

COMBATING ANIMAL CRUELTY WITH ENVIRONMENTAL LAW TACTICS

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I. INTRODUCTION

Many individuals and citizen groups view federal and state anti-cruelty statutes as inadequate in protecting animals and in providing sufficient remedies. The fight to protect animals has led to a more creative scheme of thought. Many individuals and groups have implemented legal tactics to combat animal cruelty with use of environmental law. Unlike animal cruelty statutes like the Animal Welfare Act (AWA), many of the federal environmental statutes provide citizen suit provisions or otherwise allow interested parties to sue for enforcement.¹

Citizen suit provisions in environmental statutes increase accessibility of the courts to the public.² The provisions usually include express language granting a private right of action that allows for judicial review of agency actions, and outlines procedural mechanics for when, where, and how review can be permitted.³

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¹ See SONIA S. WAISMAN, et al, ANIMAL LAW CASES AND MATERIALS 376 (3d ed. 2006).

² See *id.* at 197.

³ See *id.*

There are many instances where citizens groups have filed federal environmental citizen suits against federal agencies and private facilities that would be considered by many to be actively involved in or to have facilitated acts of animal cruelty. Animal protectionists have attempted and continue to attempt to further protection of animals by filing or supporting suits under environmental law against federal agencies and private facilitators of animal cruelty.

II. ANIMAL ADVOCATES FACE LIMITATIONS IN ANTI-CRUELTY LEGISLATION

Animal cruelty laws exist at both the state and federal levels. The AWA serves as the principal legislation at the federal level.⁴ At the state level, every state has enacted its own unique law prohibiting animal cruelty. Most of the state criminal statutes are misdemeanor offenses.

Though there is both federal and state legislation regarding animal cruelty, there is no universal definition for animal cruelty. Generally, animal abuse is considered socially unacceptable behavior that intentionally causes unnecessary pain, suffering, or distress to and/or death of an animal.⁵ This definition excludes socially acceptable treatment, such as hunting, some veterinary practices, and certain agricultural practices.⁶ Animal advocates would like to expand upon this definition to the extent that many of the practices presently excluded from protection would be covered and there would be few or no exemptions for parties involved in conduct that intentionally harms animals.⁷

⁴ 7 U.S.C. § 2132 (2004).

⁵ See Frank Ascione, *Animal Abuse and Youth Violence*, Sept. 2001, http://www.ncjrs.gov/html/ojjdp/jjbul2001_9_2/contents.html.

⁶ See *id.*

⁷ See FactoryFarming.com, *The Truth Hurts*, <http://www.factoryfarming.com/index.htm> (last visited Apr. 15, 2007); See also NABR.org, *Animal Law Section*, <http://www.nabr.org/animallaw/Proposal/NYCBarProposal.htm> (last visited Apr. 15, 2007).

The AWA is the most extensive federal statute regarding animals.⁸ The Act requires minimal standards of care and treatment for certain animals bred for commercial sale, used in research, transported commercially, or publicly exhibited.⁹ It does not regulate the billions of animals intended for food or fiber.¹⁰ It does, however, prohibit dogfights, bear or raccoon baiting, and similar animal-fighting ventures.¹¹ The AWA is enforced by the United States Department of Agriculture (USDA).¹² The USDA's Animal and Plant Health Inspection Service administers the AWA, its standards, and its regulations.¹³ The USDA has a "long and notorious reputation for ineffective enforcement."¹⁴ Much of this failure can be attributed to under-funding and a lack of interest on the part of the USDA.¹⁵ Audits have shown instances where the USDA did not effectively use its enforcement authority, did not aggressively collect fines from violators and arbitrarily lowered penalties, failed to re-inspect facilities that had serious violations, and continuously requested inadequate amounts of congressional funding.¹⁶ This has led to a decrease in incentives to comply with the AWA. Even worse, auditors found, "[a]t times, poor enforcement of the AWA has actually limited the ability of states to enforce their own laws to protect certain animals and to protect the public."¹⁷ The USDA is not interested in enforcing the AWA and its inaction has further crippled an already limited statute.

⁸ See National Center for Animal Law, <http://www.lclark.edu/org/ncal/description.html> (last visited Apr. 15, 2007).

⁹ See *id.*

¹⁰ See 7 U.S.C. § 2132(g).

¹¹ See *id.* §§ 2131, 2132; See also National Center for Animal Law, *supra* note 8.

