

2011 LEGISLATIVE AND ADMINISTRATIVE REVIEW

By

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I. FEDERAL LEGISLATION	363
A. <i>Criminalizing Spectatorship at Animal Fighting Events: The Animal Fighting Spectator Prohibition Act</i>	364
B. <i>Prohibiting Captive Hunting of Exotic Animals and Remote Control Hunting: The Sportsmanship in Hunting Act of 2011</i>	367
C. <i>Eliminating Invasive Research on Great Apes: The Great Ape Protection and Cost Savings Act of 2011</i>	370
D. <i>Phasing out Non-therapeutic Uses of Antibiotics on Factory Farms: Preservation of Antibiotics for Medical Treatment Act of 2011</i>	374
E. <i>Bills Impacting the Regulatory Approval and Labeling of Genetically Engineered Fish</i>	377
F. <i>Bills Permitting and Opposing the Reintroduction of Horse Slaughter</i>	380
II. STATE LEGISLATION	383
A. <i>Restrictions on Trapping Methods</i>	383
1. <i>For Wildlife Preservation</i>	385
2. <i>To Protect Public Safety</i>	386

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B.	<i>Banning the Shark Fin Trade</i>	387
1.	<i>California</i>	388
2.	<i>Oregon</i>	389
3.	<i>Washington</i>	389
C.	<i>Defining and Criminalizing Animal Hoarding</i>	390
1.	<i>How Many Animals Is Too Many?</i>	391
2.	<i>Relative Success in Wyoming</i>	392
D.	<i>Prohibiting Documentation of Abuse at Animal Facilities</i>	393
1.	<i>Background: Animal Enterprise Terrorism Act and Model State Legislation</i>	394
2.	<i>Activity During the 2011 Session</i>	395
E.	<i>Combating Animal Abuse</i>	397
1.	<i>Imposing Additional Criminal and Civil Obligations</i> .	397
2.	<i>Providing for the Inclusion of Pets in Domestic Violence Orders</i>	399
F.	<i>Legislative Attempts to Overturn Citizen Initiatives</i>	401
1.	<i>Oregon and Washington: Hunting Cougars with Hounds</i>	401
2.	<i>Colorado: Bear Hunts</i>	404
3.	<i>Missouri: Puppy Mill Cruelty Prevention Act of 2010</i> .	405
III.	2011 FEDERAL ADMINISTRATIVE ACTION REVIEW	407
A.	<i>Fish and Wildlife Service: Wolf Management</i>	407
1.	<i>Delisting of the Northern Rocky Mountain Population</i>	407
2.	<i>Proposed Delisting of the Wyoming Population</i>	410
3.	<i>Delisting of the Western Great Lakes Population</i>	411
B.	<i>Fish and Wildlife Service: ESA Listing Determination Settlements</i>	413
C.	<i>Fish and Wildlife Service: Listing the Bighead Carp as Injurious Fish</i>	415
D.	<i>Department of the Interior, Bureau of Land Management, and Department of Energy: Supplement to the Draft Programmatic Environmental Impact Statement for Solar Energy Development</i>	416
E.	<i>Food and Drug Administration: Withdrawal of Notices of Opportunity for a Hearing</i>	417
F.	<i>National Oceanic and Atmospheric Administration: Aquaculture Policy</i>	419
G.	<i>U.S. Trade Representative: EC Beef Hormone Dispute</i>	420
H.	<i>Federal Trade Commission: Fur Products Labeling Act</i> ...	423
I.	<i>National Institutes of Health: Adoption of New Edition of Guide for Laboratory Animals</i>	424
J.	<i>Department of the Army: Patent Licensing Availability</i> ...	426

LEGISLATIVE REVIEW EDITOR'S NOTE

It is my pleasure to introduce *Animal Law's* fourteenth annual Legislative and Administrative Review. The 2011 Legislative and Administrative Review analyzes some of the year's most groundbreaking developments in animal-related state and federal legislation, such as

federal regulations of genetically engineered fish and attempts by state legislatures to overturn animal-related citizen initiatives.

Additionally, for the first time in *Animal Law*'s history, this year's Review also includes an analysis of some of the most important animal-related administrative law developments of the year. Because many decisions impacting animals occur in the administrative arena, it is our hope that the administrative section complements the federal and state legislation sections by providing a more complete picture of the topics and trends impacting animal law.

Our goal at *Animal Law* is to provide readers with a balanced and objective analysis of the current trends in animal law. As such, *Animal Law* welcomes comments and suggestions for future editions of the Legislative and Administrative Review.

*Laura Warf***
Legislative Review Editor

I. FEDERAL LEGISLATION

The following discussion highlights several critical animal-related bills introduced during the 112th United States Congress. Animal-related bills received minimal attention during the 2011 session as the legislature focused on economic policy. Accordingly, most animal-related bills are currently stalled in congressional committees, and it is unknown which bills, if any, will proceed to floor vote.

As this issue of *Animal Law* goes to press, two bills reported in the 2010 *Legislative Review* have experienced major legislative action.¹ First, on October 10, 2011, the House passed the Veteran Dog Training Therapy Act, as part of a larger veteran's healthcare bill (H. 2074) that is currently awaiting action in the Senate's Committee on Veteran's Affairs.² Second, in early 2011, Representative Jim Gerlach (R-Pa.) and Senator Richard Durbin (D-Ill.) reintroduced the Puppy Uniform Protection and Safety Act (PUPS) (H. 835/Sen. 707)³ with broader co-

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¹ Jenny Keatinge & Richard Myers, Student Authors, 2010 *Legislative Review*, 17 *Animal L.* 415, 419–22 (2011).

² Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Veterans Sexual Assault Prevention and Health Care Enhancement Act," select "All Information" (accessed Apr. 7, 2012).

³ PUPS was previously introduced in the 110th Congress as H.R. 5434. Lib. Cong., THOMAS, *Search Bill Summary and Status for the 111th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111>; search "Puppy Uniform Protection and Safety Act," select "H.R. 5434," select "All Information" (accessed Apr. 7, 2012); see Keat-

sponsorship.⁴ Both PUPS bills—like most animal related legislation in the 112th Congress—are presently stalled in congressional committees.⁵

A. *Criminalizing Spectatorship at Animal Fighting Events:
The Animal Fighting Spectator Prohibition Act*

On July 11, 2011, Representative Thomas Marino (R-Pa.) introduced H. 2492, and on December 6, 2011 Senator Richard Blumenthal (D-Conn.) introduced Sen. 1947, collectively known as the Animal Fighting Spectator Prohibition Act.⁶ The Act will amend the federal Animal Fighting Venture Prohibition⁷ to prohibit knowing attendance at organized animal fights and impose additional penalties for causing a minor to attend an animal fight.⁸

The Animal Fighting Venture Prohibition⁹ currently criminalizes three actions associated with animal fighting:¹⁰ (1) sponsoring or exhibiting an animal fighting venture;¹¹ (2) training, selling, or transporting an animal for participation in an animal fighting venture;¹² (3) promoting an animal fighting venture.¹³ Amendments made to the

inge & Myers, *supra* n. 1, at 422 (noting that PUPS will require licensing and inspection of high volume retail puppy breeders).

