



NEW YORK
CITY BAR

COMMITTEE ON ANIMAL LAW

April 6, 2016

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Secretary Thomas J. Vilsack
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RE: Animal Welfare Act (AWA) Regulations for Birds

Dear Secretary Vilsack:

The Animal Law Committee of the New York City Bar Association¹ writes to urge the United States Department of Agriculture (USDA) to promptly promulgate regulations concerning the transportation, purchase, sale, housing, handling, humane care and treatment of birds covered by the Animal Welfare Act (AWA) (7 U.S.C. §§ 2131-2159). It has been roughly 12 years since the USDA began the rulemaking process to amend the Animal Welfare Regulations (9 CFR §§ 1.1 – 4.11) to provide bird-specific standards of care, yet it has still not proposed amendments. In addition, we understand that the USDA has not been enforcing the AWA with respect to birds,² consequently failing to fulfill Congress’s intent to assure the humane treatment of birds.³

Since 2002, birds have been included in the definition of animal in the AWA.⁴ The definition provides that an “animal” covered by the AWA is:

¹ The New York City Bar Association is an independent non-governmental organization of more than 24,000 lawyers, law professors and government officials, predominantly from New York City but also from throughout the United States and fifty other countries. The Committee is the first of its kind in the country and has a history of commenting on matters affecting animal welfare and public health, including those relating to enforcement of the AWA.

² Animal Welfare; Regulations and Standards for Birds, Rats, and Mice, 69 Fed. Reg. 31537 (proposed June 4, 2004) (USDA stated that “before we can begin enforcing the AWA with respect to such birds, we believe it is necessary to consider what regulations and standards are appropriate for them.”), <https://federalregister.gov/a/04-12692>. (All Internet sources last visited Mar. 6, 2016).

³ 7 USC section 2131 provides that Congress intended the AWA to assure the humane treatment and care of covered animals.

⁴ Pub. L. 107–171 (2002). Several organizations have argued that birds were covered prior to 2002 because the AWA’s definition of “animal” included “warm-blooded animals”; but the USDA excluded birds from the Animal Welfare Regulations. D. Smith, *Rats, mice and birds excluded from Animal Welfare Act*, MONITOR ON PSYCHOLOGY 14 (July/Aug. 2002).

any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.⁵

The definition of animal excludes birds that are bred for use in research and poultry birds used or intended for use as food or fiber, or used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. Nonetheless, many birds are covered by the AWA's limited definition and would benefit from its enforcement.

The AWA covers the conduct of dealers, exhibitors, research facilities, operators of auction sales, and carriers and intermediate handlers.⁶ Zoos, pet dealers, and scientific research facilities are some of the entities covered by this list. The Animal Welfare Regulations provide standards for covered entities' facilities and operations (including space, structure and construction, waste disposal, heating, ventilation, lighting, and interior surface requirements for indoor and outdoor primary enclosures and housing facilities); animal health and husbandry (including requirements for sanitation and feeding, watering, and separation and classification of animals); and transportation (including specifications for primary enclosures, primary conveyances, terminal facilities and the feeding, watering, care, and handling of animals in transit).⁷

The Animal Welfare Regulations include specific standards for dogs and cats,⁸ guinea pigs and hamsters,⁹ rabbits,¹⁰ nonhuman primates,¹¹ and marine animals.¹² Subpart F of Part 3 of the Animal Welfare Regulations entitled "Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other

⁵ 7 USC § 2132.

⁶ 7 USC § 2143.

⁷ 9 CFR §§ 1.1 – 4.11.

⁸ 9 CFR, Part 3, Subpart A.

⁹ 9 CFR, Part 3, Subpart B.

¹⁰ 9 CFR, Part 3, Subpart C.

¹¹ 9 CFR, Part 3, Subpart D.

¹² 9 CFR, Part 3, Subpart E.

Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals,” provides standards for animals not specifically covered under Subparts A-E. As explained below, the USDA does not believe Subpart F is applicable to birds.

In 2004, the USDA took an initial step necessary to apply the Animal Welfare Regulations to birds when it amended its definition of animal to include the birds covered by the AWA.¹³ Also in 2004, the USDA released an advance notice of proposed rulemaking (ANPR) and a request for public comments on regulations that would cover such rats, mice, and birds.¹⁴ The ANPR announced that the USDA intended to enforce the AWA in relation to birds sold as pets at the wholesale level, or transported in commerce, or used for exhibition, research, teaching, testing, or experimentation purposes and that bird-specific regulations were necessary.¹⁵ The USDA stated that it did not believe that the general Animal Welfare Regulations at 9 CFR Part 3, Subpart F would be appropriate or adequate for birds due to their unique husbandry and care requirements.¹⁶ And by noting that birds themselves are a diverse class of animal and by inviting comments on the needs of specific species of birds, the USDA suggested that species-specific regulations might be appropriate for certain species of birds.¹⁷

The comment period for the ANPR ended on November 1, 2004, and the USDA has still not proposed or promulgated regulations covering birds.