¹² See U.S. Dept. of Agriculture, Animal and Plant Health Inspection Service, <http://www.aphis.usda.gov/lpa/pubs/awact.html> (last visited Apr. 10, 2007).

¹³ See *id.*

¹⁴ Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act (2003), [http://www.nabr.org/animal law/Proposals/NYBarProposal.htm](http://www.nabr.org/animal%20law/Proposals/NYBarProposal.htm).

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ *Id.*

Further, the AWA does not have a citizen suit provision to allow citizens to seek recourse through the courts.¹⁸ Under current case law, “an enforcement action brought directly under the AWA is likely to be dismissed for failure to state a claim upon which relief can be granted, as the courts have held that the AWA provides no implied private cause of action.”¹⁹ Citizens seeking to avoid this result have sued under the Administrative Procedure Act.²⁰ The Administrative Procedure Act provides that any person suffering a legal wrong, or that any person who is adversely affected, has a right to file a suit against a government agency and permits a reviewing court to compel agency action.²¹ This approach is limited because the suit is filed against the government agency and not against the party who allegedly violated the AWA.²²

Suits filed under the Administrative Procedure Act are subject to dismissal for lack of standing.²³ Standing is a threshold question that must be satisfied to prevent a case from being dismissed.²⁴ Standing is satisfied when it is shown that the litigant is entitled to have the court decide the merits of the issue.²⁵ This can be shown once the constitutional requirements have been met.

The Supreme Court defined the constitutional requirements as (1) the plaintiff has suffered, or is in imminent danger of suffering, an injury in fact; (2) the plaintiff’s injury is traceable to the defendant’s conduct; and (3) a favorable ruling would remedy the problem of which the plaintiff complains.²⁶ “Since the early 1970’s, environmental issues-and their close cousin, animal issues-have been at the forefront of the debate over proper use of standing doctrine by the judiciary.”²⁷ Many significant animal protection cases are brought in federal court and

¹⁸ *See id.*

¹⁹ *Id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See id.*

²⁴ *See* WAISMAN, *supra* note 1, at 474.

²⁵ *See id.*

²⁶ *See id.* 184.

²⁷ *Id.* at 183.

therefore have to satisfy Article III standing requirements to prevent dismissal.²⁸

There are recent cases filed under the Administrative Procedure Act that have survived prudential and constitutional scrutiny: *Animal Legal Defense Fund v. Glickman and Alternatives Research & Development Foundation v. Glickman*.²⁹ In both cases, the plaintiff was able to show an aesthetic injury from witnessing acts of animal cruelty which entitled him to standing to challenge USDA regulations.³⁰ As a committee report from the New York City Bar Association concluded, “[w]hile these cases are an enormous step in the right direction, they demonstrate that the development of citizen’s standing on a case-by-case basis in the courts under the Administrative Procedure Act will certainly result in unpredictable, inconsistent, and spotty access to the courts.”³¹

As previously stated, states are equipped with anti-cruelty statutes as well. State anti-cruelty laws are criminal laws enforced by the District Attorney or state humane enforcement agencies. Despite the fact that an act of cruelty has been criminalized by the law, it still may not be investigated or prosecuted.³² Law enforcement and prosecutors face numerous obstacles that restrict their ability to handle animal abuse cases promptly and thoroughly.³³ For example, many police officers are not trained on the proper techniques to handle animal abuse cases, and some officers bring personal bias towards animals by regarding animals as expendable property.³⁴ Departments and prosecutors are forced to prioritize cases due to lack of funding and may be inclined to put animal law cases at the bottom.³⁵

²⁸ See *id.* at 184.

²⁹ See 154 F.3d 426 (D.C. Cir 1998); See also Report of the Committee, *supra* note 14.

³⁰ See Report of the Committee, *supra* note 14.

³¹ See *id.*

³² See WAISMAN, *supra* note 1, at 474.

³³ See *id.*

³⁴ See *id.* at 475.

³⁵ See *id.*

There is minimal case law for prosecutors to reference, and many of the courts are not interested in animal cruelty cases.³⁶ The agencies with the authority to enforce the laws are too overwhelmed to respond effectively to an animal cruelty complaint, and they do not have adequate funding to bring cases to court.³⁷ Many of these agencies focus on domestic animals like cats and dogs rather than farm animals.³⁸ As a result, state anti-cruelty statutes are not effectively enforced.