⁴ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Puppy Uniform Protection and Safety Act" select "H.R. 835," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Puppy Uniform Protection and Safety Act," select "S. 707," select "All Information" (accessed Apr. 7, 2012).

⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Puppy Uniform Protection and Safety Act" select "H.R. 835," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Puppy Uniform Protection and Safety Act," select "Sen. 707," select "All Information" (accessed Apr. 7, 2012).

⁶ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Animal Fighting Spectator Prohibition Act," select "H.R. 2492," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Animal Fighting Spectator Prohibition Act," select "S. 1947," select "All Information" (accessed Apr. 7, 2012).

⁷ 7 U.S.C. § 2156 (2011).

⁸ Humane Socy. of the U.S. (HSUS), *U.S. Senate Bill Introduced to Crack Down on Animal Fighting Spectators*, http://www.humanesociety.org/news/press_releases/2011/12/senate_bill_introduced_12062011.html (Dec. 6, 2011) (accessed Apr. 7, 2012).

⁹ An "animal fighting venture" is defined as "any event . . . that involves a fight conducted or to be conducted between at least 2 animals for purposes of sport, wagering, or entertainment, except . . . any activity the primary purpose of which involves the use of one or more animals in hunting another animal." 7 U.S.C. § 2156(g)(1).

¹⁰ Henry Cohen, *The Animal Welfare Act*, 2 J. Animal L. 13, 18 (2006).

¹¹ 7 U.S.C. § 2156(a)(1); *U.S. v. Frazier*, 595 F.3d 304, 306 (6th Cir. 2010) (upholding a two-year conviction for knowingly sponsoring and operating a cock fighting pit in violation of the Animal Fighting Venture Prohibition).

¹² 7 U.S.C. § 2156(b).

¹³ *Id.* at § 2156(c).

Animal Fighting Venture Prohibition in 2002 and 2007 removed an exception that allowed bird fighting if permitted by state law¹⁴ and substantially increased criminal penalties for operating animal fighting ventures.¹⁵

The Animal Fighting Venture Prohibition presently lacks language criminalizing spectatorship at animal fighting events; however, forty-nine states have already enacted statutes prohibiting spectatorship.¹⁶ Criminalizing spectatorship helps law enforcement agencies eliminate revenue sources that fund animal fighting events¹⁷ and imposes criminal liability upon operators of animal fighting events when ownership of an animal cannot be proven.¹⁸ State laws prohibiting spectatorship have been successfully enforced throughout the U.S. and have withstood a variety of constitutional challenges upon judicial review.¹⁹

The Animal Fighting Spectator Prohibition Act dramatically expands the scope of the Animal Fighting Venture Prohibition by criminalizing spectatorship. The Act imposes a misdemeanor penalty if a person “knowingly attend[s] an animal fighting venture.”²⁰ The Act requires that law enforcement present sufficient evidence to satisfy a “knowing[]” *mens rea* requirement;²¹ the Act does not impose criminal penalties upon “innocent bystanders” who unintentionally witness an

¹⁴ Cohen, *supra* n. 10, at 18–19; see *Slavin v. U.S.*, 403 F.3d 522, 523 (8th Cir. 2005) (rejecting constitutional challenges to the Animal Fighting Venture Prohibition).

¹⁵ See 7 U.S.C. § 2156(j) (allowing a criminal penalty of up to five years per violation); Animal Leg. Def. Fund, *Animal Fighting Facts*, <http://www.aldf.org/article.php?id=927> (updated Feb. 2009) (accessed Apr. 7, 2012) (noting that the amendments “toughen[ed] the penalties for violat[i]ons of the AWA related to animal fighting ventures”).

¹⁶ HSUS, *supra* n. 8, at ¶ 4.

¹⁷ *Id.*

¹⁸ Hanna Gibson, Animal Leg. & Historical Ctr., *Dog Fighting Detailed Discussion*, § IX(A)(v), <http://www.animallaw.info/articles/ddusdogfighting.htm#s9> (2005) (accessed Apr. 7, 2012).

¹⁹ See *Mich. v. Parker*, 1999 WL 33435342, *2 (Mich. App. 1999) (upholding Michigan’s spectatorship statute); *N.C. v. Arnold*, 557 S.E.2d 119, 123 (N.C. App. 2001), *aff’d*, 569 S.E.2d 648 (N.C. 2002) (upholding North Carolina’s spectatorship statute); *Or. v. Hartrampf*, 847 P.2d 856, 857 (Or. App. 1993) (upholding Oregon’s spectatorship statute); *Pa. v. Craven*, 817 A.2d 451, 455 (Pa. 2003) (upholding Pennsylvania’s spectatorship statute); but see *Cal. v. Super. Ct. (Elder)*, 201 Cal. App. 3d 1061, 1073–74 (Cal. App. 5th Dist. 1988) (reasoning that California’s spectatorship statute could be unconstitutionally vague if “spectator” were not sufficiently defined and could apply to a “mere passerby”).

²⁰ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “H.R. 2492,” select “All Information” (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “S. 1947,” select “All Information” (accessed Apr. 7, 2012).

²¹ The Model Penal Code requires the following to prove that a person acted knowingly: “A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if

animal fighting event.²² Furthermore, the Act aims to protect minors from viewing animal fighting violence by imposing a felony penalty²³ against any person who “causes a minor to attend an animal fighting venture.”²⁴

Since its introduction in July 2011, the Act has gained broad bipartisan support and boasts over 180 co-sponsors.²⁵ Co-sponsor Senator Mark Kirk (R-Ill.) purports that the Act will “deny event organizers the revenue that funds future events” and “close[] the final loophole to ending the inhumane practice of animal fighting.”²⁶ Sponsors of the Act also predict that it will help deter other criminal activity associated with animal fighting events, including gang violence and illegal drug possession.²⁷ The Act also enjoys overwhelmingly positive support among the public and animal rights organizations.²⁸ Notably, National Football League quarterback Michael Vick, convicted in 2007 for operating an illegal animal fighting venture,²⁹ has served as a vocal proponent of the Act, claiming that it will eliminate illegal animal fighting by “tak[ing] away the profits.”³⁰

The House version of the Act is awaiting consideration by the House Agriculture Committee’s subcommittee on Livestock, Dairy, and Poultry, and the House Judiciary Committee’s subcommittee on Crime, Terrorism, and Homeland Security.³¹ The Senate version was referred to the Committee on Agriculture, Nutrition, and Forestry, and will likely be assigned to a subcommittee for the Committee on Agriculture when Congress reconvenes in January 2012.³²

the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” Model Penal Code § 2.02(b) (ALI 1981).

