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Under-Enforcement of Federal Animal Protection Laws: Agencies Abdicating Enforcement Authority, and an Outlier Eleventh Circuit 'Serious Harm' Rule

Rebekah Green

Catholic University of America (Student), greenrs@cua.edu

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Under-Enforcement of Federal Animal Protection Laws: Agencies Abdicating Enforcement Authority, and an Outlier Eleventh Circuit 'Serious Harm' Rule

Cover Page Footnote

J.D. Candidate, The Catholic University of America, Columbus School of Law, 2022. The author sincerely thanks Roy Shannon, Jr. for his time and feedback on earlier drafts of this Comment. The author also thanks A.A. and Z.G. for their invaluable expertise and guidance in untangling the AWA and ESA. Finally, the author thanks the staff and editors of the *Catholic University Law Review* for their assistance in preparing this Comment for publication, and her family and friends for their unwavering support.

UNDER-ENFORCEMENT OF FEDERAL ANIMAL PROTECTION LAWS: AGENCIES ABDICATING ENFORCEMENT AUTHORITY, AND AN OUTLIER ELEVENTH CIRCUIT 'SERIOUS HARM' RULE

Rebekah Green⁺

Congress enacted the Endangered Species Act, Animal Welfare Act, and the Marine Mammal Protection Act to protect and preserve endangered and threatened fish and wildlife, animals, and marine mammals. The United States Department of Agriculture (“USDA”) is the primary administrative agency in charge of regulating zoos, wildlife centers, and aquariums, yet fails to consistently enforce the Animal Welfare Act, which this Comment reviews. This means that private animal advocacy agencies are left suing zoos, wildlife centers, and aquariums under the “taking” clause of the Endangered Species Act in order to ensure animal safety and care. While most circuits agree upon what rises to a “taking”, the Eleventh Circuit has taken a different position. This Comment reviews the Eleventh Circuit’s position and why it should not be followed by other circuits.

⁺ J.D. Candidate, The Catholic University of America, Columbus School of Law, 2022. The author sincerely thanks Roy Shannon, Jr. for his time and feedback on earlier drafts of this Comment. The author also thanks A.A. and Z.G. for their invaluable expertise and guidance in untangling the AWA and ESA. Finally, the author thanks the staff and editors of the *Catholic University Law Review* for their assistance in preparing this Comment for publication, and her family and friends for their unwavering support.

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INTRODUCTION

The now-imprisoned Joseph Maldonado-Passage, also known as Joe Exotic of the Netflix show *Tiger King*, once stated, “you know why animals die in cages? Their soul dies.”¹ While it is sad that it took being caged for Joe Exotic to comprehend how the animals imprisoned at his roadside zoo felt, he was not an outlier in the world of roadside zoos. In fact, animal protection laws have been violated by smaller unaccredited zoos, wildlife centers, and aquariums for many years. As this Comment will demonstrate, many of these issues stem from lack of enforcement by the appropriate administrative agencies and a split among courts about what constitutes harm or harassment under the “taking” clause of the Endangered Species Act (ESA).²

This Comment argues that the United States Department of Agriculture (USDA), the primary administrative agency in charge of regulating zoos, wildlife centers, and aquariums pursuant to the Animal Welfare Act (AWA),³ fails to consistently enforce the AWA, and uses programs such as Teachable Moments as a way to avoid issuing citations. This lack of consistent enforcement by the USDA is compounded by other factors such as the 11th

1. *Tiger King: Murder, Mayhem and Madness: Not Your Average Joe* (Netflix broadcast Mar. 20, 2020).

2. 16 U.S.C. § 1532(19).

3. 7 U.S.C. §§ 2132(b), 2133, 2143.

Circuit’s improper interpretation of the ESA and AWA in *PETA v. Miami Seaquarium*.⁴ All of these issues lead to inconsistent and harmful treatment of confined animals throughout the country.

Part I describes the history of the ESA and the AWA,⁵ focusing on the interaction of the two statutes and the “taking” clause of the ESA. Part I also briefly discusses the Marine Mammal Protection Act (MMPA) as it interacts with the ESA. Part II scrutinizes cases brought under the ESA and the AWA and the holdings of each court. Part III examines USDA decisions, inspections, and Teachable Moments.⁶ Part IV summarizes each of these areas and Part V formulates a solution. The agencies that have authority to enforce these statutes must do so. Additionally, the courts must properly interpret the statutes, and in doing so, must eschew the 11th Circuit’s serious harm threshold.

I. THE SCOOP ON THE ESA, AWA, AND MMPA

A. *The Endangered Species Act*

In 1973, Congress enacted the ESA, “to provide for the conservation of endangered and threatened species of fish, wildlife . . . and for other purposes.”⁷ With this legislation, Congress intended to preserve wildlife, to encourage states “and other interested parties . . . to develop and maintain conservation programs,” and to protect “endangered species.”⁸ Congress entrusted the Secretary of the Interior and the Secretary of Commerce to enforce the ESA.⁹ The Secretary of Commerce is responsible for marine species and acts through the National Marine Fisheries Service (NMFS) for enforcement.¹⁰ The Secretary of the Interior is responsible for other plants and animals and acts through the United States Fish and Wildlife Service (FWS).¹¹ While there are several ways an individual can violate the ESA, the focus of this Comment is on a “take” of species. The ESA defines a “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”¹² The Supreme Court set forth in *Babbitt v. Sweet Home Chapter of*

4. *PETA v. Miami Seaquarium*, 879 F.3d 1142 (11th Cir. 2018).

5. Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544; Animal Welfare Act of 1966, 7 U.S.C. §§ 2131–2160.

6. Teachable Moments were introduced by the USDA in 2016. A Teachable Moment “is a minor non-compliant item that: 1) the facility is willing and able to correct quickly; 2) is not impacting the welfare of any animals(s); and 3) has not previously been cited.” U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, (Jan. 14, 2016, 5:19 PM), <https://content.govdelivery.com/accounts/USDAA/PHIS/bulletins/13044a6> (last visited Oct. 19, 2020).

7. Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884, 884 (1973).

8. *Id.* at 884–85.

9. 16 U.S.C. § 1532(15).

10. 16 U.S.C. § 1533(a)(2)(A)–(C); 50 C.F.R. § 402.01(b) (2020).

11. 16 U.S.C. § 1533(a)(2)(A)–(C); 50 C.F.R. § 1.2 (2020); 50 C.F.R. § 402.01(b) (2020).

12. 16 U.S.C. § 1532(19).

Communities for a Great Oregon that the intent was for “[t]ake’ [to be] defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”¹³ However, neither the Court nor Congress provided a definition for “harass” or “harm” within the ESA or *Babbitt*.

The United States Departments of Commerce and Interior promulgated regulations to “implement the Endangered Species Act of 1973.”¹⁴ These regulations defined “[h]arass in the definition of ‘take’ in the [ESA] [as] . . . an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns [including] but . . . not limited to, breeding, feeding, or sheltering.”¹⁵ Exceptions to this definition are “generally accepted . . . [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the [AWA], . . . [b]reeding procedures, or . . . [p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.”¹⁶ Harm is defined as “an act which actually kills or injures wildlife . . . includ[ing] significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.”¹⁷

These federal regulations also outlined who would be responsible “for administering the [ESA].”¹⁸ The FWS and NMFS are charged with “utiliz[ing] their authorities . . . by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of [the ESA].”¹⁹ The FWS and NMFS have authority to issue permits, grant exceptions, investigate, perform inspections, impose fines, and bring enforcement actions, both civil and criminal.²⁰

B. *The Animal Welfare Act*

Congress enacted the AWA in 1966 “to regulate the transportation, sale, and handling of dogs, cats, and certain other animals intended to be used for purposes of research or experimentation, and for other purposes.”²¹ The 1966 Act only applied to, “live dogs, cats, monkeys (nonhuman primate mammals), guinea pigs, hamsters, and rabbits.”²² Congress authorized the Secretary of Agriculture

13. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995).

