



NEW YORK
CITY BAR

COMMITTEE ON ANIMAL LAW

CHRISTINE L. MOTT

CHAIR

Phone: (917) 364-5093

christine.mott.esq@gmail.com

LORI A. BARRETT

SECRETARY

Phone: (347) 770-2473

barrettlori@hotmail.com

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Public Comments Processing
Regulatory Analysis and Development
Animal and Plant Health Inspection Unit
U.S. Department of Agriculture
Attn: Honorable Tom Vilsack, Secretary U.S. Department of Agriculture
Attn: Kevin Shea, Administrator Animal and Plant Health Inspection Service
Station 3A-03.8
4700 River Road, Unit 118
Riverdale, MD 20737-1238

RE: Petition To Promulgate Standards For Captive Bears Under The Animal Welfare Act Regulations, Docket ID: APHIS-2012-0106

Dear Secretary Vilsack and Administrator Shea:

The Committee on Animal Law of the New York City Bar Association (the “Committee”) respectfully submits this response to the request in Federal Register Vol. 78, No. 228 (November 26, 2013) for comments to the Animal and Plant Health and Inspection Service (“APHIS”) of the U.S. Department of Agriculture (“USDA”) on a petition to promulgate standards for captive bears under the Animal Welfare Act (“AWA”) regulations.

The New York City Bar Association is an independent non-governmental organization of more than 23,000 lawyers, law professors and government officials, predominantly from New York City and also from throughout the United States and fifty other countries. The Committee is the first committee of its kind in the country and has a history of supporting federal, state and

local anti-cruelty legislation. When warranted, our Committee has taken positions on various issues of concern involving the handling and treatment of captive wild animals.¹

The exhibition of bears presents serious concerns for animal welfare. Currently, there are approximately 485 exhibitors with captive bears in the United States. The vast majority of these exhibitors are roadside zoos, where bears are forced to live in deplorable conditions in contravention of the most basic bear husbandry standards.² Compelling scientific evidence gathered over the past two decades by established organizations has shown that bears—due to their unique biology and dependence on a diversity of ecological resources in the wild—require special handling and care when in captivity. It has become readily apparent that the generic standards in subpart F³ of part 3 of the AWA are insufficient to ensure that bears receive such care, and thus fail to comply with the AWA’s mandate for ensuring the humane handling, care, and treatment of bears in captivity.

The Committee urges the Secretary of Agriculture (the “Secretary”) to amend part 3 of the AWA to add specific standards for all species of bears held in captivity except polar bears, for which there are specific standards in subpart E. Specifically, part 3 of the AWA should be amended to include: (i) a prohibition against keeping bears in pits or similar sensory-depriving conditions as a primary enclosure; (ii) environmental enrichment requirements that provide for means of expressing typical behavior including hibernating where appropriate, foraging, running, climbing, digging, and nest building; (iii) den and pool requirements in accordance with currently accepted professional standards; and (iv) specific minimum space requirements for primary enclosures. APHIS should also employ a full-time specialist with knowledge, background, and experience in the proper husbandry and care of bears to oversee the proper implementation and enforcement of these regulations.

I. Statutory Authority and Legal Background

The AWA,⁴ enacted in 1966 under Congress’s commerce power, regulates the care, handling, and treatment of warm-blooded animals used in research, exhibition, commercial sale, and commercial transport. As it pertains to animals used in exhibition, the AWA’s stated

¹ See, e.g., October 3, 2013 *Letter to the US Department of Agriculture commenting on proposed*

² See *Judge Grants Ben The Bear Permanent Sanctuary*, Animal Legal Defense Fund (Aug. 2012), available at aldf.org/press-room/press-releases/judge-grants-ben-the-bear-permanent-sanctuary/ (last visited Jan. 17, 2014); see also *A ‘Happily Ever After’ Ending for Ben the Bear*, People for the Ethical Treatment of Animals, available at <http://www.peta.org/features/ben-bear-rescue/> (last visited Jan. 17, 2014).

³ Subpart F sets forth general standards for the humane handling, care, and treatment of all warm-blooded animals not otherwise specified in part 3, which includes all species of bears with the exception of the polar bear.

