

1 PETER D. KEISLER
Assistant Attorney General

2 THOMAS MILLET
3 Assistant Branch Director

4 MARIA HORTENSIA RIOS (P.R. Bar #10908)
Trial Attorney, Federal Programs Branch
5 United States Department of Justice
20 Massachusetts Avenue, NW, Room 7312
6 Washington, DC 20530
Telephone: (202) 616-9750
7 Facsimile: (202) 616-8202

8 KEVIN V. RYAN
United States Attorney

9 JOANN SWANSON
Assistant United States Attorney, Chief, Civil Division
10 U.S. Attorney's Office
450 Golden Gate Ave., Box 36055
11 San Francisco, CA 94102
Telephone: (415) 436-7200
12 Facsimile: (415) 436-6748
Attorneys for Defendants

13
14 **IN THE UNITED STATES DISTRICT COURT**
15 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

16 ANIMAL LEGAL DEFENSE FUND, et al.,

17 Plaintiffs,

18 v.

19 ANN M. VENEMAN, Secretary of Agriculture,
United States Department of Agriculture, et al.,

20 Defendants.
21

C 03-03400 JL

**MEMORANDUM IN SUPPORT
OF DEFENDANTS' MOTION
TO DISMISS**

November 19, 2003
9:30 a.m.

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25 INTRODUCTION

26 Two animal rights organizations, plaintiffs the Animal Legal Defense Fund, Inc. ("ALDF")
27 and the Animal Welfare Institute ("AWI"), together with three individual plaintiffs – Valerie
28 Buchanan, Jane Garrison and Nancy Megna – bring this action against three officials of the United

1 States Department of Agriculture ("USDA") in their official capacities seeking a final decision on
2 the "Draft Policy on Environment Enhancement for Nonhuman Primates" ("Draft Policy"),
3 published in 1999. 64 Fed. Reg. 38,145 (July 15, 1999). Defendants Ann M. Veneman, Secretary
4 of the USDA ("the Secretary"), Bobby R. Acord, Administrator of the Animal and Plant Health
5 Inspection Service ("APHIS") of the USDA, and Dr. Chester A. Gipson, Deputy Administrator,
6 APHIS Animal Care Program, move to dismiss this action for lack of subject matter jurisdiction,
7 and for lack of standing under Article III of the Constitution. Additionally, Defendants move to
8 dismiss for lack of jurisdiction because the relief sought in the complaint – that Defendants be
9 compelled to make a final decision regarding the Draft Policy – has been rendered moot by the
10 USDA's final action on the Draft Policy.

11 Defendants seek the dismissal of the complaint for lack of subject matter jurisdiction
12 because the Draft Policy is simply a general statement of policy issued to guide regulated parties
13 in their efforts to comply with the AWA regulations. As such, it is not "agency action" within the
14 meaning of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551(4).

15 The complaint should also be dismissed for lack of subject matter jurisdiction because
16 Defendant Dr. Chester A. Gipson, APHIS Deputy Administrator, Animal Care, has publicly
17 announced that the USDA will not issue the Draft Policy in final form, thus rendering the relief
18 sought in the complaint moot.

19 Finally, plaintiffs lack standing to challenge the Draft Policy. Requiring Defendants to
20 finalize the Policy would have had no effect on plaintiffs' alleged injuries, as the Draft Policy
21 simply offered guidance, and was not a binding norm for which compliance was mandatory. Any
22 injury plaintiffs could claim is entirely conjectural, since a final Policy would not have required
23 any regulated party to change its conduct.

24 STATUTORY AND REGULATORY FRAMEWORK

25 A. The Animal Welfare Act.

26 In August of 1966, Congress enacted the AWA to prevent commerce in stolen animals,
27 and to ensure the humane care and treatment of animals used for research and experimentation.
28 Pub. L. No. 89-544, 80 Stat. 350 (1966). The 1966 Act required, among other things, that the

1 Secretary promulgate standards to achieve this goal, including minimum requirements for
2 housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and
3 temperature, separation by species and adequate veterinary care of these animals. Id.
4 Congress amended the Act extensively in 1970, and added authority to cover the handling, care,
5 and treatment of animals by dealers and exhibitors. Pub. L. No. 91-579, 84 Stat. 1560 (1970).
6 The 1970 Amendments also required that animal species be separated when the Secretary deems
7 such separation necessary for the humane handling, care, and treatment of those animals. Id.