14. 50 C.F.R. § 17.1 (2020).

15. 50 C.F.R. § 17.3(c) (2020).

16. *Id.*

17. *Id.*

18. 50 C.F.R. § 402.01(b).

19. 16 U.S.C. § 1536(a)(1).

20. *See* 16 U.S.C. §§ 1538, 1539, 1540.

21. Laboratory Animal Welfare Act of 1966, Pub. L. 89-544, 80 Stat. 350, 350 (1966).

22. *Id.* at 351.

to enforce the AWA.²³ Originally, the AWA was concerned with protection of pet owners from theft, sale of stolen pets, and protection of animals used for research.²⁴

The AWA was amended in 1970 to expand protection to animals used “for exhibition purposes.”²⁵ The AWA was amended again in 1976 in order “to increase the protection afforded animals in transit and to assure humane treatment of certain animals, and for other purposes.”²⁶

The Department of Agriculture promulgated regulations for adjudicatory and “administrative proceedings under section 19 of the [AWA].”²⁷ These regulations define animal as “any live or dead dog, cat, nonhuman primate, guinea pig, hamster, rabbit, or any other warmblooded animal, which is being used, or is intended for use for . . . exhibition purposes.”²⁸ Exotic animals are defined by the regulations as “any animal not identified in the definition of ‘animal’ . . . [t]his term specifically includes animals such as, *but not limited to*, lions, tigers, leopards, elephants, camels, antelope, anteaters, kangaroos, and water buffalo, and species of foreign domestic cattle, such as Ankole, Gayal, and Yak.”²⁹ The regulations confirm that an “APHIS official means any person employed by the Department who is authorized to perform a function under the Act and the regulations . . .”³⁰ Finally, exhibitors are defined by the regulations as “any person (public or private) exhibiting any animals . . . includ[ing] . . . zoos, and educational exhibits, exhibiting such animals whether operated for profit or not.”³¹

Part two, subpart A of these regulations delineate licensing requirements.³² Any person who operates or intends to operate as an exhibitor “must have a valid license.”³³ In order to get a license, the person must be in compliance with provisions of the AWA as well as any regulations or standards; if the person is not in compliance, then the license can be denied, suspended, or revoked.³⁴

Part four of these regulations outline the rules of practice that govern proceedings under the AWA.³⁵ Specifically, these regulations state that, “[i]n any case of actual or threatened physical harm to animals, in violation of the Act, or the regulations or standards issued thereunder, by a person licensed under the

23. *Id.* at 350.

24. *Id.*

25. Animal Welfare Act of 1970, Pub. L. 91-579, 84 Stat. 1560, 1560 (1970).

26. Animal Welfare Act Amendments of 1976, Pub. L. 94-279, 90 Stat. 417, 417 (1976).

27. 9 C.F.R. § 4.1 (2020).

28. 9 C.F.R. § 1.1.

29. *Id.* (emphasis added).

30. *Id.* APHIS stands for Animal and Plant Health Inspection Service. *See id.*

31. *Id.*

32. 9 C.F.R. §§ 2.1–2.12.

33. 9 C.F.R. § 2.1(a)(1).

34. 9 C.F.R. § 2.1(e).

35. 9 C.F.R. § 4.1.

Act, the Administrator may suspend such person's license temporarily"³⁶
This suspension is "in addition to any sanction" imposed against the exhibitor.³⁷

C. Marine Mammal Protection Act

The MMPA was enacted in 1972 in order "[t]o protect marine mammals . . . establish a Marine Mammal Commission; and for other purposes."³⁸ The Secretary of the Interior has "all responsibility, authority, funding, and duties under this chapter with respect to all other marine mammals covered by this chapter."³⁹ The MMPA defines the term "take" as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal."⁴⁰ The MMPA issues permits to those who wish to use marine mammals for "public display."⁴¹ While all marine mammals are protected under the MMPA, some are also protected by the ESA, leading to an overlap of the two statutes.⁴²

The Department of Commerce set forth regulations to provide procedures for administrative proceedings.⁴³ The regulations authorized the National Oceanic and Atmospheric Administration (NOAA) to "assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of . . . [the] Endangered Species Act of 1973."⁴⁴

II. COURTS INTERPRET THE ESA

A. In the Background

The Supreme Court ruled in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* "that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations."⁴⁵ The Court went on to say, "[w]hen a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the

36. 9 C.F.R. § 4.10(b).

37. 9 C.F.R. § 4.10(c).

38. Marine Mammal Protection Act of 1972, Pub. L. 92-522, 86 Stat. 1027, 1027 (1972).

39. 16 U.S.C. § 1362(12)(A)(ii). *See also* § 1362(12)(A)(i) ("[T]he Secretary of the department in which the National Oceanic and Atmospheric Administration is operating, as to all responsibility, authority, funding, and duties under this chapter with respect to members of the order Cetacea and members, other than walruses, of the order Pinnipedia."). The National Oceanic and Atmospheric Administration is currently operating under the authority of the United States Department of Commerce. *See* NAT'L OCEANIC AND ATMOSPHERIC ADMIN., <https://www.noaa.gov> (last visited Oct. 18, 2020).

40. 16 U.S.C. § 1362(13).

41. 16 U.S.C. § 1374 (2)(A).

42. *See supra* Section I.A and note 19.

43. 15 C.F.R. § 904.1(a) (2020).

44. 15 C.F.R. § 904.1(c)(14). This section provides a list of statutes under which NOAA derives its authority; the ESA is only one of many statutes. *See* 15 C.F.R. § 904.1(c).

45. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."⁴⁶

B. How Most Courts Have Interpreted What Constitutes Harm or Harass Under the ESA's "Take" Clause

While the ESA "take" clause is to be broadly interpreted, the question still arises, what degree of injury or potential injury constitutes a harm or harassment under the "take" clause?

The United States District Court for the Southern District of Indiana in *PETA v. Wildlife in Need and Wildlife in Deed, Inc.* found that the exhibitor harassed and harmed its animals, and further found that "declawing and prematurely separating [tiger] Cubs from their mothers for Tiger Baby Playtime poses a serious harm."⁴⁷

In the Eighth Circuit, the court in *Kuehl v. Sellner*, found that the exhibitor violated the "take" clause under the ESA by harassing or harming its lemurs through "social isolation, lack of environmental enrichment, and inadequate sanitation," and its tigers by failing "to provide adequate veterinary care, and . . . adequate sanitation."⁴⁸

The United States District Court for the Western District of Texas in *Graham v. San Antonio Zoological Society* rejected "the Zoo's argument that its conduct, as a matter of law, does not 'harm' or 'harass' Lucky [the elephant] because it is not 'gravely threatening.'"⁴⁹ The court pointed out that the "gravely threatening" standard promulgated by the exhibitor had not been articulated by any other court.⁵⁰ Moreover, the court concluded "that APHIS determinations of AWA compliance are evidence of AWA compliance for purposes of ESA take liability, but the court must independently assess the Zoo's animal husbandry practices under the AWA."⁵¹ The court stated that "[p]laintiffs must show that the Zoo's treatment of Lucky does not amount to generally accepted, AWA-compliant animal husbandry practices."⁵²

The United States District Court in Maryland found that Tri-State Zoological Park of Western Maryland had "unlawfully 'taken'" animals pursuant to the

46. *Id.* at 866.

47. *PETA v. Wildlife in Need and Wildlife in Deed*, 476 F. Supp. 3d 765, 776–84 (S.D. Ind. 2020).