Since 2004, the USDA has been sued twice by animal advocacy groups in connection with its lack of action with respect to birds. In 2014, PETA sued the USDA for failing to enforce the Animal Welfare Regulations with respect to birds. In *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087 (D.C. Cir., 2015), the court found that PETA had standing to assert a claim but ultimately dismissed that claim, finding that the USDA had discretion not to enforce the Animal Welfare Regulations with respect to birds.

On December 3, 2015, the Alternatives Research & Development Foundation (ARDF) sued the USDA for violating its 2000 Stipulation of Dismissal in the case *ARDF v. Glickman*, 1:99CV000581 (D.D.C., Oct. 10, 2000), in which the USDA agreed to promulgate bird-specific standards within a “reasonable time.”¹⁸ The USDA’s response to ARDF’s complaint is due April 11, 2016.

¹³ Animal Welfare; Definition of Animal, 69 Fed. Reg. 31513 (proposed June 4, 2004) (codified at 9 CFR Part 1), <https://federalregister.gov/a/04-12693>.

¹⁴ Animal Welfare; Regulations and Standards for Birds, Rats, and Mice, 69 Fed. Reg. 31537 (proposed June 4, 2004), <https://federalregister.gov/a/04-12692>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ Complaint, *Alternatives Research and Development Foundation v. Vilsack*, No. 2:2015cv6408 (E.D.Pa. Dec. 3, 2015).

Whether or not ARDF prevails in the current litigation, the Animal Law Committee believes that birds are in dire need of protection and swift action by the USDA to promulgate and enforce regulations with respect to birds covered under the AWA. The sheer numbers demand attention. Although it is unknown how many wild-caught birds are used in research, it has been estimated that roughly 25 million rats, mice, and birds (wild-caught and bred for research) are used by researchers in the U.S. annually.¹⁹

There have also been several well-publicized cases of cruelty and neglect against bird dealers and exhibitors in the past decade. In 2008, an undercover investigation of a pet dealer that supplies birds to a large, well-known pet store found that birds were treated inhumanely and were deprived of veterinary care:

Young parrots and cockatoos in the breeding mill's bird "nursery" were deprived of adequate veterinary care even when they were severely ill or injured. The investigator found a young cockatoo in the trash, a huddled-together group of baby conures with foot injuries and a juvenile Goffin's cockatoo who was wasting away after suffering from a long, undiagnosed and untreated illness and eventually died.²⁰

In 2010, PETA filmed an employee of Sun Pet Ltd., an animal dealer, handling small birds by their delicate wings.²¹ PETA has also documented birds suffering and dying in zoos.²² But because the USDA has not acted with respect to birds, entities that are or should be covered by the AWA have been able to treat birds inhumanely without risk of penalties under the Animal Welfare Regulations or license-revocation by the USDA.

The USDA's failure to promulgate regulations has also led to confusion by researchers, universities, and animal welfare organizations, causing many to believe that the AWA does not cover birds. For example, the National Association for Biomedical Research's Web site incorrectly says that "the definition of animals covered by the AWA excludes rats, mice, and birds used in research."²³ A Web site operated by an organization advocating for the use of animals in research states that statistics about the use of laboratory animals published on its site "do not include rats, mice, birds or fish, as

¹⁹ New England Antivivisection Society, *Animals Used in Research and Testing*, <http://www.neavs.org/research/overview>.

²⁰ Letter from Daphna Nahminovitch, Director, Cruelty Investigations Department, PETA, to Philip L. Francis, Chair and CEO, Petsmart Inc. (Jan 23, 2008), http://media.corporate-ir.net/media_files/irol/93/93506/2_11_Scan001.PDF; PETA, *Behind the Closed Doors of a PetSmart Animal Supplier* <https://www.youtube.com/watch?v=kOsXfetMfjM&feature=youtu.be>.

²¹ PETA, *Sun Pet Undercover Investigation*, <https://youtu.be/bHU9T70YFJU>.

²² Michelle Kretzer, PETA, *PETA Sues USDA for Years of Bird Neglect* (June 27, 2013), <http://www.peta.org/blog/peta-sues-usda-years-bird-neglect>.

²³ National Association for Biomedical Research, *Animal Welfare Act Oversight*, <http://www.nabr.org/biomedical-research/oversight/animal-welfare-act>.

these animals are not covered by the Animal Welfare Act.”²⁴ Carleton College’s Web site says, “Currently, rats and birds (and mice) are exempt from review by the USDA because they are not protected by the AWA.”²⁵ And MSPCA Angell’s Web site says, “the Animal Welfare Act (AWA), the law requiring records to be kept on laboratory animals, excludes mice, rats, and birds from its coverage.”²⁶

Based on the above reasons, the Animal Law Committee urges the USDA to issue proposed rules for Animal Welfare Regulations with respect to birds without further delay and, after a sufficient public comment period, to issue regulations promptly.

Respectfully,



Lori Barrett
Chair, Animal Law Committee

Cc:

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²⁴ Speaking of Research, *U.S. Statistics*, <http://speakingofresearch.com/facts/statistics>.

²⁵ Carleton College, *External and Internal Reviews of Animal Care and Use*, <https://apps.carleton.edu/curricular/psyc/AnimalCare/faculty/review>.

²⁶ MSPCA-Angell, *Lab Animal Welfare Overview*, https://www.mspca.org/animal_protection/lab-animal-welfare-overview.