



NEW YORK
CITY BAR

COMMITTEE ON ANIMAL LAW

ROBYN S. HEDERMAN
CO-CHAIR
rhederman@yahoo.com

May 25, 2022

REBECCA SELTZER
CO-CHAIR
rseltzer2008@yahoo.com

Kevin Shay, Administrator
U.S. Department of Agriculture
Animal and Plant Health Inspection Service
Regulatory Analysis and Development, PPD
Station 3A-03.8
4700 River Rd, Unit 118
Riverdale, MD 20737-1238

RE: Docket No. APHIS-2020-0068, Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act: Proposed Rule.

Dear Mr. Shay:

On behalf of the Animal Law Committee (the “ALC”) of the New York City Bar Association, we submit these comments regarding the Animal Welfare Act (“AWA”) standards for birds. (Docket No. APHIS–2020–0068).¹

Since 2004, all birds not used in research or for agriculture have been included in the definition of “animal” in the AWA, but, until now, the USDA has failed to promulgate any bird-specific regulations.² Therefore, we applaud the USDA for its recently proposed regulations, as there is dire need for improvement in the welfare of captive birds. We support the USDA’s proposed stance on several issues, and we have concerns and recommendations with respect to others.

¹ See Docket No. APHIS-2020-0068; Doc. No. 2020-18134;85 Fed. Reg. 51368, available online at <https://www.federalregister.gov/documents/2020/08/20/2020-18134/establishing-awa-standards-for-birds-virtual-public-meetings>. (All links last accessed on May 25, 2022.)

² Pub. L. 107–171 (2002).

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has approximately 24,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

REASONS FOR SUPPORT

The ALC supports the USDA's proposed regulations concerning unweaned birds, enclosures, the provision of enrichment including water, the inclusion of birds used in falconry, and the application of the *de minimus* rule.

Unweaned Birds

We support the USDA's proposal to prohibit the transport of unweaned birds. Unweaned birds are extremely fragile and are at a greater risk of succumbing to the stress and perils of transport than adult birds.³ Commenters have opposed this proposed rule arguing that fowl are routinely transported as hatchlings by the agriculture industry. It is important to note that since fowl are precocial, they are hatched with feathers and open eyes, and can leave their nest after 1-2 days to find food. Most other birds, however, are altricial and hatch with eyes closed and with little or no down for warmth.⁴ They are unable to leave their nest and the hatchlings rely on their parents both for heat and food.⁵

Enclosures

We support the USDA's proposal of enclosure standards that are performance-based and allow flexibility to meet the wide diversity of needs among birds, including that they provide sufficient space commensurate with the species confined, as they have for cats and dogs.⁶ We would emphasize that such enclosures should allow birds to express their natural behaviors, including flight if they are flighted. We further support the USDA's proposal that enclosures are large enough to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, with adequate freedom of movement and freedom to escape from aggression by other animals in the enclosure.

Enrichment

We support the USDA's acknowledgment of the importance of enrichment for the physical and psychological wellbeing of birds. We agree that regulated entities should develop, document, and follow a plan for environmental enhancement appropriate to the species, as these requirements will vary widely.

³ See, e.g. Australian Vet Association, *Policy on the Sale of Unweaned Altricial Birds* (July 25, 2013), <https://www.ava.com.au/policy-advocacy/policies/unusual-pets-and-avian/sale-of-unweaned-altricial-birds/> ("AVA Policy"). It is largely due to the vulnerability of unweaned birds that the state of California prohibited the sale of unweaned birds by pet shops and prohibited the possession of unweaned birds by pet shops unless the pet shop employee is certified in avian care. CAL. HEALTH & SAFETY CODE §§ 122321, 122150.

⁴ *Altricial or Precocial Young Birds: Know the Differences*, Avian Report, <https://avianreport.com/altricial-precocial-birds/>.

⁵ See AVA Policy.

⁶ Brusatte, Stephen L., et al., *The Origin and Diversification of Birds*, *Current Biology* (Oct. 5, 2015), <https://www.sciencedirect.com/science/article/pii/S0960982215009458> (detailing the vast diversity of birds).

Provision of Water Suitable for Swimming for Wading and Aquatic Birds

We further support the USDA's proposal requiring that wading and aquatic birds be provided water and that such water be of sufficient surface area and depth to allow each bird to make normal postural and social adjustments, such as immersion, bathing, swimming, and foraging.

Social Grouping

We support the USDA's proposal to address the social needs of birds, since most birds derive pleasure, comfort, and mental and physical wellbeing from being with others of their species.⁷

De minimis Rule Consistency

We support the USDA's choice to apply the existing *de minimus* rule consistent with other regulated species. A species' physical size or commercial profitability is not adequate justification for altering the *de minimus* rule.

Inclusion of Birds Used in Falconry

Finally, we support the USDA's decision to include birds used in falconry under the AWA. The fact that birds used in falconry may be regulated under other federal or state laws does not minimize the need for coverage under the AWA, especially if the level of protections would be greater or articulated with greater specificity in the AWA.

RECOMMENDATIONS

While we largely support the proposed regulations, we have concerns about the following areas and ask that the USDA strengthen or clarify its position regarding them.

Mutilations

The USDA had requested feedback on the issue of physical mutilations sometimes performed on captive birds, including pinioning (amputation of part of a bird's wing, serving to disable flight), toe clipping, devoicing, and beak alterations. It is inconsistent with the spirit of the AWA to allow birds to be subjected to often painful physical alterations solely for cosmetic or behavioral modification. Birds rely on their specific anatomies, which have evolved over millions of years, in nearly every aspect of their lives.⁸ These mutilations deprive birds of their natural

⁷ National Institute for Mathematical and Biological Synthesis (NIMBioS) *Being social: Learning from the behavior of birds*. ScienceDaily. ScienceDaily (Sept. 17, 2014), <https://www.sciencedaily.com/releases/2014/09/140917092951.htm>; Diamond, Judy, et al., *A Comparative Analysis of Social Play in Birds*, DigitalCommons@University of Nebraska (2003), <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1034&context=bioscibehavior>.