⁴ 7 U.S.C. §§ 2131-2159. The AWA requires all exhibitors and dealers to obtain a license from the Secretary of Agriculture, and provides that “no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the secretary...” 7 U.S.C. § 2133; 9 C.F.R. § 2.1 (a)(1).

purpose is to “insure . . . humane care and treatment” and “to assure the humane treatment of animals during transportation in commerce.”⁵ In effectuating this purpose, Congress gave the Secretary of Agriculture broad statutory authority to adopt standards governing “the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors”, directing that such standards shall include “minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals...”⁶

Pursuant to its statutory authority, the USDA has enacted several regulations pertaining to the keeping and exhibition of animals in captivity, specifically as concerns handling, feeding and enclosure design⁷:

§ 3.128 Space Requirements.

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.

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

§ 2.131 Handling of animals.

(a) All licensees who maintain wild or exotic animals must demonstrate adequate experience and knowledge of the species they maintain.

(b)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

(d)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

(d)(4) If public feeding of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet.

⁵ 7 U.S.C. § 2131(1)-(2).

⁶ 7 U.S.C. § 2143(a)(1), (2).

⁷ APHIS regulations can be found in 9 CFR § 2.131.

(e) When climatic conditions present a threat to an animal's health or well-being, appropriate measures must be taken to alleviate the impact of those conditions. An animal may never be subjected to any combination of temperature, humidity, and time that is detrimental to the animal's health or well-being, taking into consideration such factors as the animal's age, species, breed, overall health status, and acclimation.

9 CFR § 2.131.

II. Recommendations

The Committee urges the Secretary to amend the regulations of the AWA to: (i) prohibit the keeping of bears in pits or similar sensory-depriving conditions as a primary enclosure; (ii) include environmental enrichment requirements that provide for means of expressing typical behavior including hibernating where appropriate, foraging, running, climbing, digging, and nest building; (iii) include den and pool requirements in accordance with currently accepted professional standards; and (iv) include specific minimum space requirements for primary enclosures. Such amendments are necessary to both adequately address animal welfare concerns and ensure uniform interpretation and application of the AWA and associated regulations concerning the exhibition of bears. To oversee the proper implementation and enforcement of these regulations, APHIS should also employ a full-time specialist with knowledge, background, and experience in the proper husbandry and care of bears. The Committee bases its recommendations on its analysis of the work done by established organizations regarding the conditions in which captive bears are housed and handled in the United States, as applied to the relevant law.

(a) Amended AWA regulations are necessary to address animal welfare concerns.

Captive bears are frequently exhibited for public display and entertainment throughout the country.⁸ Over the past several decades, developments in the scientific community have advanced our knowledge and understanding of the needs and behaviors of bears in the wild and their captive-held counterparts.⁹ Bears as a species possess unique physical, psychological, and social characteristics. Consequently, bears held in captivity possess unique husbandry requirements to meet their innate biological and ecological needs.¹⁰ Many AZA-accredited zoos

⁸ See People for the Ethical Treatment of Animals, *Petition for Rulemaking to Establish Bear-Specific Standards in Subpart F of the Animal Welfare Act* (Sept. 25, 2012) ("PETA Petition"), at 3 (noting that in the United States there are over 485 class-c exhibitor USDA licensees with captive bears).

⁹ See generally Law, G., and A. Reid, *Enriching the Lives of Bears in Zoos*, *International Zoo Yearbook* 44.1, at 65-74 (2010) ("Law & Reid 2010"); Ross, S. R., *Issues of Choice and Control in the Behaviour of a Pair of Captive Polar Bears (Ursus Maritimus)*, *Behavioural Processes* 73.1, at 117-20 (2006); Mason, Clubb, Latham, Vickery, *Why and how should we use environmental enrichment to tackle stereotypic behavior?*, *Applied Animal Behaviour Science*, Volume 102, Issue 3 (February 2007); Carlstead, Seidensticker, and Baldwin, *Environmental Enrichment for Zoo Bears*, *Zoo Biology*, 10 (1991).

¹⁰ See Law & Reid 2010 ("Now...it is recognized that bears are every bit as demanding as primates and require intense husbandry routines to keep them in good mental and physical condition.").

and facilities have incorporated this knowledge into their bear husbandry practices; however, the overwhelming majority of bears held in captivity are housed in roadside zoos and other licensed facilities that consistently fail to meet even the bears' most basic needs. As a result, it is evident that the general standards promulgated by the AWA regarding the handling, care and exhibition of captive animals are insufficient to ensure the welfare of the majority of captive bears in the United States.