²² HSUS, *supra* n. 8, at ¶ 9.

²³ *Id.*

²⁴ H.R. 2492, 112th Cong. § 2(1)(A) (July 11, 2011); Sen. 1947, 112th Cong. § 2(2)(B) (Dec. 6, 2011).

²⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “H.R. 2492,” select “Cosponsors” (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “S. 1947,” select “Cosponsors” (accessed Apr. 7, 2012).

²⁶ HSUS, *supra* n. 8, at ¶ 6.

²⁷ 153 Cong. Rec. H3032–36 (daily ed. Mar. 26, 2007).

²⁸ *Id.*

²⁹ Adam Harris Kurland, *The Prosecution of Michael Vick: Of Dogfighting, Depravity, Dual Sovereignty, and “A Clockwork Orange”*, 21 Marq. Sports L. Rev. 465, 492 (2011).

³⁰ Nate Davis, *Michael Vick Backs New Anti-Dogfighting Bill*, USA Today (July 7, 2011) (available at <http://content.usatoday.com/communities/thehuddle/post/2011/07/eagles-qb-michael-vick-backs-new-anti-dogfighting-bill/1> (accessed Apr. 7, 2012)).

³¹ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “H.R. 2492,” select “All Information” (accessed Apr. 7, 2012).

³² Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Animal Fighting Spectator Prohibition Act,” select “S. 1947,” select “All Information” (accessed Apr. 7, 2012).

B. Prohibiting Captive Hunting of Exotic Animals and Remote Control Hunting: The Sportsmanship in Hunting Act of 2011

The Sportsmanship in Hunting Act of 2011³³ (H. 2210) promotes sportsmanlike conduct in hunting and a higher standard of animal welfare by restricting captive hunts and prohibiting remote-control hunting.³⁴ On June 16, 2011, Representative Steve Cohen (D-Tenn.) introduced the Sportsmanship in Hunting Act of 2011 for the fourth consecutive congressional session.³⁵ The operative language of the Act has undergone minimal revision since its introduction in 2005³⁶ and closely resembles the unenacted Captive Exotic Animal Protection Act.³⁷ However, unlike previous versions of the Act, the Sportsmanship in Hunting Act of 2011 proposes to prohibit remote-control hunting.³⁸

Captive hunting—also known as “canned hunting” or hunting on a “shooting preserve” or “game ranch”—refers to the practice of placing captive-bred, semi-domesticated, and exotic animals inside penned outdoor enclosures for the sole purpose of having the animals “hunted” and killed by paying clients.³⁹ Most captive hunting facilities are operated by professional hunting guides who offer “No Kill, No Pay” tro-

³³ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Sportsmanship,” select “H.R. 2210,” select “All Information” (accessed Apr. 7, 2012).

³⁴ Memo. from Steve Cohen, U.S. Rep. for Tenn.’s 9th Cong. Dist., & David Greengrass, Counsel to Congressman Steve Cohen, to Patrick Graves, Associate Editor for *Animal Law*, *Sportsmanship in Hunting Act*, 1 (Dec. 19, 2011) (copy on file with *Animal Law*) [hereinafter Cohen Memo.].

³⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Sportsmanship,” select “H.R. 2210,” select “All Information” (accessed Apr. 7, 2012); see Lib. Cong., THOMAS, *Search Bill Text from Multiple Congresses*, <http://thomas.loc.gov/home/multicongress/multicongress.html>; select “check all,” search “Sportsmanship in Hunting” (accessed Apr. 7, 2012) (displaying previous versions of the Act, all of which died in committee); see also Bartholomew Sullivan, *The Commercial Appeal*, *Rep. Steve Cohen Sponsors Bill to Ban Captive Hunting of Exotic Species*, <http://www.commercialappeal.com/news/2011/jun/16/rep-steve-cohen-sponsors-bill-ban-captive-hunting> (June 16, 2011) (accessed Apr. 7, 2012) (describing Representative Cohen’s efforts to reintroduce the Act during the 112th Congress).

³⁶ Congress has changed only two substantive provisions of the Act since its first introduction in 2005. The 2011 version adds a ban on remote-control hunting. H.R. 2210, 112th Cong. § 2(a) (June 16, 2011). Additionally, the 2011 version omits an exception that once allowed canned hunting on state-owned lands. *Id.*; see also Sen. 304, 109th Cong. §§ 1–3 (Feb. 7, 2005) (creating the canned hunting exception).

³⁷ See H.R. 4997, 103d Cong. (Dec. 21, 1995) (proposing to prohibit trophy hunting of confined exotic animals).

³⁸ H.R. 2210, 112th Cong. at § 2; see also *Computer-Assisted Remote Hunting Act*, H.R. 2711, 110th Cong. (June 14, 2007) (containing the operative language that the Sportsmanship in Hunting Act incorporates).

³⁹ HSUS, *Captive Hunts Fact Sheet*, http://www.humanesociety.org/issues/captive_hunts/facts/captive_hunt_fact_sheet.html (June 10, 2011) (accessed Apr. 7, 2012); Diana Norris et. al, *Animal Leg. & Historical Ctr.*, *Canned Hunts: Unfair at Any Price*, <http://www.animallaw.info/articles/arusfund22002.htm> (2002) (accessed Apr. 7, 2012).

phy-hunting excursions to affluent clientele.⁴⁰ Captive hunting is banned in twenty-six states, but over 1,000 captive hunting facilities currently operate throughout the U.S.; most of those facilities are located in Texas.⁴¹ Captive hunting has been criticized for violating the sportsmanship principle of “fair chase,”⁴² exposing native animal populations to diseases,⁴³ and subjecting captive animals to inhumane deaths caused by egregious wounds inflicted by inexperienced marksmen.⁴⁴