48. *Kuehl v. Sellner*, 161 F.Supp.3d 678, 718 (N.D. Iowa 2016), *aff'd*, 887 F.3d 845 (8th Cir. 2018).

49. *Graham v. San Antonio Zoological Soc'y*, 261 F.Supp.3d 711, 743 (W.D. Tex. 2017).

50. *Id.*

51. *Id.* at 744.

52. *Id.* at 748. This case was to resolve three outstanding motions, one of which was the exhibitor's motion for summary judgment. *Id.* at 716. Therefore, the court only outlined what must be done by the plaintiff to show that the exhibitor "harmed" or "harassed" Lucky constituting a "take" under the ESA.

“take” clause of the ESA.⁵³ The court acknowledged that “the interpretation of the ESA as to the degree of injury or potential injury necessary to constitute harassment or harm is scant and in disharmony.”⁵⁴ Nevertheless, it went on to say that there was no need for the court to “wade into this debate because . . . the evidence overwhelmingly demonstrates that every protected animal has been harassed, harmed, or both in a most grievous fashion at Tri-State.”⁵⁵ On January 29, 2021, the United States Court of Appeals for the Fourth Circuit affirmed the lower court’s decision.⁵⁶

The United States District Court for the Middle District of Florida considered whether Dade City’s Wild Things had committed a “take” under the ESA by “prematurely separating tiger cubs from their mothers, forcing the cubs to swim with the public for profit, and inadequately housing and caring for the tigers.”⁵⁷ Due to significant non-compliance by the defendant, however, the court granted People for the Ethical Treatment of Animals (PETA) a default judgment, final judgment, and permanent injunction.⁵⁸

C. The Outlier – The Eleventh Circuit

As set forth above, most courts that have addressed what constitutes a “take” under the ESA have held that conduct amounting to an injury to the animal constitutes a harm or harassment under the “take” clause of the ESA. However, the Eleventh Circuit went a different direction when it decided *PETA v. Miami Seaquarium*.⁵⁹ At issue in that case was whether the defendants committed a “take” of Lolita, a killer whale that resided at defendants’ institution.⁶⁰ Lolita weighed “about 8,000 pounds and [was] twenty-five feet long,”⁶¹ and was housed “in an oblong tank that, at its widest point, is eighty (80) feet across, and

53. *PETA v. Tri-State Zoological Park of W. Md., Inc.*, 424 F.Supp.3d 404, 433 (D. Md. 2019).

54. *Id.* at 429.

55. *Id.*

56. *PETA v. Tri-State Zoological Park of W. Md., Inc.*, 843 F. App’x 493, 497 (4th Cir. 2021).

57. *PETA v. Dade City’s Wild Things, Inc.*, No. 8:16-cv-2899-T-36AAS, 2020 U.S. Dist. LEXIS 31853, at *4 (M.D. Fla. Feb. 25, 2020).

58. *Id.* at *40–41. Defendants removed tigers from its facility prior to PETA’s scheduled (and court ordered) inspection. The tigers were taken to Wynnewood, Oklahoma. *Id.* at *6, *17. While the opinion did mention the “serious harm” standard outlined in *PETA v. Miami Seaquarium*, 879 F.4d 1142 (11th Cir. 2018), PETA ultimately amended its complaint to satisfy this new standard. Due to defendants’ behavior, the court never had to determine whether a “take” had occurred. Instead, the Magistrate Judge’s amended report and recommendations were made part of the order, a default judgment was entered, and the defendants’ counterclaims were dismissed. *Dade City’s Wild Things*, 2020 U.S. Dist. LEXIS 31853, at *40–41.

59. *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327 (S.D. Fla 2016), *aff’d*, 879 F.3d 1142 (11th Cir. 2018).

60. *Id.*

61. *Id.* at 1333.

at its lowest point, is twenty (20) feet deep.”⁶² Lolita was housed with “pacific white-sided dolphins . . . who are . . . a biologically related species in that they are taxonomically members of the same family.”⁶³ As a result of being housed with these dolphins, and being housed in an inadequately sized tank, Lolita suffered from skin and eye lesions, rakes to her skin, and “‘inappropriate’ sexual behavior” from the dolphins, among other things.⁶⁴ Despite Lolita’s suffering, the Eleventh Circuit declared that a defendant must engage in conduct that “poses a threat of serious harm” for a “take” to occur under the ESA, and ruled that serious harm had not befallen Lolita.⁶⁵

III. A LOOK AT THE USDA

APHIS inspectors, along with other interested parties, have the option of filing a complaint with the USDA, which initiates adjudicatory proceedings, when an exhibitor is in violation of the AWA.⁶⁶

A. Administrative Law Judge and Judicial Officer Decisions

Many of the zoos, aquariums, and wildlife centers in the aforementioned cases also had (or continue to have) adjudicatory proceedings pending before the USDA.⁶⁷ However, not all of the exhibitors have had proceedings before the USDA.⁶⁸

Tri-State Zoological Park of Western Maryland, Inc. (Tri-State) came before the USDA upon a complaint alleging many violations of the AWA, including permitting the public to have contact with tigers, inadequate barriers between lions and tigers and the public, inadequate barriers between a squirrel monkey and the public, inadequate enclosures for lions, inadequate waste disposal, sanitation violations, inadequate veterinary care, and inadequate record keeping.⁶⁹ On March 22, 2013, the USDA issued a decision and order against Tri-State.⁷⁰ While the Administrative Law Judge (ALJ) did not find that all of these violations had been cured, she did find that some of them had been.⁷¹ Nevertheless, APHIS recommended that Tri-State’s license be suspended for 6

62. *Id.*

63. *Id.*

64. *Id.* at 1342.

65. *PETA v. Miami Seaquarium*, 879 F.3d 1142, 1149–50 (11th Cir. 2018).

66. *See* 7 C.F.R. §§ 1.131(a), 1.133(a) (2020).

67. Many of the exhibitors have had multiple proceedings before the USDA, but what is outlined in this article is merely a sampling of those proceedings.

68. During the course of writing this Comment, the author thoroughly examined the database for names of the institutions cited as defendants in the cases mentioned herein and was unable to find proceedings against Miami Seaquarium and San Antonio Zoological Society.

69. *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 164–68 (U.S.D.A. 2013).

70. *Id.* at 128.

71. *Id.* at 168–79.

months, but the ALJ felt that recommendation was “overly harsh”⁷² and only suspended its license for forty-five days.⁷³

On appeal, the Judicial Officer issued a cease-and-desist order requiring the institution to discontinue any violations of the AWA and ordered the institution’s license to be suspended for forty-five days.⁷⁴

Wildlife in Need and Wildlife in Deed (Wildlife in Need) came before the USDA upon a complaint alleging that Timothy Stark (Stark), president of Wildlife in Need, engaged in verbal abuse of APHIS officials, intimidation and threatening of APHIS officials, “failure to provide access to inspectors,”⁷⁵ inadequate veterinary care, and failure to maintain records.⁷⁶ On February 3, 2020, the USDA issued a decision and order against Stark, who was found to have “willfully violated the AWA on multiple occasions[,] . . . [had] a history of previous violations, and . . . did not act in good faith.”⁷⁷ The ALJ makes a point of noting that Stark had “over 120 violations of the AWA” against him, and showed “blatant disregard for the regulation Standards and requirements applicable to him as a licensee . . . [and believed] that his own experience and expertise is more reliable [than] that of experienced USDA personnel and experts, and that his opinions should override the AWA and Regulations.”⁷⁸

The ALJ issued a cease-and-desist order against Stark to prevent him from continuing to violate the AWA, revoked his license, and imposed civil penalties in the amount of \$300,000.⁷⁹

On April 10, 2020, the USDA issued a consent decision against Cricket Hollow Zoo (Cricket Hollow) and its owners the Sellners regarding a complaint filed by APHIS.⁸⁰ Cricket Hollow was found to have “willfully violated” the AWA.⁸¹ While the decision did not outline all of Cricket Hollow’s violations, the ALJ did issue a cease-and-desist order against the institution preventing them from continued violations of the AWA and revoked its license.⁸²

72. *Id.* at 163.