In addition, the anti-cruelty statutes pose more obstacles to ensuring the wellbeing of animals. Many anti-cruelty statutes are significantly weakened by exemptions.³⁹ Whole classes of animals are excluded from state protection, such as wildlife or farm animals, animals used for medical or research purposes, animals used in entertainment venues, such as rodeos, circuses, and zoos, and animals and specific practices used agricultural industries.⁴⁰

III. FOUR ENVIRONMENTAL LAWS USED BY MANY ANIMAL ADVOCATES IN COMBATING ANIMAL CRUELTY

The Clean Water Act, Clean Air Act, the Migratory Bird Treaty, and the National Environmental Policy Act have been at the forefront of many lawsuits filed by both environmental and animal advocacy organizations.

A. *Understanding the Clean Water Act*

The Clean Water Act was enacted to “restore and maintain chemical, physical, and biological integrity of the Nation’s waters.”⁴¹ The Clean Water Act prohibits the discharge of any pollutant into United States waters except in accordance with

³⁶ See David Wolfson, *Farm Animals and the Law*, http://www.satyamag.com/may97/farm_animals.html (last visited Apr. 10, 2007).

³⁷ See *id.*

³⁸ See *id.*

³⁹ See WAISMAN, *supra* note 1, at 475.

⁴⁰ See *id.*

⁴¹ 33 U.S.C. § 1251(a) (2004).

certain restrictions.⁴² Pollutants discharged from “point sources” are permitted through a regulated system under the National Pollution Discharge Elimination System.⁴³ The Clean Water Act established a program to issue permits limiting the amount of discharge from point sources.⁴⁴ Point sources are “any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged.”⁴⁵ The Environmental Protection Agency (EPA) administers the permit program, but a state may apply to the EPA for authority to administer the program.⁴⁶ Once the state assumes the authority, the EPA takes on a supervisory role. If the EPA determines that a state is not administering the program in compliance with federal standards, the EPA must provide an opportunity to cure, and if the issue is not resolved, the EPA must withdraw the state’s authority.⁴⁷ The Clean Water Act provides for citizens’ suits to enforce the EPA’s nondiscretionary duties.⁴⁸

*B. Exploring the Method In Which Clean Water Act
Has Been Implemented in the Fight Against
Animal Cruelty*

Animal protectionist groups may dedicate many man hours investigating animal cruelty at facilities like Concentrated Animal Feeding Operations (CAFO), but find it difficult to file any resulting animal cruelty claims because farm animals are excluded from the AWA and state statutes. A secondary effect from an environmental suit may eliminate the cruel practices or at least increase the quality of life for animals. Organizations like the Humane Society for the United States (HSUS) and the Sierra Club have used environmental laws to file suits against CAFOs.

⁴² See *id.* § 1311(a).

⁴³ See *id.* § 1342.

⁴⁴ See *id.* §§ 1311, 1312.

⁴⁵ See *id.* § 1362(14).

⁴⁶ See *id.* § 1342(b).

⁴⁷ See *id.* § 1342(c)(3).

⁴⁸ See *id.* § 1365(a)(2).

CAFOs are industrial-style animal-production sites that have replaced the majority of traditional family farms.⁴⁹ These industrial-style animal factories increase animal production through genetic manipulation and chemical and drug additives in the feed.⁵⁰ The animals are concentrated in giant confinement barns that “crowd animals together in inhumane conditions ripe for disease.”⁵¹ Specifically, broiler chickens are housed in industrial barns containing 25,000 birds that are bred to have heavy breasts that inhibit their ability to stand.⁵² These birds tend to die of thirst because they are unable to reach water.

Broiler birds are not the only farm animals that suffer a painful plight; dairy cows, hogs, egg laying hens, and beef cows are also subject to deplorable confinement, chemical and drug injections, as well as castration, tail docking, beatings, and de-beaking.⁵³

CAFOs are also large contributors to water pollution and noxious gas.⁵⁴ CAFOs create “one of the nation’s most dangerous water pollution problems.”⁵⁵ According to the Environmental Protection Agency, hog, chicken and cattle waste has polluted 35,000 miles of rivers in 22 states and contaminated groundwater in 17 states.⁵⁶

Livestock produce an enormous amount of waste--about 500 million tons of manure a year. But the corporate livestock industry’s waste disposal practices – spraying it onto croplands or storing it in open-air waste pits called lagoons- often

⁴⁹ See SierraClub.org, Inhumane Treatment of Farm Animals, <http://www.sierraclub.org/factoryfarms/factsheets/inhumane.asp> (last visited Apr. 10, 2007).