Needs of Bears in the Wild

Bears are energetic, highly intelligent animals. Wild bears live in ecologically rich environments in spaces ranging from dozens to thousands of square miles. Their daily routine consists of foraging for food, gathering materials for denning and nesting, climbing, exploring, and caring for their young. Depending on the specific season and geographic location, bears can spend up to 75% of their time foraging for food.¹¹ Bear diets range from fruits, nuts, and various plant materials to insects, fish, and small rodents and mammals. In fact, some bears species' diets consist largely of plant and vegetative matter,¹² and studies have shown that some species of captive bears fare better on a plant-based diet as opposed to one high in animal protein.¹³ In addition to their daily routines, bear behavior is influenced by seasonal fluctuations in food supplies. Depending on the species and geographic location, some bears will hibernate as long as eight months during the winter without leaving their dens.¹⁴ Although not yet fully understood by scientists, denning and hibernating serve important biological functions including foot-pad renewal and metabolic changes.¹⁵

Conditions of Facilities Housing Captive Bears

¹¹ Garshelis *et al.*, 1980. Garshelis and Pelton, *Activity of black bears in the Great Smoky Mountains National Park*, *Journal of Mammalogy*, Vol. 61 (1980), at 8-19; Garshelis and Noyce, *Seeing the world through the nose of a bear — Diversity of foods fosters behavioral and demographic stability*, *Frontiers in Wildlife Science: Linking Ecological Theory and Management Applications* (2008), at 139-163.

¹² Black bears in the wild can be up to 95% vegetarian. Laidlaw, Lefebvre, Poulson, and Zimmerman, *Status of Bear Welfare at Chief Saunooke Bear Park, Cherokee Bear Zoo, and Santa's Land, in Cherokee, North Carolina*, People for the Ethical Treatment of Animals (April 2010), http://www.mediapeta.com/peta/pdf/peta_cherokee_bear_welfare_report.pdf, at 9 [hereinafter PETA Cherokee Report].

¹³ *Id.*

¹⁴ See generally, Fenwick, *Behavior-based Bear Husbandry for Winter Denning: A Practical Application at Fortress of the Bear, Sitka, Alaska* (November 2009), http://media.wix.com/ugd/eee153_2e58b3e137a579f072f679aef08307e3.pdf; Garshelis and Pelton 1980; Jones 1999.

¹⁵ *Id.*, Kolenosky and Strathearn, *Winter Denning of Black Bears in East-Central Ontario*, *Int. Conf. Bear Res. and Manage.*, Vol. 305 (1987), at 305-316, available at http://www.bearbiology.com/fileadmin/tpl/Downloads/URSUS/Vol_7/Kolenosky_Strathearn_Vol_7.pdf.

Captive bears held in substandard facilities are subject to physical, mental and emotional suffering. Studies show that bears are more likely to suffer in captivity than almost any other species, due to their complex biological and behavioral needs.¹⁶ Behavior-based bear husbandry dictates that captive bears should be kept in conditions similar to their natural environments and in ways that are “meaningful to the bears’ sensibilities.”¹⁷ Unfortunately, many USDA-licensed facilities fail to meet bears’ even most basic needs.

The vast majority of USDA-licensed facilities housing bears are roadside zoos.¹⁸ Roadside zoos are typically privately owned facilities that are not accredited by the Association of Zoos and Aquariums. They run the gamut from small menageries where animals are kept in barren cages constructed of concrete and metal bars to larger compounds that are surrounded by chain-link fencing. It is widely reported that these facilities fail to provide for the basic, essential needs of bears in captivity, including proper enclosure design, environmental enrichment, appropriate daily and seasonal husbandry, and veterinary care.¹⁹ Enclosure designs are frequently antiquated and grossly inadequate, consisting of undersized metal cages or barren concrete pits.²⁰ The sizes of such enclosures often total 1000 square feet or less, with flooring made up of unyielding concrete or unsuitable substrates—such as mulch, soil, bark, leaves, straw, or pebbles—that prevent the bears from fulfilling their behavioral need for foraging, investigating, digging, and constructing day beds.²¹ Additionally, many facilities have enclosures that lack adequate protection from sunlight and inclement weather, and inadequate drainage and ventilation systems.²² Bears are often fed inappropriate diets consisting mostly of commercial grade dog chow, providing little nutritive value to the naturally omnivorous species.²³ Further,

¹⁶ See generally Ros Clubb, Georgia Mason, *Captivity effects on wide-ranging carnivores, animals that roam over large territory in the wild do not take kindly to being confined*, *Nature*, Vol. 425, October 2, 2003; The Humane Society of the United States, *Maryland’s Fatal Attractions: An Overview of Captive Wildlife Issues in Maryland*, at 14 (Dec. 4, 2014), available at <http://www.humanesociety.org/assets/pdfs/wildlife/captive/marylands-fatal-attractions.pdf> [hereinafter “Maryland’s Fatal Attractions”] at 11; Carlstead, Seidensticker, and Baldwin at 3–16.