73. *Id.* at 164.

74. *Id.* at 179.

75. Timothy L. Stark, AWA Docket Nos. 16-0124; 16-0125, 2020 USDA LEXIS 8 at *21–23 (U.S.D.A. Feb. 3, 2020) (emphasis and styling removed).

76. *Id.* at *31–69. The violations are far too numerous to completely list, but the inadequate veterinary care cited included general lack of veterinary care that led to the death of multiple animals. *Id.* at *198.

77. *Id.* at *2–3.

78. *Id.* at *1–2.

79. *Id.* at *3.

80. Cricket Hollow Zoo, Inc., AWA Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155, 2020 USDA LEXIS 30 at *1–2 (U.S.D.A. Apr. 20, 2020).

81. *Id.* at *1.

82. *Id.* at *2–3. This decision did not outline all of Cricket Hollow’s violations, likely because of the extensive procedural history. See Cricket Hollow Zoo, Inc., 78 Agric. Dec. 137 (U.S.D.A. 2019); Cricket Hollow Zoo, Inc., 76 Agric. Dec. 225 (U.S.D.A. 2017); Cricket Hollow Zoo, Inc., 76 Agric. Dec. 217 (U.S.D.A. 2017); Cricket Hollow Zoo, Inc., 75 Agric. Dec. 233 (U.S.D.A.

On February 7, 2020, the USDA issued a decision and order on remand against Stearns Zoological Rescue & Rehab Center, Inc. (d/b/a Dade City Wild Things) (DCWT).⁸³ The ALJ found that DCWT violated the AWA for a number of reasons, including: improper handling of tigers, physical abuse against young tigers, and inadequate enclosures.⁸⁴ As a result of these violations, the ALJ issued a cease-and-desist order against DCWT directing them to stop violating the AWA, suspended its AWA license for ninety days, and imposed a civil penalty of \$16,000.⁸⁵

B. Teachable Moments

In 2016, the USDA revised its Animal Welfare Inspection Guide to include a program called Teachable Moments.⁸⁶ According to the USDA, the purpose of Teachable Moments is to bring “an educational approach that allows an inspector and a licensed/registered facility to work together to bring minor issues at that facility that are not impacting animal welfare into compliance with Animals Welfare Act regulations and standards.”⁸⁷ The USDA states that Teachable Moments are applicable only to “minor noncompliances identified during an inspection.”⁸⁸ To be a Teachable Moment, the noncompliance must meet the following criteria:

[i]t is a minor noncompliance that is not causing discernable pain or distress to an animal, and [i]t does not fall under a section of the Regulations or Standards that is already being cited, and [t]he facility/site is willing and able to correct the issue quickly, and [t]he minor noncompliance was not previously listed as a Teachable Moment or cited on an inspection report within the last two years.⁸⁹

The Teachable Moments are not documented within the inspection report.⁹⁰

A quick look at some of the Teachable Moments cited by inspectors include the following: records of acquisition of animals not being up to date, sanitation

2016); Cricket Hollow Zoo, Inc., 75 Agric. Dec. 232 (U.S.D.A. 2016); Cricket Hollow Zoo, Inc., 75 Agric. Dec. 236 (U.S.D.A. 2016).

83. Stearns Zoological Rescue & Rehab Ctr., Inc., AWA Docket No. 15-0146, 2020 USDA LEXIS 16 (U.S.D.A. Feb. 7, 2020).

84. *Id.* at *5–6.

85. *Id.* at *84.

86. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, (Jan. 14, 2016, 5:19 PM), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6> (last visited Oct. 19, 2020).

87. *Id.*

88. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *Teachable Moments Information*, <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (last visited Oct. 19, 2020).

89. *Id.*

90. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, (Jan. 14, 2016, 5:19 PM), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6> (last visited Oct. 19, 2020).

issues, inadequate fencing, and facilities in disrepair.⁹¹ If it appears that these are some of the same violations mentioned earlier in the USDA cases, that is because they are. Even though the Teachable Moment worksheet cites the section of the AWA violated, the inspectors unilaterally decide whether these violations reach the threshold of something more than a “minor noncompliance.”⁹²

The USDA’s Animal Welfare Inspection Guide instructs its inspectors to give special considerations to exhibitors on their first inspection, and to “limit Teachable Moments to recordkeeping and identification issues.”⁹³ However, the Guide fails to state how long an exhibitor has to correct any “Teachable Moments.”

C. Change in Enforcement by USDA

On August 22, 2019, the Washington Post wrote an investigative piece outlining the change in enforcement of the AWA and emphasis thereof within the USDA in recent years.⁹⁴ The article states that “[l]eaders of the agency’s Animal Care division told inspectors to treat those regulated by the

91. See U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Green Meadows Cultural Events* (Aug. 12, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “51-C-0043;” then click “view teachable moments” tab and follow View Teachable Moment hyperlink); U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Cassidy Jagger* (Jan. 17, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “51-C-0115;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink); U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Hoosier Camel Encounter LLC* (Jan. 15, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “32-C-0279;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink); U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Fairview Zoological Farm Inc.* (Aug. 19, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “42-C-0219;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink); U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, The Wildlife Center at Uncle Donalds Farm Inc.* (Aug. 4, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “58-C-1028;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink); U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Smoky Mountain Zoological Park Inc.* (Jan. 15, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “63-C-0221;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink).

92. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *Teachable Moments Information*, <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (last visited Oct. 19, 2020).

93. *Animal Welfare Inspection Guide*, U.S. DEP’T AGRIC. 1-1, 2-7–2-8 (2021), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

94. Karin Brulliard & William Wan, *Caged Raccoons Drowled in 100-Degree Heat. But Federal Enforcement Has Faded*, WASH. POST, (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drowled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html.

agency—breeders, zoos, circuses, horse shows and research labs—more as partners than as potential offenders.”⁹⁵ Additionally the agency has “been told to emphasize education, not enforcement.”⁹⁶ One former inspector who left the USDA in 2017 said, “[i]t feels like your hands are tied behind your back. You can’t do many things you’re supposed to when it comes to protecting animals. You’re seeing inspectors so frustrated they’re walking out the door.”⁹⁷

Since 2016, the citations issued by the USDA have dropped precipitously.⁹⁸ In 2016, 8,869 inspections were performed and 4,944 citations issued, but by 2018, only 8,354 inspections had been performed and 1,716 citations were issued.⁹⁹ Moreover, the USDA only “launched 19 enforcement cases . . . against alleged violators [in 2018], a decline of 92 percent compared to 2016.”¹⁰⁰ While the USDA alleged that the sharp drop in citations and enforcement was due to vacancies and “a positive sign that its more collaborative approach has reduced violations,”¹⁰¹ USDA’s Animal Care division employees told a different story. One veterinarian who was an assistant director stated that “[t]he changes that have been made over the past two years have systematically dismantled and weakened the inspection process . . . [resulting in] untold numbers of animals that have experienced unnecessary suffering.”¹⁰² Former inspectors have admitted that Teachable Moments were used instead of citations, particularly on the first time.¹⁰³ Another recent change was “an incentive program that allows facilities to avoid citations by self-reporting even serious violations, including those that resulted in animal deaths. These violations are no longer documented by the USDA.”¹⁰⁴

On March 12, 2021, the Office of Inspector General (OIG) released an audit report “evaluat[ing] APHIS’ controls over the licensing of exhibitors of dangerous animals, and the agency’s efforts to safeguard both the animals and members of the public who visit exhibitor facilities.”¹⁰⁵ The report found that “[a]s of December 2019, there were 2,245 . . . (Exhibitor) licensees nationwide” and more than 2,800 inspections were performed of the exhibitors by 43 inspectors.¹⁰⁶ The report references a 2010 audit when the OIG also evaluated

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. U.S. DEPT. OF AGRIC., OFF. OF INSPECTOR GEN., FOLLOW-UP TO ANIMAL AND PLANT HEALTH INSPECTION SERVICE’S CONTROLS OVER LICENSING OF ANIMAL EXHIBITORS, AUDIT REPORT 33601-0003-23 (2021).