⁵⁰ See *id.*

⁵¹ *Id.*

⁵² See *id.*

⁵³ See *id.*

⁵⁴ See *id.*

⁵⁵ *Id.*

⁵⁶ See SierraClub.org, Protect America’s Water from Factory Farm Pollution, <http://www.sierraclub.org/factoryfarms/factsheets/inhumane.asp> (last visited Apr. 10, 2007).

result in leak, spills and runoff that pollute ground and surface water and create a health risk to people and wildlife. That's why the Sierra Club is calling for a moratorium on new large CAFOs until our clean-water protections are strengthened, and the massive pollution from current facilities is eliminated.⁵⁷

One of the Sierra Club's four major campaigns is protecting America's waterways from factory-farm pollution.⁵⁸ The Sierra Club recommends filing suit against CAFOs under the Clean Water Act or the Clean Air Act using the citizen suit provision.⁵⁹ The Sierra Club suggests that just filing suit opens a lot of doors and shows the agencies, politicians, and CAFO owner or grower the public's concerns are serious. The Sierra Club also believes that that a joint claim from a group of plaintiffs is more likely to prevail: "The problem with a lawsuit is that you may have to show that you have been harmed--which means waiting until after something negative has occurred. Recent cases, however, have prevailed on the basis of a 'presumptive nuisance' which means that certain things can be presumed to be a nuisance and there is no need to wait until it actually happens."⁶⁰

The Sierra Club has filed suit against CAFOs under the Clean Water Act on several occasions. While not all of the suits have yielded holdings in favor of the Sierra Club, there have been cases that have resulted in beneficial results for the environment and animals. Other organizations like the HSUS and the Concerned Area Residents for the Environment have filed suits under the Clean Water Act against CAFOs.

The HSUS, the nation's largest animal protection organization, is combating animal cruelty in New York by filing

⁵⁷ *Id.*

⁵⁸ See SierraClub.org, Keep Animal Waste Out of Waters, <http://www.sierraclub.org/factoryfarms/> (last visited April 10, 2007).

⁵⁹ See SierraClub.org, Strategies to Keep CAFOs Out, <http://www.sierraclub.org/factoryfarms/resources/strategies.asp> (last visited Apr. 10, 2007).

⁶⁰ *Id.*

suit under the Clean Water Act.⁶¹ In March 2007, the HSUS successfully expanded its lawsuit against the Hudson Valley Foie Gras farm for violating the Clean Water Act.⁶² Hudson Valley Foie Gras raises and slaughters ducks to produce the French delicacy *foie gras*--fatty liver.⁶³ The birds are force-fed abnormal amounts of food through a pipe shoved down their throats.⁶⁴ This causes their livers to expand to more than ten times its natural size.⁶⁵ This practice causes extreme and inhumane suffering for the birds and produces large amounts of fecal and slaughter waste.⁶⁶

Less than one year ago, the State of New York granted the facility \$400,000 in tax funds to expand.⁶⁷ In August 2006, the HSUS filed suit against the state for granting the subsidy, and, in September 2006, sued Hudson Valley Foie Gras for hundreds of violations of the federal Clean Water Act.⁶⁸ New York defended granting the subsidy by insisting that the facility was in compliance with all federal and state laws.⁶⁹ The HSUS and other animal advocate groups filed suit against New York State to prohibit the production and sale of foie gras as an adulterated food product.⁷⁰ In February 2007, New York fined Hudson Valley Foie Gras \$30,000 for violating state environmental law over 800 times.⁷¹ The facility was facing up to \$37,500 *per* violation.⁷² The penalty issued equated to less than \$50 per violation.⁷³ In March 2007, in federal court, the Humane Society successfully expanded its

⁶¹ HSUS.org, State Fines Foie Gras Factory Farm in Response to HSUS Lawsuit, http://www.hsus.org/farm/news/pressrel/state_foie_gras_factory_030607 (last visited Apr. 10, 2007).