¹⁷ PETA Cherokee Report at 8.

¹⁸ PETA Petition at 4.

¹⁹ See, e.g., PETA Cherokee Report, where investigators found that the enclosures for captive bears at Cherokee’s Chief Saunooke Bear Park, Cherokee Bear Zoo, and Santa’s Land in Cherokee, North Carolina “ranked among the worst [the investigators] ever encountered..”

²⁰ PETA Petition at 17-18 (specifically naming over 15 roadside zoos where captive bears are housed in barren pits or undersized cages).

²¹ *Id* at 22-24.

²² The Humane Society of the United States, *Maryland’s Fatal Attractions* at 14.

²³ PETA Petition at 38 (“Feeding adult bears commercially prepared dog food, as is customary at some facilities, can be harmful because it is too high in protein and excessively fattening, and may contribute to the high incidence of cancer deaths in captive bears.”) (citing Laidlaw, R., L. Lefebvre, E. M. B. Poulsen, & D. Zimmermann, *Status of Bear Welfare in Cherokee, North Carolina*, Rep. Ed.

substandard facilities fail to provide captive bears with any form of environmental enrichment or sensory stimulation that would allow the bears to exercise their instinctual behaviors to forage, nest, and den. Instead, bears at these facilities are often subject to public viewing at all times, with no opportunities for privacy, left to beg, dance or perform for the public.²⁴ As a result of these substandard facilities and living conditions, bears kept at these facilities are subject to physical, mental, and emotional suffering, and cannot exercise their most basic instincts to forage, nest, and den.

Bears kept in such conditions suffer from numerous health problems. Physically, captive bears suffer from obesity as a result of improper diet, poor nutrition and inactivity; dental disease and bacterial infection resulting from the chewing of metal cages; foot sores and arthritis as a result of spending their days on hard concrete; and overheating, skin irritation and matted fur resulting from a lack of environmental enrichments, such as trees, logs or pools, which bears utilize to groom their coats.²⁵ Psychologically, captive bears suffer from stress, anxiety and boredom.²⁶ Studies have shown that species with long-distance activity profiles, such as bears, are most likely to suffer psychological stress from inadequate captive environments.²⁷ When confined to enclosures without adequate space to roam, dig and forage, bears become stressed, bored and anxious. Captive bears are more likely to exhibit “stereotypic” and aberrant behaviors, including pacing, walking in circles, rolling or bobbing their heads, or swaying from side to side (which the public often misinterprets as “dancing”). Such behaviors are caused by a lack of space, sensory enrichment, and cognitive stimulation, as well as inappropriate social groupings.²⁸ Stereotypic behaviors often indicate “an abnormal interaction between the bear and his or her surroundings and can be indicative of diminished welfare.”²⁹ Significantly, a study of

D. Leahy. Norfolk: People for the Ethical Treatment of Animals (2010).

²⁴ See Weiss, *Cherokee Bear Park May Be Sued By Tribal Elders for Violating Endangered Species Act*, Huffington Post (Sept. 25, 2013), available at http://www.huffingtonpost.com/2013/09/25/cherokee-bear-park_n_3990728.html.

²⁵ The Humane Society of the United States, *Captive Bear Welfare Factsheet*, last accessed January 17, 2014, available at <http://www.humanesociety.org/assets/pdfs/wildlife/captive/captive-bear-welfare.pdf>.

²⁶ Further, captive bears may become victims of cruel and unnecessary training techniques in order to make them perform “on command” for an audience. Bears may also be subject other forms of inhumane treatment at the hands of careless and inexperienced owners. For example, to meet the demand for public handling, roadside zoos often prematurely separate bear cubs from their mothers, which may make those cubs more likely to contract and transmit disease. See HSUS Bear Welfare Factsheet; see also October 3, 2013 *Letter to the US Department of Agriculture commenting on proposed amendments to the Animal Welfare Act regarding the handling of big cats, bears, and nonhuman primates*, available at <http://www2.nycbar.org/pdf/report/uploads/20072574-AWAWildlifeComment.pdf>.