The Sportsmanship in Hunting Act restricts captive hunting by creating a federal misdemeanor for the interstate transportation or possession of a “confined exotic animal” for the purpose of killing or injuring the animal during a trophy hunt.⁴⁵ The Act defines “confined exotic animal” as a “mammal of a species not indigenous to the [U.S.] that has been held in captivity . . . the majority of the animal’s life; or . . . a continuous period of 1 year.”⁴⁶ “Captivity,” as defined by the Act, does not include any period of time when an animal “lives as it would in the wild—(A) surviving primarily by foraging for naturally occurring food; (B) roaming at will over an open area of not less than 1,000 acres; (C) and having the opportunity to avoid hunters.”⁴⁷

The Sportsmanship in Hunting Act has received both praise and criticism. Animal welfare and hunting rights organizations have praised the Act, demonstrating that sportsmanship and animal welfare are not always mutually exclusive policy goals.⁴⁸ However, both constituencies have also criticized the Act. On one hand, some hunting

⁴⁰ Laura J. Ireland, *Canning Canned Hunts: Using State and Federal Legislation to Eliminate the Unethical Practice of Canned “Hunting,”* 8 Animal L. 223, 225 (2002); see also Martha Rosenberg, *Bedeviled by Cowardice and Bloodlust Cheney Goes Canned Hunting*, http://www.opednews.com/articles/genera_martha_r_071109_bedeviled_by_bloodlu.htm (Nov. 9, 2007) (accessed Apr. 7, 2012) (describing former Vice President Dick Cheney’s frequent national headlines for participating in canned hunts of birds).

⁴¹ Ireland, *supra* n. 40, at 226; see HSUS, *Captive Hunting by State*, http://www.humanesociety.org/assets/pdfs/hunting/captive_hunt_states.pdf (updated June, 2011) (accessed Apr. 7, 2012) (depicting states allowing captive hunting as of June, 2011).

⁴² See Boone & Crockett Club, *Fair Chase Statement*, http://www.boone-crockett.org/huntingEthics/ethics_fairchase.asp?area=huntingEthics (accessed Apr. 7, 2012) (defining fair chase as “the ethical, sportsmanlike, and lawful pursuit and taking of any free-ranging wild, native North American big game animal in a manner that does not give the hunter an improper advantage over such animals”).

⁴³ Ireland, *supra* n. 40, at 226.

⁴⁴ Cohen Memo., *supra* n. 34, at 3.

⁴⁵ H.R. 2210, 112th Cong. at § 2.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Cohen Memo., *supra* n. 34, at 3; see HSUS, *The HSUS Applauds Introduction of Federal Bill to Combat Captive Hunts*, http://www.humanesociety.org/news/press_releases/2011/06/captive_hunt_bill_introduced_congress_061711.html (June 17, 2011) (accessed Apr. 7, 2012) (evidencing animal welfare organization support); Michael Markarian, *Sportsmanship in Hunting Act: Putting a Stop to Pay-Per-View and Pay-to-Kill Hunting*, http://www.huffingtonpost.com/michael-markarian/putting-a-stop-to-pay-per-b_211156.html (June 4, 2009) (accessed Apr. 7, 2012) (evidencing hunting rights organization support).

rights organizations argue that the Act unfairly prohibits fair-chase trophy hunting on smaller ranches, providing food for animals that would otherwise starve,⁴⁹ and infringes on the states' traditional power to regulate hunting.⁵⁰ Hunters also allege that captive hunting remains an arbitrary concept that cannot be easily defined or regulated.⁵¹ Alternatively, animal welfare organizations argue that the proposed definitions of "confined exotic animal" and "captive" fail to protect domestic exotic animals and effectively legalize captive hunts that occur on ranches exceeding 1,000 acres in size.⁵²

In response to this criticism, Representative Cohen commented that the majority of unconscionable captive hunting operations fall within the scope of the Sportsmanship in Hunting Act:

[A] majority of animals hunted in . . . "canned" facilities are non-native species transported from other countries or bred in captivity. The intent behind this provision . . . was to protect these animals . . . [T]he statutory definitions . . . broaden the scope [of the Act] . . . [s]ince the statute includes those animals who have lived in captivity for the majority of their lives (but does not require that an animal currently be in captivity), protection is given to those animals that were bred in captivity and then transferred to a hunting ranch larger than 1,000 acres. Typically, 1,000 acres, even though enclosed, is a large enough area that the animal can live as though "wild[.]" Therefore, for hunting ranches over 1,000 acres, the circumstances are similar enough to hunting in the wild that those enterprises do not fall within the scope of the Act.⁵³

In addition to restricting captive hunting, the Act prohibits remote hunting—also known as "internet hunting" or "remote-control hunting"⁵⁴—by imposing a felony penalty for "knowingly mak[ing] available a computer-assisted remote hunt."⁵⁵ The Sportsmanship in Hunting Act defines a "computer-assisted remote hunt" as the use of a "computer or other device . . . to allow a person remotely to control the

⁴⁹ Jim Fisher, *A Rancher's View, Legislation to Stop Hunting the H.R. 2210: Sportsmanship in Hunting Act of 2011*, <http://aranchersview.blogspot.com/2011/08/legislation-to-stop-hunting-hr-2210.html> (Aug. 11, 2011) (accessed Apr. 7, 2012); Morgan Loew, *Arizona Organization Protects 'Canned' Hunting*, <http://www.kpho.com/story/16022205/arizona-organization-protects-canned-hunting> (Nov. 14, 2011) (accessed Apr. 7, 2012).

⁵⁰ Jamie Wrage, *Taking Aim at Canned Hunts Without Catching Game Ranches in the Crossfire*, 30 Loy. L.A. L. Rev. 893, 916–919, 922 (1997).

⁵¹ *Id.*

⁵² Friends of Animals, *Can It! Say NO to the Sportsmanship in Hunting Act of 2005*, <http://www.friendsofanimals.org/news/2005/november/can-it-say-no-to-the.html> (Nov. 14, 2005) (accessed Apr. 7, 2012); see also 76 Fed. Reg. 39804 (July 7, 2011) (proposing to revise Endangered Species Act regulations to prohibit the hunting of endangered captive-bred wildlife, including scimitar-horned oryx, addax, and dama gazelle).

⁵³ Cohen Memo., *supra* n. 34, at 1–3.

⁵⁴ Jim Suhr, *Lawmaker Takes a Shot at 'Remote-Control' Hunting*, USA Today (Mar. 9, 2007) (available at http://www.usatoday.com/tech/news/techpolicy/2007-03-09-remote-control-hunting_N.htm (accessed Apr. 7, 2012)).