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See id.*

⁶⁹ *See id.*

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See id.*

ongoing lawsuit against Hudson Valley Foie Gras for violation of the federal Clean Water Act to ensure appropriate penalties are assessed and to include the new legal violations identified by the state.⁷⁴ The matter is still pending in federal court.⁷⁵ As a result of this litigation, there are two bills before the New York State Assembly and Senate that would outlaw force-feeding birds to produce fatty livers.⁷⁶

Filing suit against the Hudson Valley Foie Gras shed light onto animal cruelty practices that were being sanctioned by the State of New York, resulting in enough public awareness to stimulate bills that would completely eliminate the practice in the state.⁷⁷ A favorable action in the federal court would force the facility to comply with federal regulations mandated in the Clean Water Act. Speculation can be drawn on how compliance with the Clean Water Act would impact the act of force-feeding birds: it may not end the force-feeding, and result in only environmental benefits for surrounding waterways. Compliance with the Clean Water Act would force *foie gras* farms to apply for a permit, adhere to the “Total Maximum Daily Load” stipulations, and report the amount of waste to either the EPA or the state authority.⁷⁸ Compliance with the Clean Water Act may require the facility to reduce the amount of waste produced, resulting in a decreased amount of birds that are force-fed and slaughtered for their fatty livers. Because the lawsuit was filed under the Clean Water Act, there will only be secondary benefits, if any, for the force-fed ducks.

In *Concerned Area Residents for the Environment et al. v. Southview Farm*, the plaintiffs used the citizen’s provision under the Clean Water Act, as well as, nuisance, negligence, and trespass claims to challenge the defendant’s practice of storing and disposing of liquid manure on its large dairy farm in western New York.⁷⁹ Southview Farm is the largest dairy farm in the State of New York with 2,200 heads of cows, heifers, and calves.⁸⁰

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See id.*

⁷⁷ *See id.*

⁷⁸ 33 U.S.C. § 1251 (303)(d) (2004).

⁷⁹ 34 F.3d 114 (2d Cir. 1994).

⁸⁰ *Id.* at 116.

Southview does not use traditional pasturing practices.⁸¹ Instead, the animals are kept in barns except for the three times a day they are milked.⁸² The enormous amount of fecal waste produced is not handled in the traditional farming husbandry practice of spreading the manure with a manure spreader.⁸³ Instead, the waste is stored in four-acre storage lagoons with a capacity of approximately six to eight million gallons of liquid waste.⁸⁴ A separator works in conjunction with the lagoons.⁸⁵ It pumps the manure over a mechanical device which drains off the liquid and passes the solid waste out through a compressing process.⁸⁶ The solid waste is then dropped into bins for transport while the liquid runs through a pipe into the lagoons via gravity.⁸⁷ The separated liquid was used for washing down the barns where the cows are housed.⁸⁸ Southview's records show that millions of gallons of manure were applied to its field.⁸⁹

The plaintiffs filed suit against Southview, alleging the facility was subject to compliance with the Clean Water Act and had eleven violations, which included liquid manure draining directly into a stream that ultimately flows into Genesee River.⁹⁰ The district court granted judgment in favor of the defendants, holding that as a matter of law the facility was not a CAFO subject to compliance because, on a portion of the farm, crops were grown.⁹¹ The plaintiffs appealed.⁹²

The appellate court held the facility had over 700 cattle that were *not* put out to pasture; under definition of the Clean Water Act the facility was a CAFO, and therefore, one type of point source under the Act.⁹³ As a CAFO, Southview was not

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 116-17.

⁹¹ *Id.*

⁹² *Id.* at 117.

⁹³ *Id.* at 117-18

subject to any agricultural exemptions.⁹⁴ The Clean Water Act requires that point sources obtain a permit for discharges which was not done in this instance.⁹⁵ The district court's ruling was reversed and remanded for further proceedings.⁹⁶

As in the Foie Gras case, the matter presented before the court was constrained to the Clean Water Act. The actual animal cruelty involving poor treatment of the cows was irrelevant to the proceedings. Southview will have to comply with the Clean Water Act because as a CAFO it is a point source, but will it have to change its practices towards the cows? It all depends on how the CAFO wants to handle reducing and controlling the amount of pollutant it expels. There is a level of uncertainty that accompanies a victory for animal advocates under environmental laws.

C. Understanding the Clean Air Act

The Clean Air Act regulates sources of air pollution. Its primary objective is to establish federal standards for various pollutants from stationary and mobile sources and to provide regulations for polluting emissions by state implementation plans.⁹⁷ Also, the amendments are designed to prevent significant deterioration in certain areas where air quality exceeds the national standards, and to obtain improved air quality where federal standards are not met.⁹⁸ EPA is supposed to report to Congress newer methods to achieve greater visibility and to issue regulations to achieve that objective.⁹⁹ The Clean Air Act has a citizen-suit provision that gives citizens a right to the courts when they have been harmed or aggrieved by an air polluter.¹⁰⁰

⁹⁴ *Id.* at 118.