8 Congress amended the AWA in 1985 to provide additional authority to the Secretary to
9 regulate the care provided to animals by research facilities, dealers and exhibitors. The
10 amendments supplemented the Act's broad remedial scheme and expanded the Secretary's
11 regulatory powers. Pub. L. No. 99-198, 99 Stat. 1645 (1985). Under the 1985 Amendments, the
12 Secretary was directed to promulgate "minimum requirements *** for a physical environment
13 adequate to promote the psychological well-being of primates." 7 U.S.C. § 2143(a)(2)(B).

14 B. The AWA Regulations.

15 Pursuant to the rulemaking authority granted to the Secretary under the 1985
16 Amendments, a notice was published in March 1986 in the Federal Register stating the Secretary's
17 intent to issue standards on the handling, care, and treatment of nonhuman primates. 51 Fed. Reg.
18 7950 (1986). The notice solicited information and comments on that proposed rulemaking. On
19 March 15, 1989, the Secretary published proposed regulations, which included an amendment of
20 the existing regulations contained at 9 C.F.R. Part 3, Subparts A and D. 54 Fed. Reg. 10,897
21 (1989). Subpart D of Part 3 contains standards for the humane handling, care, treatment and
22 transportation of nonhuman primates. 54 Fed. Reg. 10913-10929, 10941-10954 (1989). The
23 Secretary solicited comments on the proposed rules at Subpart D, and received a total of 10,686
24 comments on these provisions in time for consideration. See 55 Fed. Reg. 33,448 (1990).

25 In light of the volume of comments received, and as a result of the Secretary's ongoing
26 consultations with other federal agencies, a second proposed rule was published in the Federal
27 Register on August 15, 1990. Id. Interested parties were given until October 1, 1990, to submit
28 comments on the second proposed rule. Id. The Secretary received 11,932 comments in

1 response to the second proposed rule, and after consideration of the relevant comments, published
2 the final regulations in the Federal Register on February 15, 1991. 56 Fed. Reg. 6426 (1991).

3 The final regulations were effective on March 18, 1991. Id.

4 The regulations establish "minimum requirements *** for a physical environment
5 adequate to promote the psychological well-being of primates," 7 U.S.C. § 2143(a)(2)(B), in two
6 respects. First, the regulations contain specific provisions that set forth detailed guidelines with
7 which the regulated facility must comply. See, e.g., 9 C.F.R. § 3.81(a)-(d). Second, each
8 regulated facility must develop an "environment enhancement" plan ("AWA plan") in accordance
9 with "currently accepted professional standards," and must make the AWA plan available to
10 agency inspectors and officials of any funding agency. Id. at § 3.81.

11 As to the specific provisions, the regulations, first, prohibit restraints, unless required for
12 health reasons as determined by the attending veterinarian or by a research proposal approved by
13 the Institutional Animal Care and Use Committee. 9 C.F.R. § 3.81(d). Where restraint devices
14 are allowed, they must be "for the shortest period possible," and where restraint of more than 12
15 hours is required, the primate "must be provided the opportunity daily for unrestrained activity for
16 at least one continuous hour during the period of restraint, unless continuous restraint is required
17 by the research proposal approved by the Committee at research facilities." Id.

18 Second, the regulations require that the primary enclosure "be enriched by providing
19 means of expressing noninjurious species-typical activities." 9 C.F.R. § 3.81(b). The regulations
20 go on to provide examples of such enrichments:"perches, swings, mirrors, and other increased
21 cage complexities; providing objects to manipulate; varied food items; using foraging or task-
22 oriented feeding methods; and providing interaction with the care giver or other familiar and
23 knowledgeable person consistent with personnel safety precautions." Id.