⁵⁵ H.R. 2210, 112th Cong. at § 2.

aiming and discharge of a weapon so as to kill or injure an animal while not in the physical presence of the targeted animal.”⁵⁶

Remote hunting often takes place in extremely small enclosures—“typically pens less than an acre”—where there is little to no opportunity for animals to escape.⁵⁷ Enclosures are rigged with specially mounted firearms that can be operated over the internet through a webcam or other computer software.⁵⁸ Animals are not even aware of predator presence, and the remote hunter need only click a button to kill the animal.⁵⁹

The National Rifle Association and the Safari Club have condemned computer-assisted remote hunting as unsportsmanlike,⁶⁰ and the Humane Society of the United States (HSUS) has denounced remote hunting as inhumane.⁶¹ Representative Cohen states that remote hunting is commonly considered “especially unsportsmanlike, even when compared with common captive hunting practices” and merits a heavy criminal penalty.⁶² Currently, no remote hunting services operate within the U.S.⁶³ The only documented remote hunting service in the U.S. operated in Texas from 2003 to 2005 and quickly generated a flurry of public outrage that prompted twenty-three states, including Texas, to pass laws prohibiting remote hunting.⁶⁴

The Sportsmanship in Hunting Act of 2011 was referred to the House Subcommittee on Crime, Terrorism, and Homeland Security on August 25, 2011.⁶⁵ Representative Cohen hopes to increase public support and awareness of the Act but admits that legislative emphasis on economic policy makes it “difficult to accurately predict (or even anticipate) if or when the bill may be considered or even passed.”⁶⁶

C. *Eliminating Invasive Research on Great Apes: The Great Ape Protection and Cost Savings Act of 2011*

Four years ago, during the 110th Congress, Representative Edolphus Towns (D-N.Y.) introduced the Great Ape Protection Act (GAPA) to prohibit invasive research on great apes, including chim-

⁵⁶ *Id.*

⁵⁷ Cohen Memo., *supra* n. 34, at 1.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Zachary Seward, *Internet Hunting Has Got to Stop—If It Ever Starts*, *The Wall Street J.* (Aug. 10, 2007) (available at http://online.wsj.com/article/SB118668766176893323.html?mod=hps_us_pageone (accessed Apr. 7, 2012)).

⁶¹ HSUS, *supra* n. 48, at ¶ 1.

⁶² Cohen Memo., *supra* n. 34, at 1.

⁶³ *Id.*

⁶⁴ Canadian Fedn. of Humane Socys., *Remote Control Hunting*, http://cfhs.ca/wild/remote_control_hunting/ (accessed Apr. 7, 2012) (noting that no remote-control hunting services exist in Canada).

⁶⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Sportsmanship,” select “H.R. 2210,” select “All Information” (accessed Apr. 7, 2012).

⁶⁶ Cohen Memo., *supra* n. 34, at 4.

panzees, bonobos, gorillas, orangutans, and gibbons.⁶⁷ GAPA stalled in House subcommittees before the conclusion of the 110th Congress.⁶⁸ One year later, Representative Towns and 160 co-sponsors reintroduced GAPA during the 111th Congress;⁶⁹ shortly thereafter, Senator Maria Cantwell (D-Wash.) introduced an identical version of the Act in the Senate.⁷⁰ Despite gaining considerable support during the 111th Congress, both the House and Senate versions of GAPA died in congressional committees.⁷¹

On April 13, 2011, Senator Cantwell and Representative Roscoe Bartlett (R-Md.) reintroduced GAPA as The Great Ape Protection and Cost Savings Act of 2011 (Sen. 810/ H. 1513).⁷² The Great Ape Protection and Cost Savings Act of 2011 mirrors GAPA and includes two provisions advancing the welfare of great apes.⁷³ First, the Act eliminates invasive research on great apes by prohibiting any research that may cause injury or pain to a great ape, including possession or transportation for the purpose of conducting invasive research.⁷⁴ Second, the Act proposes to transfer all great apes owned by the federal government for purposes of invasive research to national animal sanctuaries.⁷⁵

Nine countries—in addition to the European Union—have already enacted legislation prohibiting invasive research on great apes.⁷⁶ Currently, chimpanzees are the only great apes used for invasive research

⁶⁷ H.R. 5852, 110th Cong. (April 17, 2008); Lib. Cong., *THOMAS, Search Bill Summary and Status for the 110th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=110>; search “Great Ape Protection,” select “All Information” (accessed Apr. 7, 2012) [hereinafter H.R. 5852 Summary].

⁶⁸ H.R. 5852 Summary, *supra* n. 67, at “Latest Major Action.”

⁶⁹ Lib. Cong., *THOMAS, Search Bill Summary and Status for the 111th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111>; search “Great Ape Protection,” select “H.R. 1326,” select “All Information” (accessed Apr. 7, 2012) [hereinafter H.R. 1326 Summary].

⁷⁰ Lib. Cong., *THOMAS, Search Bill Summary and Status for the 111th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=111>; search “Great Ape Protection,” select “S. 3694,” select “All Information” (accessed Apr. 7, 2012).

⁷¹ *Id.*; H.R. 1326 Summary, *supra* n. 69, at “Latest Major Action.”

⁷² Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Great Ape Protection,” select “H.R. 1513,” select “All Information” (accessed Apr. 7, 2012); Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Great Ape Protection,” select “S. 810,” select “All Information” (accessed Apr. 7, 2012).

⁷³ Compare H.R. 1513, 112th Cong. (Apr. 13, 2011) and Sen. 810, 112th Cong. (Apr. 13, 2011) with Sen. 3694, 111th Cong. (Aug. 3, 2010).

⁷⁴ H.R. 1513, 112th Cong. at § 4; Sen. 810, 112th Cong. at § 4 (prohibiting invasive research on great apes and ending all federal funding for invasive research).

⁷⁵ H.R. 1513, 112th Cong. at §§ 2, 5; Sen. 810, 112th Cong. at §§ 2, 5.

⁷⁶ Roscoe Bartlett, *Stop Using Chimps as Guinea Pigs*, N.Y. Times A23 (Aug. 11, 2011) (available at <http://www.nytimes.com/2011/08/11/opinion/stop-using-chimps-as-guinea-pigs.html> (accessed Apr. 7, 2012)); see also Nancy R. Hoffman & Robin C. McGinnis, Student Authors, *2007–2008 Legislative Review*, 15 *Animal L.* 265, 272 (2009) (surveying the Great Ape Protection Act of 2008).

in the U.S.⁷⁷ Approximately 1,000 chimpanzees are used or housed for invasive research in the U.S., including an estimated 500 chimpanzees owned by the federal government.⁷⁸

Supporters of the Great Ape Protection and Cost Savings Act argue that invasive research is no longer medically necessary and that it subjects chimpanzees to inhumane forms of experimentation.⁷⁹ Opponents of the Act counter that invasive research remains the only effective means of discovering a cure for Hepatitis C (HCV)—a disease that infects 3.9 million people and kills an estimated 12,000 Americans per year⁸⁰—and could prove instrumental for developing cures for current and future diseases.⁸¹ Animal welfare advocates have also criticized the Act for failing to prohibit non-invasive forms of research that cause great apes to be housed in unnatural settings: “the [Act] would leave over 100,000 primates confined in laboratories and subject to continued research.”⁸²

Controversy also exists as to the extent to which the Act would conserve fiscal resources. Legislators and the HSUS estimate that the Act will save taxpayers approximately \$25 to \$30 million annually.⁸³

⁷⁷ Karina Schrengohst, *Animal Law—Cultivating Compassionate Law: Unlocking the Laboratory Door and Shining Light on the Inadequacies & Contradictions of the Animal Welfare Act*, 33 W. New Eng. L. Rev. 855, 880 (2011).