⁹⁵ *Id.*

⁹⁶ *Id.* at 123.

⁹⁷ See 42 U.S.C § 7491 (2003); See also Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, http://www.fws.gov/laws/laws_digest/clenair.html (last visited Apr. 17, 2007).

⁹⁸ See Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service, *supra* note 97.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

*D. Exploring How the Clean Air Act Can Be Related
To Animal Cruelty*

A CAFO emits pollution that threatens animal welfare.¹⁰¹ The emissions are often so noxious that the pathologies produced are “painful, stressful and even fatal to animals and agriculture workers.”¹⁰² Swine facilities have the potential to produce the most deadly fumes.¹⁰³ The waste disposal systems in swine facilities drops the waste through slats on the floor into a large pit, where massive amounts of waste release more than forty poisonous gases, including ammonia and hydrogen sulfide.¹⁰⁴

An Iowa State University report notes that nearly 60% of workers in swine confinement facilities commonly suffer respiratory effects ranging from headaches to shortness of breath. When manure pits are agitated before emptying, hydrogen sulfide levels can rise to lethal levels within seconds. Exposure to hydrogen sulfide during pit agitation has accounted for the deaths of several confinement workers.¹⁰⁵

Three-quarters of all ammonia emitted in the United States comes from animal agriculture.¹⁰⁶ Poultry factory farms are contributors to ammonia emissions.¹⁰⁷ The ammonia is the result of wet litter and high temperatures that promote bacterial growth, releasing the noxious gas.¹⁰⁸ Research shows that ammonia levels of 50 parts per million in a single poultry house is above normal and will seriously impact bird growth and significantly

¹⁰¹ See Susanne Abrormaitis, *EPA Offers Large Producers Amnesty on Clean Air Act Violations*, Feb. 17, 2005, http://www.hsus.org/farm/news/ournews/epa_amnesty.html.

¹⁰² *Id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *Id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

compromise animal welfare.¹⁰⁹ The excessive amounts of ammonia can cause “respiratory disease, gastrointestinal irritation, foot/hock and breast blisters, eye infection, blindness and even death.”¹¹⁰ The exposure to ammonia can cause trachea and lung lesions that can render birds more susceptible to bacterial infections such as *E. coli*.¹¹¹ “Many factory farms set up operations in an area with the full expectation of closing down within ten years, because they know the high levels of ammonia and other noxious gases will corrode the very foundation of the barns,” says Robert Haddad, Director of Farming Systems for the HSUS.¹¹²

By the very nature of a CAFO, crowded indoor quarters with hundreds or thousands of animals crammed in, producing enormous amounts of fecal waste daily, an opportunity of “harm” will surely arise--giving way to a citizen suit under the Clean Air Act. Animal advocacy groups can and have filed such a suit under the Clean Air Act. Much like the results in a Clean Water Act lawsuit, there is some question as to how beneficial the suit is to the animals in question.

However, the Clean Air Act may have a stronger impact on a CAFO than the Clean Water Act. Controlling the amount of noxious gas in the air would mean producing less fecal waste, which directly impacts the amount of animals a facility could have. Controlling the amount of fecal waste expelled into the waterways, for compliance with the Clean Water Act, could be accomplished by producing less waste or implementing a different disposal method. Compliance with the Clean Air Act could result in better ventilation for animals, larger quarters, different waste disposal, and possibly fewer animals in a facility. This would not stop other forms of animal cruelty, but it may increase the quality of life for some animals.

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *See id.*

¹¹² *Id.*

E. Understanding the Migratory Bird Treaty Act

The Migratory Bird Treaty Act was enacted to put an end to commercial trade of birds and their feathers.¹¹³ The Treaty decreed migratory birds and their parts, including eggs, nests, and feathers, are fully protected.¹¹⁴ The Treaty is domestic legislation that implements the United States' commitment to four international conventions for protection of shared migratory bird resources: Canada, Japan, Mexico, and Russia.¹¹⁵ Each convention serves to protect a selected species of birds that are common to both party-countries during the birds' annual life cycle.¹¹⁶

The Migratory Bird Treaty Act is a criminal statute and does not provide a citizen suit provision.¹¹⁷ A private party who violates the Act is subject to prosecution by the Department of Justice.¹¹⁸ Because of the absence of a citizen suit provision, a citizen wanting to file suit to prevent a federal agency from taking arbitrary and capricious final agency action under the Act would have to file under the Administrative Procedure Act (APA) to gain access to the courts.¹¹⁹ If the prohibitions of the Migratory Bird Treaty Act apply to the federal agencies, "private parties could seek to enjoin Federal actions that take migratory birds, unless such take is authorized pursuant to regulations developed in accordance with 16 U.S.C. 704, even when such Federal actions are necessary to fulfill Government responsibilities and even when the action poses no threat to the species at issue."¹²⁰

¹¹³ See A Guide to the Laws and Treaties of the United States for Protecting Migratory Birds, <http://www.fws.gov/migratorybirds/internltr/treatlaw.html> (last visited Apr. 12, 2007).