106. *Id.* at 1.

APHIS' controls over exhibitors' licenses and found "that APHIS inspectors did not report safety conditions because the inspectors were challenged by APHIS' broadly worded guidance while evaluating compliance at facilities."¹⁰⁷ The OIG also "noted several instances in which APHIS inspectors either did not identify safety-related deficiencies during inspections, or did not document the conditions and require corrective actions *due to the lack of periodic onsite supervision*."¹⁰⁸

The 2021 report "found that 24 out of 86 . . . inspections conducted at the 19 exhibitors in [OIG's] sample . . . were deemed late."¹⁰⁹ The reason for late inspections was because APHIS was not "adequately monitor[ing] the timely completion of inspections."¹¹⁰ When the OIG looked into the late inspections, it found that the inspections were "between 2 and 412 days late," and that some had "been missed because there were no inspectors assigned to those facilities for a period of time."¹¹¹ APHIS officials also told the OIG "that the lack of staff and high turnover made it difficult to monitor the completion of inspections."¹¹²

Overall, the OIG audit of "790 exhibitors that had infractions between October 2017 and December 2019 . . . found there were 25 exhibitors with 10 or more infractions."¹¹³

IV. ANALYSIS

A. Lack of Enforcement

A review of the aforementioned cases and ALJ opinions demonstrates a general lack of enforcement of the AWA by the USDA. Moreover, the rollout of the Teachable Moments program, while touted as being implemented for educational purposes, is providing a way for the USDA to avoid citing exhibitors for violations.

Tri-State opened in 2002 and was cited for numerous violations of the AWA during inspections spanning from May 17, 2006 through September 29, 2010.¹¹⁴ These violations were all documented by one inspector with APHIS.¹¹⁵ The violations included improper handling of animals, improper housing facilities, improper waste disposal, improper perimeter fence, improper sanitation, insufficient number of "adequately trained employees," improper "[h]andling, [c]are, and [t]reatment of [n]onhuman [p]rimates," inadequate veterinary care,

107. *Id.* at 2.

108. *Id.* (emphasis added).

109. *Id.* at 8.

110. *Id.*

111. *Id.* at 8–9.

112. *Id.* at 9.

113. *Id.* at 10.

114. Tri-State Zoological Park of W. Md., Inc., 72 Agric. Dec. 128, 130–32 (U.S.D.A. 2013).

115. *Id.* at 132.

and failure to maintain records.¹¹⁶ Despite the seriousness, ongoing nature, and lack of cure of these violations, the ALJ only suspended the exhibitor's license for 45 days.¹¹⁷

In 2017, PETA sued Tri-State for violations of the ESA.¹¹⁸ This suit was initiated four years after the above-mentioned ALJ decision. PETA alleged that Tri-State's violations of standards for "[s]anitary living conditions, poor diets, substandard veterinary care, and inadequate shelter and enrichment" amounted to a "take" under the ESA.¹¹⁹

PETA's undercover investigation of Tri-State from 2014 through 2015 documented "animal excrement throughout the zoo grounds—in the kitchen where animal food is prepared . . . the grounds generally, and in each of the protected animals' enclosures."¹²⁰ Additionally, PETA documented "[s]cores of domestic cats, many of whom are unvaccinated, sported matted and unkempt fur along with crusted, watery, or bloody discharge seeping from their eyes, nose, or ears."¹²¹ These cats were roaming free throughout the grounds and were clearly a danger to the enclosed animals with regards to spreading disease.¹²² PETA also alleged inadequate veterinary care "to its lemurs, tigers, and lions,"¹²³ "[l]ack of [e]nrichment,"¹²⁴ "[i]nadequate and [u]nhealthy [f]ood,"¹²⁵ and finally, deaths of a lion, Mbube, a lemur, Bandit, and two tigers, Kumar and India.¹²⁶

116. *Id.* at 155–57, 133–61.

117. *Id.* at 179.

118. PETA v. Tri-State Zoological Park of W. Md., Inc., 424 F.Supp. 3d 404, 408 (D. Md. 2019).

119. *Id.*

120. *Id.*

121. *Id.* at 411.

122. *Id.* Two PETA investigators said "that even though they had visited dozens of zoos and sanctuaries combined, Tri-State was 'the dirtiest' and 'worst place' they had ever seen." *Id.*

123. *Id.* at 412.

124. *Id.* at 413. Tri-State ignored "basic animal husbandry standards" that require lemurs "in captivity [to] be housed in groups of at least four to seven." *Id.* at 414. Instead, Tri-State forced Bandit, a lemur, to live by himself. *Id.* Moreover, Tri-State lacked a substantive enrichment plan that conformed with "generally accepted husbandry practices." *Id.* at 414–15.

125. *Id.* at 418. Tri-State used roadkill and animal carcasses donated to them by hunters as food for its big cats and did not keep any records documenting freshness or source of the carcasses. *Id.*

126. *Id.* at 420–25. Mbube was eleven years old when he was euthanized. Since Tri-State did not perform a necropsy the cause of death is unknown, but it is clear that he "met a slow and painful demise without any real veterinary care." *Id.* at 420. Bandit was twelve years old when he died. Records showed that he "never received any preventative veterinary care, such as regular check-ups, vaccinations, or routine tests" despite suffering from a respiratory infection for almost two years and vertebral disc disease. *Id.* at 422. Most disturbing is that the day before Bandit's death it was observed that he had torn his penis off, which is most likely due to "chronic stress and anxiety." *Id.* at 422–23. Kumar died at twelve years old due to a "stroke of the spine." *Id.* at 423. India died at twelve years old due to sepsis and an enlarged heart. *Id.* at 425.

The *Tri-State* court agreed with PETA that “the protected animals [had] been subjected to a take under the ESA.”¹²⁷ As a result, the court “enjoin[ed] Defendants . . . from continuing to violate the ESA with respect to the animals at issue; permanently enjoin[ed] Defendants from owning or possessing any endangered or threatened species; and terminate[d] Defendants’ ownership and possessory rights in the animals at issue.”¹²⁸ Most importantly, the court ordered *Tri-State* to “immediately transfer ownership and custody of the surviving animals to The Wild Animal Sanctuary.”¹²⁹

The record shows that *Tri-State* was in a state of violation with the USDA from at least 2006 forward, yet nothing was filed until May 11, 2011.¹³⁰ The USDA knew and documented these violations, but nothing meaningful seemed to be done, and as a direct result, the animals continued to suffer.