⁷⁸ *Id.*; New Eng. Anti-Vivisection Socy., *Research Labs with Chimpanzees, Project R&R: Release & Restitution for Chimpanzees in U.S. Laboratories*, <http://www.releasechimps.org/labs/labs-with-chimpanzees#axzz1iQonpn7r> (updated June 2011) (accessed Apr. 7, 2012) (listing research facilities currently housing chimpanzees); see also HSUS, *Federal Bill to End Invasive Research on Chimpanzees Introduced in Congress*, http://www.humanesociety.org/news/press_releases/2011/04/federal_bill_research_chimpanzees_introduced_041311.html (Apr. 13, 2011) (accessed Apr. 7, 2012) (describing a proposal to prohibit invasive research on chimpanzees).

⁷⁹ Bartlett, *supra* n. 76, at ¶ 2; Phys. Comm. for Responsible Med., *Institute of Medicine Report Could Spell End of Chimpanzee Experiments*, <http://pcrm.org/media/news/institute-of-medicine-report-end-chimp-experiments> (Dec. 15, 2011) (accessed Apr. 7, 2012); see also GlaxoSmithKline, *Use of Non-Human Primates (NHPs) in the Discovery and Development of Medicines and Vaccines*, <http://www.gsk.com/policies/GSK-public-position-on-NHP.pdf> (updated Mar. 2011) (accessed Apr. 7, 2012) (noting that leading pharmaceutical researcher GlaxoSmithKline no longer uses chimpanzees for research “in part thanks to new directions . . . and other techniques in biomedical research”).

⁸⁰ Assn. of Am. U., *AAU Opposes Great Ape Protection and Cost Savings Act*, <http://www.aau.edu/WorkArea/DownloadAsset.aspx?id=12250> (June 16, 2011) (accessed Apr. 7, 2012).

⁸¹ *Id.*; John VandeBerg & Stuart Zola, *A Unique Biomedical Resource at Risk*, 437 Nat. 30, 30–32 (Sept. 2005).

⁸² Schrengohst, *supra* n. 77, at 880–81.

⁸³ HSUS, *Great Ape Protection and Cost Savings Act: Savings of Nearly \$30 Million Annually to Taxpayers*, <http://speakingofresearch.files.wordpress.com/2011/12/hsus-gapa-cost-analysis.pdf> (accessed Apr. 7, 2012) (showing that HSUS’s \$25 to \$30 million cost savings derives from contract data obtained from NIH during 2010 and is divisible into three figures: (1) \$22,208,028 saved annually by eliminating federally-funded invasive research grants; (2) \$3,651,460 saved annually by discontinuing support of privately owned chimpanzees housed in federal labs; (3) \$3,543,785 saved annually by transferring federally owned chimpanzees to sanctuaries); Andy Marso, Fox News,

Eliminating government funding for invasive research would save approximately \$22.2 million annually.⁸⁴ The remaining \$7.2 million would be saved by transferring government-owned chimpanzees to sanctuaries (\$3.5 million) and ending government support of research on privately owned chimpanzees (\$3.7 million).⁸⁵ Critics of this calculus argue that a June 2011 National Institutes of Health (NIH) Report⁸⁶ indicates that transferring federally owned chimps would increase daily care costs from \$34.10 to \$43.80 per day.⁸⁷

Diverging medical opinions concerning the scope and necessity of invasive research on chimpanzees prompted NIH to commission a comprehensive review of the subject in 2011.⁸⁸ On December 15, 2011, after a seven-month consideration period, a twelve-member medical expert committee issued an extensive report in which it concluded that “the present trajectory of scientific research indicates a decreasing need for the use of chimpanzees due to the emergence of non-chimpanzee models.”⁸⁹ Later that day, NIH announced that it would no longer award funding for chimpanzee research and is currently considering whether thirty-seven invasive research projects merit continued funding.⁹⁰

Despite recognizing a decline in the need for nonhuman primate research, the NIH Report acknowledged that invasive research is still necessary for “[hepatitis C] vaccine development, . . . monoclonal antibody research, comparative genomics research, and behavioral research.”⁹¹ Accordingly, a divided NIH panel⁹² cautioned against an

Bartlett ‘Sanctuary’ Plan Would Rescue Chimps, Taxpayers, <http://www.foxnews.com/politics/2011/04/15/bartlett-sanctuary-plan-rescue-chimps-taxpayers/> (Apr. 15, 2011) (accessed Apr. 7, 2012).

⁸⁴ HSUS, *supra* n. 83, at 2.

⁸⁵ *Id.*

⁸⁶ Natl. Inst. of Health, *About NIH*, <http://www.nih.gov/about/> (Dec. 5, 2011) (accessed Apr. 7, 2012) (National Institutes of Health is the primary federal agency responsible for assessing biomedical research techniques and funding).

⁸⁷ Fedn. of Am. Socys. for Experimental Biology, *Chimpanzees in Biomedical Research*, <http://www.faseb.org/LinkClick.aspx?fileticket=2I9VwGTr8nM%3D&tabid=363> (accessed Apr. 7, 2012); NIH, *Costs for Maintaining Humane Care and Welfare of Chimpanzees*, http://grants.nih.gov/archive/grants/policy/air/cost_for_caring_housing_of_chimpanzees_20110609.htm (June 9, 2011) (accessed Apr. 7, 2012).

⁸⁸ Inst. of Med. of the Natl. Acad., *Chimpanzees in Biomedical and Behavioral Research: Assessing the Necessity*, <http://www.iom.edu/~media/Files/Report%20Files/2011/Chimpanzees/chimpanzeereportbrief.pdf> (Dec. 15, 2011) (accessed Apr. 7, 2012) (noting that the Institute of Medicine of the National Academies was tasked with preparing the NIH’s chimpanzee research report) [hereinafter NIH Rpt.].