¹¹⁴ See 16 U.S.C. § 703(a) (2004).

¹¹⁵ See *id.*; See also A Guide to the Laws, *supra* note 115.

¹¹⁶ See A Guide to the Laws, *supra* note 115.

¹¹⁷ See Wildlife and Fisheries, 50 C.F.R. § 21 (2006).

¹¹⁸ See DEPT. OF INTERIOR, MIGRATORY BIRDS; TAKE OF MIGRATORY BIRDS BY THE DEPARTMENT OF DEFENSE (2004), <http://www.fws.gov/migratorybirds/issues/dodmbtarule/MBTATakeProposedRuleFinal.pdf>.

¹¹⁹ See *id.*

¹²⁰ *Id.*

F. Understanding the National Environmental Policy Act

National Environmental Policy Act (NEPA) was enacted “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”¹²¹ NEPA requires federal agencies to incorporate environmental values into their decision making process.¹²² The agencies must consider the environmental impact of any proposed action and reasonable alternatives.¹²³ To ensure these requirements are met, federal agencies must submit an Environmental Impact Statement--a detailed statement--which EPA will review and comment on.¹²⁴ The EPA maintains a national filing system for all EISs. “NEPA does not mandate protection of the environment. Instead, it requires agencies to follow a particular process in making decisions and to disclose the information/data that was used to support those decisions.”¹²⁵ NEPA is not equipped with a citizen suit provision.¹²⁶ All citizens wanting to file suit because of NEPA violation have to file under the APA to gain access to the courts.¹²⁷

¹²¹ 42 U.S.C. § 4321 (2000).

¹²² See National Environmental Policy Act, <http://www.epa.gov/compliance/nepa/index.html> (last visited Apr. 11, 2007).

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ The U.S. Department of the Interior Bureau of Land Management, National Environmental Policy Act of 1969, <http://www.blm.gov/wo/st/en/infor/nepa.2.html> (last visited Apr. 8, 2007) (explaining the National Environmental Policy Act and how it is applied).

¹²⁶ See National Environmental Policy Act, *supra* note 122.

¹²⁷ See *id.*

G. An Application of NEPA & Migratory Bird Treaty Act

In 2005, the Fund for Animals, the HSUS, the Animal Rights Foundation of Florida, and several private citizens filed a suit against the U.S. Department of Interior and, subsequently other federal agencies for violating the Migratory Bird Treaty Act, NEPA, and the Endangered Species Act.¹²⁸ The lawsuit was in response to federal efforts to manage the nation's population of double-crested cormorants (species of bird).¹²⁹ According to federal administrative records, the cormorant was responsible for \$25 million annually lost in catfish production, mostly in the Mississippi Delta.¹³⁰ The plaintiffs petitioned for declaratory and injunctive relief.¹³¹ Both parties motioned for summary judgment.¹³²

The Fish and Wildlife Service is the federal agency with authority to regulate the double-crested cormorant via the Migratory Bird Treaty Act.¹³³ Although the species is not protected by the Endangered Species Act, it is federally protected under the 1972 amendment to the Convention for the Protection of Migratory Birds and Game Mammals.¹³⁴ Under the statute, protected birds may not be taken except as authorized by regulation implementing the Migratory Bird Treaty Act.¹³⁵ "Take" means to hunt, kill, trap, capture, pursue, or collect or attempt to do any of the before-mentioned.¹³⁶

The court found that the Fish and Wildlife Service based its analysis on a "considerable body of then-available knowledge, while acknowledging certain open questions that merited future research and monitoring."¹³⁷ The plaintiff's claim that the Final Environmental Impact Statement violated NEPA by failing to

¹²⁸ See *Fund for Animals v. Norton*, 365 F. Supp. 2d 394, 399 (2005).

¹²⁹ See *id.* at 400.

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See *id.*

¹³³ See *id.* at 407.

¹³⁴ See *id.* at 400.