24 Third, certain types of primates "must be provided special attention regarding
25 enhancement of their environment, based on the needs of the individual species...." 9 C.F.R.
26 § 3.81(c). These are: infants, young juveniles, primates showing signs of psychological distress,
27 those for whom the Committee-approved research protocol requires restricted activity, and
28 individually housed primates unable to see or hear their own or compatible species. Id. Also,

1 there must be "special provisions for great apes weighing over 110 lbs. (50 kg), including
2 additional opportunities to express species-typical behavior." Id.

3 Fourth, the AWA plan must "include specific provisions to address the social needs of
4 nonhuman primates of species known to exist in social groups in nature,"and "[s]uch specific
5 provisions must be in accordance with currently accepted professional standards, as cited in
6 appropriate professional journals or reference guides, and as directed by the attending
7 veterinarian" 9 C.F.R. § 3.81(a). Individual housing is provided for under conditions denoted as
8 "exceptions." Id. It is permitted in cases of vicious or overly aggressive behavior or debilitation
9 (id. at (a)(1)), or where necessary to prevent contagion (id. at (a)(2)). Furthermore, a primate may
10 not be housed with another species "unless they are compatible, do not prevent access to food,
11 water, or shelter by individual animals, and are not known to be hazardous to the health and well-
12 being of each other." Id. at (a)(3). Individually housed primates "must be able to see and hear
13 nonhuman primates of their own or compatible species" unless the attending veterinarian
14 determines it would endanger their health, safety, or well-being. Id.

15 Finally, the regulations impose precise, numerical requirements on the size of primates'
16 primary enclosures, including a table of minimum cage size (floor area and height) according to
17 the typical weight of the species. 9 C.F.R. § 3.80(b)(2)(i), (iv) (table). Where more than one
18 animal is housed in a cage, the required floor area is the sum of the requirements for each
19 individual (except in the case of infants less than 6 months of age housed with their mothers). Id.
20 While the cage size requirements are in a separate section (§ 3.80, entitled "Primary Enclosures")
21 from the section entitled "Environment enhancement to promote psychological well-being"
22 (§ 3.81), the Secretary intended the cage size requirements as part of his compliance with the
23 "psychological well-being" provision of the Act.

24 In short, the Secretary's regulations comprise a combination of provisions, ranging from
25 the extremely specific – cage size, prohibition of restraints, requirement that individually housed
26 primates be able to see and hear their own or compatible species – to the extremely broad –
27 requirement to develop a plan in accordance with currently accepted professional standards –,
28 with other requirements falling somewhere in between – i.e., list of examples of environmental

1 enrichment such as swings and perches, list of types of primates requiring special attention,
2 requirement to address social needs of primates known to exist in social groups in nature.

3 C. The Draft Policy on Environment Enhancement for Nonhuman Primates.

4 On July 15, 1999, the Administrator of the Animal and Plant Health Inspection Service
5 ("APHIS"), exercising enforcement authority delegated by the Secretary, published the Draft
6 Policy in the Federal Register seeking public comments. 64 Fed. Reg. 38,145 (July 15, 1999).
7 APHIS "developed a draft policy to clarify what we believe must be considered and included in
8 the plan in order for dealers, exhibitors, and research facilities to adequately promote the
9 psychological well-being of nonhuman primates." Id.

10 In 1996, after 5 years of experience enforcing § 3.81, we evaluated the effectiveness of the
11 performance standards by surveying our inspectors about their experience in reviewing
12 environment enhancement plans developed under § 3.81. The results of our evaluation
13 indicated that dealers, exhibitors, and research facilities did not necessarily understand
14 how to develop an environment enhancement plan that would adequately promote the
15 psychological well-being of nonhuman primates. In addition, there has been considerable
16 disagreement in various sectors of the public over the adequacy of the performance
17 standards in § 3.81, as well as confusion among the regulated public concerning on what
18 basis they will be judged by inspectors as meeting or not meeting the requirements. Our
19 inspectors requested information and clarification on how to judge whether someone was
20 meeting the requirements in § 3.81.