⁸⁹ *Id.* at 4.

⁹⁰ Josh Fischman, *The Chron. of Higher Educ.*, *Chimp Research Is Sharply Curbed After Critical Report to NIH*, <http://chronicle.com/article/Chimp-Research-Is-Sharply/130112/> (Dec. 15, 2011) (accessed Apr. 7, 2012).

⁹¹ NIH Rpt., *supra* n. 88, at 4.

⁹² *Id.*; Melissa Healy, *Most, but Not All, Research on Chimpanzees Can End*, *Panel Says*, *L.A. Times* (Dec. 15, 2011) (available at <http://www.latimes.com/health/la-he-chimps-medical-research-20111216,0,3113642.story> (accessed Apr. 7, 2012)) (“panel members were not asked to consider the ethical ramifications of using nonhuman pri-

“outright ban” of invasive research, concluding that a ban could “potentially caus[e] unacceptable losses to the public’s health.”⁹³ Proponents of the Great Ape Protection and Cost Savings Act have praised NIH for recognizing the declining need for invasive research,⁹⁴ but NIH’s reluctance to support prohibiting invasive research will likely increase the chance that the Act will die in committee at the end of the 112th Congress.⁹⁵

D. Phasing out Non-therapeutic Uses of Antibiotics on Factory Farms: Preservation of Antibiotics for Medical Treatment Act of 2011

Representative Sherrod Brown (D-O.H.) first introduced the Preservation of Antibiotics for Medical Treatment Act (PAMTA) during the 108th Congress.⁹⁶ Subsequent versions of PAMTA were reintroduced during the 109th, 110th, and 111th Congresses; each version died in congressional committees.⁹⁷

In 2011, during the 112th Congress, Representative Louise Slaughter (D-NY) and seventy-eight cosponsors reintroduced PAMTA (H. 965) in the House; an identical PAMTA companion bill (Sen. 1211) was later introduced in the Senate by Senator Dianne Feinstein (D-Cal.) and seven co-sponsors.⁹⁸ Both PAMTA bills were referred to con-

mates in medical experiments”); Serena Gordon, *Experts Urge Limits on Medical Research on Chimpanzees*, <http://www.medicinenet.com/script/main/art.asp?articlekey=152711> (Dec. 15, 2011) (accessed Apr. 7, 2012) (“The committee could not reach full consensus on whether or not another area—research on a prophylactic (preventative) hepatitis C vaccine—met the criteria or not.”).

⁹³ NIH Rpt., *supra* n. 88, at 1–2, 4.

⁹⁴ Healy, *supra* n. 92, at ¶ 9.

⁹⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Great Ape Protection,” select “H.R. 1513,” select “All Information” (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Great Ape Protection,” select “S. 810,” select “All Information” (accessed Apr. 7, 2012); see also Christine Hsu, Medical Daily, *Research Chimps: Should They Stay or Go?*, <http://www.medicaldaily.com/news/20111208/8167/chimpanzee-great-ape-protection-and-cost-savings-act-of-2011-congress-animal-rights-research-va.htm> (Dec. 8, 2011) (accessed Apr. 7, 2012) (stating that the final decision to pass the Act will “heavily depend upon the conclusions of the Institute of Medicine” report).

⁹⁶ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 108th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=108>; search “Preservation of Antibiotics for Medical Treatment Act,” select “H.R. 2932,” select “All Information” (accessed Apr. 7, 2012).

⁹⁷ Lib. Cong., THOMAS, *Search Bill Text from Multiple Congresses*, <http://thomas.loc.gov/home/multicongress/multicongress.html>; select “check all,” search “Preservation of Antibiotics for Medical Treatment Act” (accessed Apr. 7, 2012) (displaying previous versions PAMTA, all of which died in committee).

⁹⁸ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Preservation of Antibiotics for Medical Treatment Act,” select “H.R. 965,” select “All Information” (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Preservation of Antibiotics for Medical Treatment Act,” select “S. 1211,” select “All Information” (accessed Apr. 7, 2012).

gressional committees shortly after introduction.⁹⁹ PAMTA seeks to “preserve the effectiveness of medically important antibiotics used in the treatment of human and animal diseases by reviewing the safety of certain antibiotics for non-therapeutic purposes in food-producing animals.”¹⁰⁰ In sum, PAMTA would allow the Federal Drug Administration (FDA) to withdraw approval for “non-therapeutic” uses on factory farms of feed-additive antibiotics that are important to human health.¹⁰¹

Animals consume approximately 80% of antibiotics distributed in the U.S.¹⁰² The majority of antibiotics consumed by animals are administered for non-therapeutic purposes, such as promoting growth or warding off potential diseases.¹⁰³ Health experts warn that the widespread use of antibiotics in livestock presents an “enormous threat to the efficacy of antibiotics in humans” by causing harmful bacteria to undergo accelerated genetic mutations and to develop into antibiotic-resistant strains of bacteria.¹⁰⁴ Antibiotic-resistant bacterial infections kill an estimated 90,000 Americans annually and result in \$26 billion to \$36 billion in annual healthcare costs.¹⁰⁵

The U.S. Department of Agriculture (USDA), the World Health Organization, the Infectious Diseases Society of America, and the Union of Concerned Scientists have recognized the relationship between the non-therapeutic use of antibiotics in agriculture and the proliferation of antibiotic-resistant strains of bacteria.¹⁰⁶ Meanwhile,

⁹⁹ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Preservation of Antibiotics for Medical Treatment Act,” select “H.R. 965,” select “All Information” (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search “Preservation of Antibiotics for Medical Treatment Act,” select “S. 1211,” select “All Information” (accessed Apr. 7, 2012).

¹⁰⁰ H.R. 965, 112th Cong. § 3 (Mar. 9, 2011); Sen. 1211, 112th Cong. § 3 (June 15, 2011).

¹⁰¹ H.R. 965, 112th Cong. at § 4; Sen. 1211, 112th Cong. at § 4 (permitting the use of antibiotics on diseased animals).

¹⁰² Ralph Loglisci, *New FDA Numbers Reveal Food Animals Consume Lion’s Share of Antibiotics*, <http://www.livablefutureblog.com/2010/12/new-fda-numbers-reveal-food-animals-consume-lion%E2%80%99s-share-of-antibiotics> (accessed Apr. 7, 2012).

¹⁰³ Arielle Lessing, *Killing Us Softly: How Sub-Therapeutic Dosing of Livestock Causes Drug-Resistant Bacteria in Humans*, 37 B.C. Env’tl. Aff. L. Rev. 463, 469 (2010).

