, the periodic trimming of the long hairs growing at the distal end of the tail, provides a more humane alternative to tail docking.³⁰ Switch-trimming results in animals suffering less from fly attacks than those with docked tails, although it is not an ideal practice (since it compromises fly-avoidance behavior).³¹ A report by the UC Davis School of Veterinary Medicine proposes that trimming the switch in the spring (when the tail is more likely to be dirty) and allowing it to grow back over the summer, when flies are at their peak, would strike a compromise between humane interests and milking workers' comfort.³²

CONCLUSION

For the aforementioned reasons, the proposed bill would protect cattle from unnecessary cruelty in a manner similar to that in which the New York legislature has already protected horses from similar treatment since 1965. Additionally, the anticipated fiscal impact of the proposed legislation is nonexistent.³³ Accordingly, we recommend that the proposed legislation be passed.

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²⁹ See: Quaife T. 2002, *Tail docking makes little sense*, Dairy Herd Management, October 16. www.dairyherd.com/news_editorial.asp?pgID=724&ed_id=2190. (Accessed May 11, 2010).

See also: D.A. Schreiner and P.L. Ruegg, *Effects of Tail Docking on Milk Quality and Cow Cleanliness*, J. DAIRY SCIENCE, Vol. 85 No. 10 2503-2511 (2002), at: <http://jds.fass.org/cgi/content/full/85/10/2503> (Accessed May 11, 2010).

³⁰ University of California Cooperative Extension *Dairy Care Practices*, 2nd Ed (1998). University of California, Davis. www.vetmed.ucdavis.edu/vetext/INF-DA/INF-DA_CAREPRAX4.HTML. (Accessed May 11, 2010)

³¹ See: C.L. Stull, M.A. Payne, S.L. Berry and P.L. Hullinger, University of California Davis, *Tail Docking in Dairy Cattle* (2004). Available at: <http://www.vetmed.ucdavis.edu/vetext/INF-AN/Tail-Docking-Dairy.pdf> (Accessed May 11, 2010).

³² *Id.*

³³ See memo section of Proposed New York State Assembly Bill A01883, at: http://assembly.state.ny.us/leg/?default_fld=%0D%0A&bn=A1893%09%09&Summary=Y&Memo=Y (Accessed May 11, 2010).