21 While we continue to believe that the flexibility of the performance standards in § 3.81 is
22 in the best interests of the animals covered by the regulations, we do believe that
23 additional information on how to meet the standards in § 3.81 is necessary. We have,
24 therefore, developed a draft policy on environment enhancement for nonhuman primates.
25 The draft policy appears at the end of this document. We intend this policy to be used by
26 dealers, exhibitors, and research facilities as a basis in developing plans under § 3.81 for
27 environment enhancement to promote the psychological well-being of nonhuman
28 primates.

Id. at 38,146.

21 In the supplementary information introducing the Draft Policy, APHIS indicates that
22 dealers, exhibitors and research facilities where nonhuman primates are housed would not be
23 required to develop and follow environment enhancement plans in accordance with the draft
24 policy, but could follow and develop alternative practices, as long as these meet the requirements
25 of § 3.81:

26 Dealers, exhibitors, and research facilities who house nonhuman primates will
27 meet the requirements of § 3.81 if they develop and follow an environment
28 enhancement plan (referred to below as "plan") in accordance with this policy. If a
plan is not developed in accordance with this policy, the plan may or may not meet
the requirements of § 3.81. If a dealer, exhibitor, or research facility wants

1 assurance that an alternative plan (not in accordance with this policy) is in
2 compliance with § 3.81, they may request approval of the plan in writing from the
Deputy Administrator of Animal Care.

3 Id. at 38,147. As in the case of the regulation, the Draft Policy allows for flexibility and
4 innovation in how the regulated entities can meet the AWA and regulatory requirements. Id.

5 Subsequent to the publication of the Draft Policy in 1999, the Court of Appeals for the
6 District of Columbia held that the AWA regulations promulgated by the Secretary in 1991 were
7 valid. ALDF v. Glickman, 204 F.3d at 235. This decision was the last of a line of cases in which
8 plaintiff ALDF and others challenged 9 C.F.R. § 3.81, arguing that said regulation did not
9 adequately specify the minimum requirements for the physical environment of primates, in
10 violation to both the AWA and the APA. See ALDF v. Glickman, 943 F.Supp. 44, 47 (D.C.C.
11 1996), *vacated*, 130 F.3d 464 (D.C. Cir. 1997), *reh'g in banc granted, vacated*, 136 F.3d 829, and
12 *on reh'g in banc*, 154 F.3d 426 (D.C. Cir. 1998), *cert. denied*, National Association for
13 Biomedical Research v. ALDF, 526 U.S. 1064 (1999).

14 The Court of Appeals held that the AWA statutory mandate did not require the Secretary
15 to set the requirements for cage size and other matters related to the care and the promotion of
16 psychological well-being of nonhuman primates in greater specificity than what is already
17 provided for in the regulation. ALDF v. Glickman, 943 F.3d at 195-96. The "Secretary was
18 reasonably concerned that more precise specification might cause harm, it was entirely reasonable
19 under the statute for him to choose a relatively flexible standard." Id. at 196.

20 D. The USDA's recent announcements regarding the Draft Policy.

21 In December 2002, Dr. Chester A. Gipson, APHIS Deputy Director, Animal Care,
22 announced USDA's final action on the Draft Policy at a meeting held by the Scientists' Center for
23 Animal Welfare ("SCAW"). See Defendants' Exhibit 1 (Declaration of Dr. Chester A. Gipson).
24 This meeting was attended by members of the research community and by various animal
25 protection groups. Id. Dr. Gipson announced that USDA was not going forward with the Draft
26 Policy. Id. He further announced that USDA and the United States Department of Health and
27 Human Services, National Institutes of Health ("NIH"), had agreed to develop best management
28 practice guidelines concerning nonhuman primates. Id. Dr. Gipson also appeared at the Public

1 Responsibility in Medicine and Research ("PRIM&R") meeting on March 31, 2003. Id. This
2 was also a gathering of members of the research community and representatives from various
3 animal protection groups. Id. He again announced that USDA was not going forward with the
4 Draft Policy, and that the USDA and NIH had agreed to develop best management practice
5 guidelines concerning nonhuman primates. Id. These guidelines are currently being developed.
6 Id.