Wildlife in Need, an exhibitor located in Indiana, was cited for numerous violations of the AWA between “January 2012 through January 2016.”¹³¹ The USDA filed a complaint alleging “well over 120 violations of the AWA.”¹³² Timothy Stark (Stark), owner and president of Wildlife in Need, was so flagrant in his disregard of the AWA that his “actions, testimony, and pleadings, revealed a belief that his own experience and expertise is [*sic*] more reliable [than] that of experienced USDA personnel and experts, and that his opinions should override the AWA and Regulations.”¹³³

The violations the USDA alleged included “interfere[ence] with and verbal[] abus[e of] APHIS officials in the course of carrying out their duties,”¹³⁴ failure “to provide APHIS officials with access to conduct AWA inspections of their facilities, animals and records,”¹³⁵ lack of adequate veterinary care,¹³⁶ “fail[ure] to identify dogs,”¹³⁷ “fail[ure] to make, keep, and maintain records or forms” of disposition and acquisition of animals,¹³⁸ willful disregard of handling regulations,¹³⁹ and “fail[ure] to meet Standards for adequate housing of animals, proper diet, adequate protection of food supply, appropriate exercise plans, appropriate environmental enhancement . . . potable water supply, and provision

127. *Id.* at 430.

128. *Id.* at 434.

129. *Id.*

130. *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 128–29 (U.S.D.A. 2013).

131. Timothy L. Stark, AWA Docket Nos. 16-0124; 16-0125, 2020 USDA LEXIS 8 at *9 (U.S.D.A. Feb. 3, 2020).

132. *Id.* at *1.

133. *Id.* at *1–2.

134. *Id.* at *15.

135. *Id.* at *22.

136. *Id.* at *31–34.

137. *Id.* at *61.

138. *Id.* at *67–68.

139. *Id.* at *69.

of a sufficient number of adequately trained employees.”¹⁴⁰ The ALJ correctly found that Stark and Wildlife in Need had “willfully violated the AWA on multiple occasions,” ordered them to “cease and desist from violating the AWA,” revoked their AWA license, and assessed a civil penalty in the amount of \$300,000.¹⁴¹ Finally, the ALJ personally assessed a civil penalty of \$40,000 to Stark for his violations.¹⁴²

On September 29, 2017, PETA initiated an action against Wildlife in Need alleging that the exhibitor had “harmed, harassed, and wounded Big Cats in their possession in violation of the ESA” by declawing the Big Cats as well as “prematurely separating them from their mothers to use in hands-on, public interactions called ‘Tiger Baby Playtime.’”¹⁴³ PETA sought a permanent injunction as well as an order removing the Big Cats from Wildlife in Need.¹⁴⁴

Evidence showed that Stark eschewed veterinarian advice and decided to declaw his Big Cats because “I own the damn cat. If I want to have it declawed, I will have it declawed. That’s my prerogative.”¹⁴⁵ Stark ignored the fact that declawing Big Cats can lead to “a lifetime of pain,” goes against generally acceptable veterinary standards, husbandry practices, and USDA guidance, as well as causes behavioral harm.¹⁴⁶ As a direct result of Stark declawing his Big Cats, two of the cubs died from ringworm infections several days after the procedure, and many other cubs endured “swollen paws and [other] long-term adverse effects.”¹⁴⁷

Perhaps most shocking was Stark prematurely separating cubs for “Tiger Baby Playtime.” In some cases, Stark pulled the cubs from their mothers one day after birth.¹⁴⁸ Additionally, Stark received young cubs from other exhibitors, including Joe Exotic, who would ship cubs younger than a week to Stark.¹⁴⁹ The cubs were used in “Tiger Baby Playtime,” which exposed the cubs to an unnatural and stressful environment they could not escape.¹⁵⁰

The court found that Stark’s declawing of Big Cats violated the ESA in that it harmed, harassed and wounded the animals.¹⁵¹ Additionally, the court ruled that Stark’s premature separation of the cubs from their mother subjected the Big

140. *Id.* at *100.

141. *Id.* at *2–3.

142. *Id.* at *3.

143. PETA v. Wildlife in Need & Wildlife in Deed, 476 F. Supp. 3d 765, 768–69 (S.D. Ind. 2020).

144. *Id.* at 769.

145. *Id.*

146. *Id.* at 772.

147. *Id.* at 781.

148. *Id.* at 782.

149. *Id.*

150. *Id.*

151. *Id.* at 776–81.

Cats to a “take” under the ESA in that it harmed and harassed them.¹⁵² Specifically, the court found that the premature separation amounted to a “serious harm.”¹⁵³ So, while the court was not required to decide whether Stark’s treatment of his Big Cats rose to a serious harm, it did find that it rose to a serious harm, and in many cases, a deadly one.¹⁵⁴ The court awarded PETA a permanent injunction against Wildlife in Need.¹⁵⁵

Wildlife in Need’s website shows a post from February 9, 2020, a mere six days after the USDA issued its order revoking Wildlife in Need’s AWA license, which states, “[i]t’s interesting that the media is saying we’re closed. That’s just one of their mistruths we can counter quickly. We are open!”¹⁵⁶ Wildlife in Need evidently has no regard for the authority of the USDA or its regulations.

Wildlife in Need opened in 1999, and the USDA started issuing citations against Stark in 2002. Before Stark’s AWA license was finally revoked nearly twenty years later, on June 11, 2020, the USDA issued citations against Stark on at least fifteen different occasions.¹⁵⁷

On July 30, 2015, APHIS filed a complaint against Cricket Hollow alleging numerous violations of the AWA between June 2013 and May 2015 including failure to provide access for APHIS inspectors to the animals, facilities, and records, inadequate veterinary care, and improper handling of animals.¹⁵⁸ While there were many proceedings regarding this complaint, ultimately, on November 30, 2017, the ALJ ordered Cricket Hollow to “cease and desist from violating the Act,” revoked Cricket Hollow’s AWA license, and ordered that they not apply for another license.¹⁵⁹

As the above APHIS complaint was proceeding through the USDA’s administrative process, several individuals filed a complaint against Cricket Hollow and its two owners, Pamela and Tom Sellner, on October 5, 2015 alleging violations of the ESA.¹⁶⁰ Specifically, the plaintiffs alleged that Cricket Hollow harmed or harassed its animals subjecting them to a “taking” under the ESA.¹⁶¹ The alleged harms and harassment were caused by “social isolation, inadequate veterinary care, inadequate sanitation, inadequate housing and

152. *Id.* at 781–85.

153. *Id.* at 784 (emphasis in original).

154. *Id.* at 776–85.

155. *Id.* at 785.

156. *It’s Interesting that the Media is Saying We’re Closed. That’s Just One of Their Mistruths We Can Counter Quickly. We are Open!*, WILDLIFE IN NEED, INC., 501 C3 (Feb. 9, 2020), <https://wildlifeinneed.wordpress.com/2020/02/09/its-interesting-that-the-media-is-saying-were-closed-thats-just-one-of-their-mistruths-we-can-counter-quickly-we-are-open/>.

157. *Factsheet: Wildlife in Need, Inc. Tim Stark*, PETA (June 2021), <https://secure.mediapeta.com/peta/PDF/WildlifeinNeedInc.pdf>. Fortunately, PETA documented Stark’s citations because the USDA does not list any citations prior to May 5, 2014.

158. Cricket Hollow Zoo, Inc., 76 Agric. Dec. 225, 226–30, 236, 258 (U.S.D.A. 2017).

159. *Id.* at *384.

160. Kuehl v. Sellner, 161 F.Supp.3d 678, 680–81 (N.D. Iowa 2016).

161. *Id.* at 681.

caging, inadequate environmental enrichment, and inadequately implemented nutritional protocols.”¹⁶²

Even though treatment of the animals in Cricket Hollow did not rise to the level of neglect presented in *Tri-State* or *Wildlife in Need*, the conditions were abysmal. Cricket Hollow socially isolated its lemurs and failed to provide adequate enrichment.¹⁶³ Moreover, excrement and food waste were left to accumulate in their habitat.¹⁶⁴ The court agreed that all of these violations rose to the level of harm or harassment to the lemurs under the ESA.¹⁶⁵ The court also agreed that the inadequate veterinary care and lack of sanitation constituted a harm or harassment under the ESA to the tigers.¹⁶⁶ Ultimately, the court ordered that the lemurs and tigers be transferred to an appropriate exhibitor licensed by the USDA and enjoined Cricket Hollow from “acquiring any additional animals on the endangered species list, without first demonstrating an ability to care for the animals and receiving [c]ourt approval.”¹⁶⁷

Most disturbing about this case is that prior to filing suit, one of the plaintiffs wrote a letter to the Iowa Department of Agriculture and USDA-APHIS alerting them to the horrid conditions of Cricket Hollow.¹⁶⁸ The USDA did several inspections of this exhibitor but the case pending with the USDA dragged on for five years, giving Cricket Hollow ample time to cure its violations. It never did completely.