¹³⁵ See *id.*

¹³⁶ See *id.*, citing 50 C.F.R. § 10.12.

¹³⁷ See *id.* at 433-34.

include an adequate compilation of relevant information was rejected.¹³⁸ The court held that Fish and Wildlife Service's approach to managing species population under public resource depredation order did not contradict the intent or any provision of the Migratory Bird Treaty Act, since the agency determined when, to what extent, if at all, and by what means taking of birds was permissible, and adopted suitable regulations.¹³⁹ As for the Endangered Species Act claim, the court found that there was no violation: the cormorant was not protected under the Endangered Species Act and the Fish and Wildlife Service's actions were not likely to jeopardize the continued existence of endangered or threatened species.¹⁴⁰ Summary judgment for the defendants was granted.¹⁴¹

While the court did not render a favorable judgment for the plaintiffs involved, this case is a good example of how citizens and organizations can successfully gain access to the courts via Administrative Procedure Act to sue for violations under the Migratory Bird Treaty Act and NEPA. It is also an example of how organizations interested in the wellbeing of animals have to focus on other issues in order to file suit under environmental law. Instead of focusing on the thousands of cormorants that would be killed unnecessarily by a change in policy, the plaintiffs focused on administrative requirements under NEPA and pertaining to Migratory Bird Treaty Act.

Since neither NEPA nor the Migratory Bird Treaty Act have citizen suit provisions, the plaintiffs had to use the Administrative Procedure Act to gain access to the courts.¹⁴² Perhaps the plaintiffs could have presented a similar argument of aesthetic injury, as in *Animal Legal Defense Fund v. Glickman*.¹⁴³ This presumes the plaintiffs witnessed acts of animal cruelty, such as cormorant killings. A more feasible argument may have been that there was a presumptive nuisance. This would have allowed the plaintiffs to argue that killing cormorants could be presumed to be a nuisance and there was no need to wait until it actually

¹³⁸ See *id.* at 434.

¹³⁹ See *id.* at 410.

¹⁴⁰ See *id.* at 426-27.

¹⁴¹ See *id.* at 434.

¹⁴² See National Environmental Policy Act, *supra* note 123.

¹⁴³ 154 F.3d 426, 428 (D.C. Cir 1998).

happened.¹⁴⁴ It is mere speculation as to whether a presumptive nuisance argument would have prevailed, but such an argument would have focused more on the harm of killing cormorants than Fish and Wildlife Service administrative procedure.

IV. CONCLUSION

The fight for environmental justice may benefit the goals of animal advocates. Both environmental groups and animal advocates recognize the harm that can be inflicted on the environment and farm animals by government agencies, private persons, and CAFO facilities. It is clear from research that the system is not perfect, and that it takes creative legal tactics in the war against animal cruelty.

Applying tactics such as filing suit under environmental laws may result in some benefits, but they require the plaintiffs to focus on environmental issues. An animal advocacy organization desiring to assist the plight of farm animals in CAFOs would have to focus on sewage run-off or other impacts on surrounding waterways to file suit under the Clean Water Act. The same organization would have to focus on noxious gases and fumes to state a claim under the Clean Air Act.

NEPA and Migratory Bird Treaty Act suits force the plaintiffs to sue the government agency with authority to enforce or regulate applicable laws and not the entity causing the harm. None of these tactics focus directly on animal cruelty.

Positive results stemming from lawsuits filed under environmental legislation have secondary benefits for suffering animals. While this may improve quality of life for the animals in question, it may not end all of the suffering from animal cruelty. This was shown in the case involving the *foie gras* factory, where the actual birds may not gain much benefit from the factory having to comply with the Clean Water Act. As with the cormorants in the Fish and Wildlife Service case, a more favorable decision may have resulted if the case were focused on the senseless extermination of cormorants rather than on the administrative practice of the Fish and Wildlife Service.

¹⁴⁴ See Strategies to Keep CAFOs Out, *supra* note 59.

Environmental law is feasible to use in litigation pertaining to animal cruelty, but the remedies ultimately may not be beneficial to the movement against animal cruelty. Such litigation draws focus away from the actual harms experienced by animals and may weaken appreciation of the seriousness of these harms imparted to politicians, the public and commercial animal entities. There must be an equal balance to make sure that the actual cruelty is not forgotten or does not fade into the background while we search for creative and innovative legal tactics to force private actors and the federal government to comply with present law, as well as implement new laws that give greater access to the courts.