7 ARGUMENT

8 I. PLAINTIFFS' APA CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER 9 JURISDICTION: THE DRAFT POLICY IS NOT A FINAL AGENCY ACTION.

10 Under the APA, a court may review only "final agency action." 5 U.S.C. § 704; Public
11 Citizen v. Office of the United States Trade Representative, 970 F.2d 916, 918 (D.C. Cir. 1992).

12 To qualify as "final," an agency's action must "mark the 'consummation' of the agency's decision
13 making process." Bennett v. Spear, 520 U.S. at 177- 78. In addition, "the action must be one by
14 which rights or obligations have been determined, or from which legal consequences will flow."
15 Id. at 178 (internal quotations omitted).

16 The Draft Policy was clearly not the consummation of the USDA's decision making
17 process this policy; it was document offering guidance to "dealers, exhibitors, and research
18 facilities as a basis in developing plans under §3.81 for environment enhancement to promote the
19 psychological well-being of nonhuman primates." 64 Fed. Reg. at 38,146. The binding
20 regulatory provision is 9 C.F.R. § 3.81, which the Court of Appeals for the District of Columbia
21 has held to be a valid and reasonable exercise of the extensive discretion conferred upon the
22 Secretary by Congress in 7 U.S.C. § 2143(a). ALDF v. Glickman, 204 F.3d at 235.

23 The Draft Policy did not impose any standards which had to be followed by the regulated
24 parties. It simply explained the existing rules and offered guidance as to how regulated parties
25 could comply. See Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99 (1995). It was
26 proposed because USDA APHIS inspectors had encountered "confusion among the regulated
27 public" on how to comply. 64 Fed. Reg. at 38,146. No party, however, would have been required
28 to bring its conduct into compliance with the Draft Policy, even had it been if finalized, as
regulated parties were free to propose their own plans. Id. at 38,147. The Draft Policy did not

1 establish a binding norm, nor determined rights or obligations. As such, it was a general
2 statement of policy, see 5 U.S.C. § 553(b)(A), not a rule, and thus, not subject to APA review.
3 Pacific Gas & Electric Co. v. Federal Power Commission, 506 F.2d 33, 38 (D.C.Cir. 1974);
4 National Wildlife Federation v. Burford, 627 F.Supp. 1445 (D.Mont. 1985), *aff'd*, 871 F.2d 849
5 (9th Cir. 1989); Hocor v. USDA, 82 F.3d 165, 167 (7th Cir. 1996).

6 II. PLAINTIFFS' CLAIM SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER 7 JURISDICTION: IT IS MOOT.

8 The United States Constitution, Article III § 2, cl. 1, requires the existence of an actual
9 case or controversy to support federal court jurisdiction. U.S. Const., art. III, Section 2; Deakins v.
10 Monaghan, 484 U.S. 193, 199 (1988). "A moot action is one where 'the issues presented are no
11 longer live or the parties lack a legally cognizable interest in the outcome.'" Northwest
12 Environmental Defense Center v. Gordon, 849 F.2d 124, 1244 (9th Cir. 1988) (quoting Murphy v.
13 Hunt, 455 U.S. 478, 481 (1982)); see also County of Los Angeles v. Davis, 440 U.S. 625, 631
14 (1979) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)). "The basic question in
15 determining mootness is whether there is a present controversy as to which effective relief can be
16 granted." Id. (citing United States v. Geophysical Corporation, 732 F.2d 693, 698 (9th Cir.
17 1984)). In this case, the USDA has already issued the decision which plaintiffs seek to compel
18 through this action. Because the USDA has made a final decision regarding the Draft Policy, see
19 Df. Ex. 1, plaintiffs' request for injunctive relief cannot be granted as it is moot. See prayer for
20 relief at 2, 3.