On July 17, 2015, APHIS filed a complaint against DCWT alleging violations of the AWA that included improper identification of animals, failure to provide access to facilities, records, and animals to USDA inspectors, and improper handling of animals.¹⁶⁹ The ALJ found that DCWT did violate the AWA by, among other things, failing to “have a responsible person available to provide access to APHIS officials . . . to inspect its facilities, animals and records . . . [and] handle animals as carefully as possible . . . with minimal risk of harm to the animals and the public.”¹⁷⁰ Furthermore, DCWT used “physical abuse to handle or work [young tigers] . . . [and] expos[ed] young or immature tigers to rough or excessive handling and/or exhibit[ed] them for periods of time that would be detrimental to their health or well-being.”¹⁷¹ In response to these

162. *Id.*

163. *Id.* at 710–11.

164. *Id.* at 712.

165. *Id.* at 710–13.

166. *Id.* at 713–17.

167. *Id.* at 719.

168. *Id.* at 693–94.

169. Stearns Zoological Rescue & Rehab Ctr., Inc., AWA Docket No. 15-0146, 2020 USDA LEXIS 16, *24, *30–34 (U.S.D.A. Feb. 7, 2020).

170. *Id.* at *34.

171. *Id.* at *34–35.

violations, the ALJ assessed a penalty of \$16,000 to DCWT, issued a cease-and-desist order, and suspended its license for ninety days.¹⁷²

PETA filed a suit against DCWT on October 12, 2016 alleging that by “prematurely separating tiger cubs from their mothers, forcing the cubs to swim with the public for profit, and inadequately housing and caring for the tigers”¹⁷³ DCWT had violated the ESA and committed a “take.”¹⁷⁴ The issue with this case is that DCWT willfully prevented PETA from conducting a court-ordered inspection, thereby concealing the full extent of the violations.¹⁷⁵ However, the court did ultimately grant a default judgment to PETA and issued a permanent injunction.¹⁷⁶

DCWT represents another exhibitor who willfully violated the AWA and eschewed the USDA’s authority. Understandably, it is difficult to enforce regulations on unwilling participants, but the point of licensure is to enforce adherence to laws and regulations.¹⁷⁷ Moreover, it is the USDA’s express responsibility to ensure compliance with the AWA.¹⁷⁸

More troubling still, is the USDA’s rollout of its “teachable moments” program. As previously stated herein, Teachable Moments are “minor noncompliances identified during an inspection.”¹⁷⁹ They are also noncompliances that are not listed on the inspection reports.¹⁸⁰ Reviewing some of the Teachable Moments available through the USDA website shows that these “minor noncompliances” are not, in fact, minor. Some of these noncompliances are similar to AWA violations for which exhibitors have lost their licenses or had their licenses suspended.¹⁸¹ Whether or not intended, the USDA’s use of

172. *Id.* at *75.

173. *PETA v. Dade City’s Wild Things, Inc.*, Case No: 8:16-cv-2899-T-36AAS, 2020 U.S. Dist. LEXIS 31853 *3–4 (M.D. Fla. Feb. 25, 2020).

174. *Id.* at *3–4.

175. *Id.* at *5–7. In fact, Dade City transferred its tigers out of state to another exhibit because “[w]ith no tigers, how they gonna prove tiger abuse?” *Id.* at *28–34.

176. *Id.* at *40–41.

177. 9 C.F.R. 2.1(e) (2020).

178. Laboratory Animal Welfare Act of 1966, Pub. L. No. 89-544, 80 Stat. 350, 350 (1966).

179. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *Teachable Moments Information*, <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (last visited Oct. 19, 2020).

180. U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, (Jan. 14, 2016, 5:19 PM), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6> (last visited Oct. 19, 2020).

181. See U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Green Meadows Cultural Events* (Aug. 12, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “51-C-0043;” then click “view teachable moments” tab and follow View Teachable Moment hyperlink). The minor noncompliance was that the records of acquisition were not up to date. *Id.* See also U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, Hoosier Camel Encounter LLC* (Jan. 15, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “32-C-0279;” then click “view teachable moments” tab and follow View Teachable Moments

Teachable Moments gives the appearance of circumventing enforcement of the proper laws and regulations.

Teachable Moments are not documented on the inspection report; therefore, the USDA may state that non-compliant exhibitors are in compliance.¹⁸²

B. Why the Eleventh Circuit's Improper Interpretation Matters

The AWA can only be enforced through government enforcement actions. The USDA is the agency authorized to enforce the AWA upon exhibitors. However, the ESA is different in that it includes a citizen suit provision permitting “any person [to] commence a civil suit on his own behalf to enjoin any person . . . in violation of [the ESA]; or to compel the Secretary to apply . . . the prohibitions set forth in [the ESA] with respect to the taking of any . . . endangered species.”¹⁸³ When a government agency fails to properly enforce the ESA or the AWA, that leaves only citizen suits under the ESA as a way to protect the animals being harmed. This is why the 11th Circuit’s decision in *Miami Seaquarium* is so important – the USDA relied upon it to support its lack of enforcement.

When PETA filed suit against Miami Seaquarium in 2015, it alleged that Miami Seaquarium had committed a “take” of a Southern Resident Killer Whale named Lolita in violation of the ESA.¹⁸⁴ Lolita was subjected to living in a tank much too small for her size, that failed to provide “adequate protection from the sun,” and she had to share her tank with “incompatible species.”¹⁸⁵ These species caused stress to Lolita, by engaging in “‘inappropriate’ sexual behavior toward Lolita,” and scrapping her skin with their teeth causing abrasions.¹⁸⁶ Furthermore, the prolonged exposure to sun caused Lolita to suffer “from an irreversible condition known as ‘surfer’s eye’ as a result of ‘prolonged exposure to UV radiation’” and she developed “blisters and wrinkles.”¹⁸⁷ Additionally, Lolita engaged in behavior indicative of stress and had “significant wear in six

hyperlink) (finding that the minor noncompliance was that the records of acquisition, disposition or transport were incomplete to the point that “[i]t [was] difficult to determine what animals are present, which have been acquired, and which were sold or have died with the current system of record keeping”). Again, the exhibitor failed to keep proper records of acquisitions. See U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH SERV., *Teachable Moments, The Wildlife Center at Uncle Donalds Farm Inc.* (Aug. 4, 2020), <https://aphis-efile.force.com/PublicSearchTool/s/teachable-moments> (search certificate number for “58-C-1028;” then click “view teachable moments” tab and follow View Teachable Moments hyperlink). Recall that Tri-State was cited for failure to maintain records. *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 158, 162 (U.S.D.A. 2013).

182. *Animal Welfare Inspection Guide*, U.S. DEP’T AGRIC. 1-1, 2-6 (2021), https://www.aphis.usda.gov/animal_welfare/downloads/Animal-Care-Inspection-Guide.pdf.

183. 16 U.S.C. § 1540(g).

184. *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1332–33 (S.D. Fla 2016).

185. *Id.* at 1334.

186. *Id.* at 1342.