²⁷ Clubb and Mason 2003; Clubb and Mason 2006; PETA Petition.

²⁸ PETA Petition at 27, citing Shyne 2006.

²⁹ PETA Cherokee Report at 24.

33 carnivorous species revealed that bears displayed both the highest frequency and maximum prevalence of stereotypic behaviors compared to other families of animals.³⁰

How the proposed rulemaking would alleviate these problems

The requested rulemaking sets forth the minimal criteria that must be established to ensure that the behavioral, social and psychological requirements of captive bears are met in enclosure design and husbandry. This rulemaking is therefore consistent with the purpose of the AWA “to ensure that animal[s] used [for] ... exhibition purposes are provided humane care and treatment.”³¹

Specifically, the proposed minimum space requirements for bear enclosures are necessary to meet bears’ specific spatial needs. The enclosures must be large enough to allow the bears to engage in normal movement patterns and behaviors (such as wild food-gathering behaviors) and to provide sufficient space for the bears to feel secure. Pit-style enclosures should be prohibited to provide for bears’ natural instincts for curiosity, privacy and food-exploration. Further, in a pit-style enclosure bears are at a psychological disadvantage because human visitors—who they may perceive as predators—are staring down at them, causing them to feel trapped and vulnerable and resulting in psychological harm.

The proposed pool and den requirements are similarly necessary. Research has shown that bears with access to large or medium pools exhibit fewer stereotypic behaviors than other bears as a result of the opportunity to wash and clean themselves, amongst other species-appropriate behaviors.³² Quiet, dark, cool private winter denning sites should be available, either by giving the bears the ability to dig dens in the enclosure or giving them access to indoor winter denning bedrooms so that bear species that den up for the winter in the wild are given an opportunity to do so in captivity.³³ Further, the proposed minimum enrichment requirements would also alleviate bear suffering and reduce stereotypic behavior by providing for means by which bears may express natural behaviors such as hibernating where appropriate, foraging, running, climbing, digging, and nest building.³⁴

In essence, the proposed rulemaking offers a narrowly-tailored means by which to fulfill the AWA’s purpose in ensuring that bears kept for exhibition purposes are provided humane care and treatment.

(b) Amended AWA regulations are necessary to eliminate enforcement challenges resulting from a lack of guidance to inspectors and regulated parties.

³⁰ PETA Petition at 28, citing Vickery and Mason 2003; Clubb 2001.

³¹ 74 Fed. Reg. 30502-01 (June 23, 2009).

³² Clubb and Mason 2003.

³³ PETA Petition at 57.

³⁴ For examples of enrichment toys and activities offered at Smithsonian’s National Zoological Park, see http://media.wix.com/ugd/eee153_7d1c9139bc3bd2dfdec53e8e96e8333a.pdf.

Although scientific research over the past few decades has provided greater insight into the special needs and traits of bears, this data has not been incorporated into AWA regulations with respect to the care and handling of captive bears. This absence of bear-specific regulations under the AWA has created enforcement challenges due to a concomitant lack of guidance to inspectors and regulated parties. For example, an APHIS Inspection Report from Dec. 16, 2009 notes that bear dens at the inspected facility “seem kind of small” but noted that “since they are [governed by] subpart F I don’t feel comfortable citing space issues” and APHIS Inspection Notes from Nov. 30, 2009 mistakenly assume that a bear’s stereotypic pacing behavior was “exercise.”³⁵ Accordingly in the absence of specific care and handling regulations for captive bears licensees and inspectors are left to their own subjective determinations as to whether the exhibition of such animals complies with AWA standards. Relatedly, it is important that APHIS employ a full-time specialist with knowledge, background, and experience in proper bear husbandry to provide further guidance to inspectors and regulated parties.

III. Conclusion

For the foregoing reasons, we urge the Secretary to amend the regulations of the AWA to: (i) prohibit the keeping of bears in pits or similar sensory-depriving conditions as a primary enclosure; (ii) include environmental enrichment requirements that provide for means of expressing typical behavior including hibernating where appropriate, foraging, running, climbing, digging, and nest building; (iii) include den and pool requirements in accordance with currently accepted professional standards; and (iv) include specific minimum space requirements for primary enclosures. We also urge APHIS to employ a full-time 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.

Yours truly,



Christine Mott
Chair, Committee on Animal Law

³⁵ PETA Petition at 7-8.