⁸ Wynns, Samantha, *The Remarkable Adaptations of Birds to Their Environment*, National Park Service (May 26, 2018), <https://www.nps.gov/cabr/blogs/the-remarkable-adaptations-of-birds-to-their-environment.htm>.

behaviors, make them vulnerable to injury and predation, and can have lasting negative ramifications.⁹ These modifications are primarily carried out to modify the behavior and physical abilities of the birds, rather than addressing the conditions that are causing the unwanted behavior or making accommodations to the birds' living situations.¹⁰ In the rare instance where a qualified avian veterinarian deems it necessary to perform one of these procedures solely for the health and welfare of the bird, the veterinarian should produce a written recommendation, and the procedure should only be performed by such a qualified avian veterinarian.

Tethering

We oppose allowing tethering to be used as a primary means of containment, and tethering should not be interpreted to fall under the definition of a "primary enclosure." The proposed regulations contain circumstances under which tethering can be used, including if "it is appropriate for the species" and "will not cause any form of harm to the bird." We maintain that it is not appropriate for any avian species to be tethered as a primary means of containment and that such tethering will cause, at least, psychological harm to the bird.¹¹ Tethering would not satisfy the minimum requirements for "primary enclosures" for dogs or cats, which require a physical enclosure under the AWA, and would be akin to chaining a dog or cat as a primary means of containment.¹² We recommend that the exemption for tethering be removed or that it be clarified to state that tethering may not be used as the primary means of containment.

Flight

Birds, especially those that spend much of their time flying in nature, including but not limited to parrots, birds of prey, and arboreal and perching birds, are negatively affected when not provided with enclosure space sufficient to allow for flight.¹³ At minimum, birds should be provided with daily opportunity to access space sufficient for flight. We disagree with those comments suggesting that merely enough space for a bird to extend its wings is sufficient.

⁹ Richard Pallardy, Richard, *Grounded: The Pinioning of Captive Birds*, Britannica.com <https://www.britannica.com/explore/savingearth/grounded-the-pinioning-of-captive-birds>.

¹⁰ Tyson, Elizabeth, *For an End to Pinioning: The Case Against the Legal Mutilation of Birds in Captivity*, Journal of Animal Ethics (2013), <https://www.jstor.org/stable/10.5406/janimalethics.4.1.0001>; Association of Avian Veterinarians, *AAV Position Statement: Permanent Anatomic Alterations of Avian Species*, <https://cdn.ymaws.com/www.aav.org/resource/collection/5BC40BD0-9410-4924-AD81-30F0389E8435/alteration.pdf#:~:text=AAV%20Position%20Statement%20Permanent%20Anatomic%20Alterations%20of%20Avian,structure%20or%20function%2C%20with%20the%20following%20exceptions%3A%20a>.

¹¹ Walker, Amy et al., *Charity calls for total ban on tethering birds of prey*, Guardian.com (June 28, 2019), <https://www.theguardian.com/world/2019/jun/28/charity-calls-for-total-ban-on-tethering-birds-of-prey> (Describing video footage of tethered birds "continually attempting to fly away before being pulled back down by their tether and chewing at their leg straps").

¹² 9 CFR § 3.6.

¹³ Kelly, Denise et al., *The True Nature of Parrots*, Avianwelfarecoalition.org (2007), <https://www.avianwelfare.org/issues/articles/truenature.htm>.

“Pet Animal” Definition and Retail Pet Stores

Under current regulation, “pet animal” is defined as “any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, and hamsters. This term excludes exotic animals and wild animals.”¹⁴ We disagree with the USDA’s proposal to amend this definition to include birds and amend the illustrative list of animals by adding examples of pet birds that “would include but not be limited to parrots, canaries, cockatiels, lovebirds, and budgerigar parakeets.” The proposed definition is contradictory and will have the effect of eliminating protection for many birds who are, in fact, “exotic” and “wild,” and are regularly sold in pet stores. The species of birds included as examples in the proposed definition, and most birds both kept as pets and sold in pet stores, *are* exotic and/or wild animals—the AWA itself defines an exotic animal to be one that is “native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad.”¹⁵ Even under a different meaning, the fact that parrots or parotlets hatch in the United States does not change the fact that they are genetically identical to their wild counterparts. Since retail pet stores are regulated under the AWA only if they sell wild or exotic animals, many birds who otherwise would have been protected will be excluded under this proposed definition. The Animal Law Committee therefore proposes that 1) all birds that are sold in retail situations, regardless of breed, should be included under the definition of “pet animal” and that there be no exclusion for “exotic” or “wild animals”, or 2) all birds sold in retail situations, including those listed in the proposed definition, should be defined as “exotic” or “wild animals,” and therefore would be covered by the AWA.

We appreciate the opportunity to provide comments on the proposed AWA standards for birds, and thank you for your consideration.

Respectfully submitted,

Robyn Hederman, Co-Chair
Animal Law Committee

Rebecca Seltzer, Co-Chair
Animal Law Committee

Contact

Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org
Mary Margulis-Ohnuma, Policy Counsel | 212.382.6767 | mmargulis-ohnuma@nycbar.org

¹⁴ 9 CFR § 1.1.

¹⁵ *Id.* This definition is consistent with the Wild Bird Conservation Act, which defines “exotic bird” to mean “any live or dead member of the Class Aves that is not indigenous to the 50 States or the District of Columbia.” 50 CFR 15.3