21 Plaintiffs' claim that the USDA is in violation of the APA and the AWA by unlawfully
22 withholding or unreasonably delaying the final decision on the Draft Policy should, likewise, be
23 dismissed. First, as discussed in the preceding section, the Draft Policy is a general policy
24 statement that did not establish "binding norms," and thus the USDA did not have to comply with
25 the APA rule-making process – which requires, for instance, publication in the Federal Register
26 and in the Code of Federal Regulations. Second, although the Secretary had the statutory duty to
27 issue the AWA regulations, there was no statutory duty for her to issue the Draft Policy in final
28 form, nor is there at present a duty to publish any similar document offering guidance to "dealers,
exhibitors, and research facilities as a basis in developing plans under §3.81 for environment

1 enhancement to promote the psychological well-being of nonhuman primates." 64 Fed. Reg. at
2 38,146; see Madison-Hughes v. Shalala, 80 F.3d 1121, 1124-25 (6th Cir. 1996); Brower v. Evans,
3 257 F.3d 1058, 1067-68 (9th Cir. 2001). Thus, the Secretary was not required to follow the APA
4 rule-making process in matters related to the Draft Policy, and had already complied with her
5 statutory duty under the AWA by issuing the AWA regulations. Plaintiff's request for declaratory
6 relief, see prayer for relief at 1, should be denied.

7 III. PLAINTIFFS LACK STANDING TO CHALLENGE THE DRAFT POLICY.

8 To have standing under Article III, plaintiffs must allege an "injury in fact" that is "actual
9 or imminent, not conjectural or hypothetical," that is "fairly traceable" to the challenged action,
10 and that is likely to be redressed by the relief requested. Lujan v. Defenders of Wildlife, 504 U.S.
11 555, 560- 61 (1992) (internal quotations omitted). Plaintiffs do not satisfy these requirements.¹

12 Specifically, plaintiffs cannot show that any alleged injury is "fairly traceable" to the Draft
13 Policy. The Draft Policy, was advisory, not mandatory. While regulated parties may choose² to
14 follow it – "this draft policy will assist regulated entities by clarifying what actions we consider
15 necessary in order to comply with the requirements of § 3.81," 64 Fed. Reg. at 38,146 –, the
16 USDA has "recognize[d] that there may be other options that would also meet the requirements of
17 § 3.81. Our adoption of this draft policy would not prevent regulated entities from developing
18 practices other than those in the draft policy, as long as those practices meet the requirements of §
19 3.81." Id. Thus, it is conjecture to assume that the existence of a final Policy would have caused
20 any specific regulated party, which might have been visited by any plaintiff, to alter its conduct.

21 APHIS inspectors currently perform their duties pursuant to the standards in the AWA
22 regulations. Any decisions made by them or other USDA officials would not have been made
23 based on the Draft Policy, rather, the decisions would be based – and continue to be based – on

24
25 ¹ To meet the "case or controversy" requirement of Article III, a plaintiff must
26 demonstrate: (1) that she has suffered "injury in fact;" (2) that the injury is "fairly traceable" to
27 the defendant's actions; and (3) that a favorable judicial ruling will "likely" redress the plaintiff's
injury. See Lujan v. Defenders of Wildlife, 504 U.S. at 560-61. Our discussion will focus on the
third prong of this test.

28 ² The Draft Policy can still be consulted by regulated parties for guidance on how to
comply with § 3.81.

1 the AWA regulations, which have been held to be legally valid.