187. *Id.*

of her teeth, which might result from a stereotypic behavior of biting the side of the tank or the gates within it.”¹⁸⁸ Looking at the prior cases outlined herein, it is likely that other circuits would have agreed with PETA that Miami Seaquarium had harmed and/or harassed Lolita and, therefore, committed a “take” under the ESA. However, the U.S. District Court of the Southern District of Florida decided to reinterpret the applicable ESA statute.

The opinion outlines the legislative history of the ESA, but after analyzing the “plain meaning of ‘take’ and its attendant verbs—harm, harass, hunt, shoot, kill, wound, capture, trap, pursue, collect—relative to the ESA’s purpose,” the court concluded that harm and harass could only describe acts that were “gravely threatening.”¹⁸⁹ This is opposite to holdings by courts in other circuits, and, more importantly, what the Supreme Court held in *Babbitt*, that “‘take’ [should be] defined . . . in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”¹⁹⁰ The court in *Miami Seaquarium* failed to interpret “take” in the broad manner proscribed by the Supreme Court when it interpreted “take” as only encompassing grave harm.

Miami Seaquarium was appealed to the 11th Circuit, which affirmed the lower court’s decision, but noted that they “[did] not agree that actionable ‘harm’ or ‘harass[ment]’ includes only deadly or potentially deadly harm.”¹⁹¹ However, the court proceeds to opine that the threshold is “threat of serious harm.”¹⁹²

The 11th Circuit did analyze statutory construction and the broad purpose outlined in *Babbitt*, but it managed to come to a different conclusion than the other circuits. The court claims that if it were to take on an expansive meaning of harass that “[a]ny continual annoyance, trouble, or vexation could, for example, be actionable ‘harass[ment].’”¹⁹³ However, this is contrary to Congressional intent and the Court’s opinion in *Babbitt*.

As outlined in PETA’s brief to the 11th Circuit, “the prohibition on ‘take’ is expansive: it includes ‘every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife . . . [t]hese terms must . . . be construed to include any injury to a protected animal.”¹⁹⁴ Black’s Law Dictionary defines harassment as “[w]ords, conduct, or action (usu[ally] repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress to that person and serves no legitimate purpose.”¹⁹⁵

188. *Id.* at 1343.

189. *Id.* at 1348.

190. *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 704 (1995).

191. *PETA v. Miami Seaquarium*, 879 F.3d 1142, 1144 (11th Cir. 2018).

192. *Id.* at 1149.

193. *Id.* at 1150.

194. Brief of Appellants at 20, *PETA v. Miami Seaquarium*, 879 F.3d 1142 (11th Cir. 2018) (No. 16-14814), 2016 WL 4539566. (internal citations and emphasis removed).

195. *Harassment*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Harassment is literally “continual annoyance, trouble, or vexation.”¹⁹⁶ Black’s Law Dictionary defines harm as “[i]njury, loss, damage; material or tangible detriment.”¹⁹⁷ Neither one of these definitions supports that harm or harassment equals a “threat of serious harm.”¹⁹⁸

V. COMMENT

Administrative changes need to occur within the USDA. The current trend of failing to enforce applicable laws and regulations upon exhibitors cannot continue. The USDA’s intent to use Teachable Moments as a way to educate is admirable. In some instances, however, the USDA undermines the gravity of the exhibitor’s noncompliance by classifying it as a Teachable Moment instead of a violation. The USDA’s job is to ensure that exhibitors are in compliance with the AWA, which in turn protects the animals. When the USDA fails to note egregious treatment of animals on inspection reports, then it is undermining its own purpose.

The best example of the USDA not performing its duties is the *Tri-State* case. USDA did report citations and eventually filed a complaint; however, the ALJ found Tri-State had violated the AWA and then slapped its wrist with a forty-five-day suspension of its license.¹⁹⁹ Yet, PETA’s investigation, which started within one year of the ALJ’s decision, brought to light severe AWA violations that resulted in the long-term suffering and, in some cases, death of the animals.²⁰⁰ It is clear from this case that USDA enforcement was inconsistent at best prior to 2016. Given that the USDA added Teachable Moments to its Animal Welfare Inspection Guide in 2016, and the previously mentioned decline of violations, it is likely that USDA enforcement only continued to worsen.²⁰¹

The most significant problem with solving this issue is that there are laws already on the books. The USDA is supposed to be enforcing them. However, it is not. The only way to truly solve this problem is to bring to light the issues and demand the administration enforce them.

Complicating this matter further is the fact that when courts improperly interpret statutes, such as the 11th Circuit did, it creates confusion. Florida is

196. *Miami Seaquarium*, 879 F.3d at 1150.

197. *Harm*, BLACK’S LAW DICTIONARY (11th ed. 2019).

198. *Miami Seaquarium*, 879 F.3d at 1150.

199. *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 179 (U.S.D.A. 2013).

200. *PETA v. Tri-State Zoological Park of W. Md., Inc.*, 424 F. Supp. 3d 404, 420–26 (D. Md. 2019).

201. See U.S. DEP’T AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., *USDA Animal Care Revises Its Animal Welfare Inspection Guide*, (Jan. 14, 2016, 5:19 PM), <https://content.govdelivery.com/accounts/USDAAPHIS/bulletins/13044a6> (last visited Oct. 19, 2020); Karin Brulliard & William Wan, *Caged Raccoons Drooled in 100-Degree Heat. But Federal Enforcement Has Faded*, WASH. POST, (Aug. 22, 2019), https://www.washingtonpost.com/science/caged-raccoons-drooled-in-100-degree-heat-but-federal-enforcement-has-faded/2019/08/21/9abf80ec-8793-11e9-a491-25df61c78dc4_story.html.

home to several zoos, aquariums, and wildlife centers. They are all affected by the 11th Circuit's serious harm standard. The serious harm standard justifies exhibitors' inadequate treatment of their animals. Coupled with the USDA's lack of enforcement, animals continue to suffer. It is the job of the judiciary to ensure that laws are being properly interpreted, upheld, and enforced. When that does not happen, injustice occurs.

Perhaps most affected by both of these issues are roadside zoos, aquariums, and wildlife centers. After reviewing background on the aforementioned cases, many of the exhibitors lacked the proper education or a background in caring for animals.²⁰² While they may genuinely care for the animals, they do not know how to properly care for the animals. It would be helpful for the USDA to provide education to these exhibitors about properly caring for their animals; however, this must be weighed against what is in the best interests of the animals.

The USDA and the courts have a duty to uphold and enforce the legislation that was enacted to protect these animals. Instead, individuals and special interest groups are having to step up to ensure these animals are protected.

CONCLUSION

It is for all of the reasons stated herein that the USDA must start enforcing the AWA in earnest. The exhibitors are not to be treated as customers, but as individuals holding a license to house and care for animals protected by the ESA and the AWA. When the USDA fails to do its job, animals suffer. The purposes of the ESA and the AWA are to protect the animals, but those purposes cannot be achieved when the laws are not being enforced. Moreover, courts must not look to the 11th Circuit for direction when deciding ESA matters. It is abundantly clear that the 11th Circuit mis-stepped in its serious harm threshold, and no other courts should follow in its footsteps.

202. The owner of Tri-State worked "as a management operations consultant, specializing in the fields of sanitation, housekeeping, building management, and environmental services" for 30 years prior to opening Tri-State. *Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 130 (U.S.D.A. 2013). The owners of Cricket Hollow "grew up on farms and worked with livestock . . . [one of the owners] took an artificial insemination course for bovines and . . . attended . . . community college studying horse husbandry, but did not finish that course." *Kuehl v. Sellner*, 161 F. Supp. 3d 678, 689 (N.D. Iowa 2016), *aff'd*, 887 F.3d 845 (8th Cir. 2018).