2 For example, in the case of individual plaintiff Buchanan, see complaint ¶¶ 13-20, she
3 allegedly wrote a letter to APHIS expressing her concern that Terry, a male chimpanzee, had been
4 housed at the Southern Nevada Zoological-Botanical Park without a companion since 1995.
5 Nothing in the Draft Policy, even if had been finalized, would have required those conditions to
6 change. The Draft Policy provides that:

7 We consider pair or group housing (Option 1) to be the most desirable housing
8 option and we expect this option to be used whenever possible. We consider this
9 particularly important for chimpanzees, gorillas, gibbons, and siamangs, which
10 seem to suffer particularly from being housed individually. If Option 1 is not
11 utilized, the plan must provide an explanation and justification for each diminished
12 degree of social interaction. Social housing also facilitates important primate
13 behaviors associated with signals that communicate emotional states or other
14 information between individuals. Acceptable reasons for choosing Options 2, 3, or
15 4 would include:

1. The health and well-being of the individual primate;
- 12 2. Documented unavailability of compatible individuals;
- 13 3. The scientific requirements of a protocol approved by an Institutional Animal
14 Care and Use Committee (IACUC) (for registered research facilities); or
4. The animal's assignment to an IACUC-approved project that will result in
15 euthanasia or disposition within a short period (normally less than 60 days).

16 64 Fed. Reg. at 38,147. Therefore, while the Draft Policy stated a preference that Terry have the
17 companionship of another chimpanzee, its finalization without changes would have not
18 necessarily mandated the Southern Nevada Zoological-Botanical Park to obtain a companion for
19 Terry. As provided in the Draft Policy, pair or group housing is the most desirable housing
20 option, but there are circumstances in which other housing options may be acceptable, and even
21 preferred. Id.

22 Thus, to compel the Agency to reach a final decision as to the Draft Policy would not have
23 necessarily redressed individual plaintiff Buchanan's alleged injuries, or those of the other
24 plaintiffs in this suit. The Draft Policy simply offered further guidance with respect to the
25 implementation of the standards and minimum requirements of 9 C.F.R. § 3.81, yet its publication
26 in final form was not essential for the APHIS inspectors and the regulated facilities to be informed
27 about the standards and minimum requirements of the statute. The AWA regulations already
28 provide detailed information on those standards and minimum requirements. Also, in order to
meet the minimum requirements, a regulated facility has the duty to keep current with the

1 "accepted professional standards as cited in appropriate professional journals or reference guides,
2 and as directed by the attending veterinarian." 9 C.F.R. § 3.81. The Draft Policy "represents what
3 we believe are the currently accepted professional standards for promoting the psychological
4 well-being of nonhuman primates through enhancement of the primates' environment. We believe
5 this draft policy will assist regulated entities by clarifying what actions we consider necessary in
6 order to comply with the requirements of § 3.81." 64 Fed. Reg. 38,146. The Draft Policy offered
7 guidance, yet it was not, as provided in 9 C.F.R. § 3.81, the sole source of advice on how to meet
8 the professional standards and minimum requirements of the AWA and the AWA regulations.

9 Had the USDA published the Draft Policy in final form without changes, APHIS
10 inspections and operations would have been conducted as usual in compliance with the current
11 AWA regulations. The USDA has decided not to go forward with Draft Policy, but this has made
12 no difference in how APHIS inspections and operations are conducted. The binding rules during
13 the time the Draft Policy was under consideration and at present remain the same: the AWA
14 regulations. Because finalizing the Draft Policy is not the cause of plaintiffs' alleged injuries, and
15 because the relief sought would not have redressed those injuries, plaintiffs lack standing.

16 CONCLUSION

17 For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

18 Respectfully submitted.

19 PETER D. KEISLER
20 Assistant Attorney General
21 THOMAS MILLET
22 Assistant Branch Director

23 MARIA HORTENSIA RIOS
24 (P.R. Bar #10908)
25 Trial Attorney, Federal Programs Branch
26 United States Department of Justice
27 20 Massachusetts Avenue, NW, Room 7312
28 Washington, DC 20530
Telephone: (202) 616-9750
Facsimile: (202) 616-8202
E-mail: maria.rios@usdoj.gov

Mailing Address
P.O. Box 883
Washington, DC 20044

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Delivery Address
20 Massachusetts Avenue, NW
Washington, DC 20001

Counsel for Defendants