¹⁰⁴ Anastasia S. Stathopoulos, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. Legis. & Pub. Policy 407, 420–21 (2010); Food & Water Watch, *Food Safety Consequences of Factory Farms 1*, <http://documents.foodandwaterwatch.org/doc/FoodSafetyFactoryFarms.pdf> (accessed Apr. 7, 2012).

¹⁰⁵ Stathopoulos, *supra* n. 104, at 421, 442; HSUS, *Antibiotics in Animal Agriculture & Human Health*, <http://www.humanesociety.org/assets/pdfs/farm/hsus-fact-sheet-antibiotics-in-animal-agriculture-and-human-health.pdf> (accessed Apr. 7, 2012).

¹⁰⁶ H.R. Energy & Com. Comm., *Antibiotic Resistance and the Use of Antibiotics in Animal Agriculture*, 111th Cong. Test. of Jon Clifford, USDA, (July 14, 2010) (available at <http://democrats.energycommerce.house.gov/documents/20100714/Clifford.Testimony.07.14.2010.pdf> (accessed Apr. 7, 2012)); Infectious Disease Socy. of Am., *Combat-*

FDA has not formally acknowledged or disavowed the relationship between non-therapeutic use of antibiotics in agriculture and antibiotic resistance, having taken a variety of stances on the issue.¹⁰⁷

For instance, in 2010—after banning the non-therapeutic use of Baytril® on poultry in 2005¹⁰⁸—FDA released a policy document stating that the agricultural industry should limit the use of antibiotics to assuring animal health in order to prevent antibiotic resistance.¹⁰⁹ Similarly, FDA has voiced support for previous versions of PAMTA as a means of replacing its current “very burdensome” process of withdrawing approval for animal antibiotic uses.¹¹⁰

However, on December 22, 2011, FDA released a notice to withdraw hearings about the suspension of non-therapeutic agricultural uses of penicillin and tetracyclines.¹¹¹ Many advocates of restricting non-therapeutic uses viewed this decision as a major setback and as evidence of FDA’s reluctance to address the issue.¹¹² FDA’s notice to withdraw hearings was issued after the Government Accountability Office (GAO) claimed that FDA had made limited progress and lacked data needed to examine non-therapeutic use of antibiotics in agriculture.¹¹³ GAO encouraged FDA to improve its data-collection procedures and determine areas that require more research before evaluating animal antibiotic uses.¹¹⁴ Currently, FDA maintains that it

ing Antimicrobial Resistance: Policy Recommendations to Save Lives 8, 10, 11, http://cid.oxfordjournals.org/content/52/suppl_5/S397.full (Feb. 15, 2011) (accessed Apr. 7, 2012); Union of Concerned Scientists, *Preservation of Antibiotics for Medical Treatment Act*, http://www.ucsusa.org/food_and_agriculture/solutions/wise_antibiotics/pamta.html (updated June 24, 2011) (accessed Apr. 7, 2012); World Health Org., *Antimicrobial Resistance*, <http://www.who.int/mediacentre/factsheets/fs194/en/> (updated Feb. 2011) (accessed Apr. 7, 2012).

¹⁰⁷ Vanessa Briceño, *Superbug Me: The FDA’s Role in the Fight Against Antibiotic Resistance*, 9 N.Y.U. J. Legis. & Pub. Policy 521, 521–33 (2006).

¹⁰⁸ *Id.* at 521.

¹⁰⁹ *The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals*, Draft Guidance 209, 16 (U.S. FDA, Ctr. Veterinary Med. June 28, 2010) (available at <http://www.fda.gov/downloads/animalveterinary/guidancecomplianceenforcement/guidanceforindustry/ucm216936.pdf> (accessed Apr. 7, 2012)).

¹¹⁰ Julie Follmer & Roseann Termini, *Whatever Happened to Old Mac Donald’s Farm: Concentrated Animal Feeding Operation, Factory Farming and the Safety of the Nation’s Food Supply*, 5 J. Food L. & Policy 45, 66–67 (2009).

¹¹¹ 76 Fed. Reg. 79697, 79697 (Dec. 22, 2011); *infra* pt. III(E) (discussing FDA’s recent action); *see infra* pt. III(E) for a discussion of the Food and Drug Administration’s 2011 published notice announcing the withdrawal of two Notices of Opportunity for a Hearing on subtherapeutic agricultural uses of antibiotics. Those notices were originally published in 1977.

¹¹² Ashley Portero, Intl. Bus. Times, *FDA Withdraws Longstanding Petition to Regulate Antibiotics in Livestock Feed*, <http://www.ibtimes.com/articles/275785/20120103/fda-antibiotics-livestock-withdraws-longstanding-petition-regulate.htm> (Jan. 3, 2012) (accessed Apr. 7, 2012).

¹¹³ *Antibiotic Resistance: Agencies Have Made Limited Progress Addressing Antibiotic Use in Animals*, GAO Rpt. To Ranking Member, Comm. Rules, H.R., GAO-11-801 1 (U.S. GAO Sept. 2011) (available at <http://www.gao.gov/new.items/d11801.pdf> (accessed Apr. 7, 2012)).

¹¹⁴ *Id.* at 46–47.

“continues to view antimicrobial resistance as a significant public health issue” and has pledged not to withdraw future consideration of agricultural uses of antibiotics.¹¹⁵

As regulators evaluate agricultural uses of antibiotics, the agricultural industry has lobbied extensively against PAMTA. Major agricultural organizations—including the American Farm Bureau Federation, National Cattlemen’s Beef Association, and National Hog Farmer—allege that prohibiting non-therapeutic antibiotic use will result in increased animal disease and higher meat prices, and that it will not reduce the emergence of antibiotic resistant strains of disease.¹¹⁶ The National Pork Producers Council (NPPC) claims that there is “no scientific study linking antibiotic use in food animals to antibiotic resistance in humans.”¹¹⁷ Moreover, NPPC predicts that PAMTA will likely stall: “[t]here’s little chance that the PAMTA bill will be approved on its own in 2011 with Congress so focused on budget considerations.”¹¹⁸

Congress’s failure to pass PAMTA for over a decade and sluggish regulatory action have caused some commentators to suggest that non-therapeutic uses of antibiotics in agriculture must be combated by non-legislative alternatives, such as citizen-driven action.¹¹⁹ Others suggest that reform will most likely come from voluntary actions taken by agricultural organizations.¹²⁰ Regardless, PAMTA will likely remain deadlocked in committee deliberation during the 112th Congress.

E. Bills Impacting the Regulatory Approval and Labeling of Genetically Engineered Fish

Legislative efforts to regulate genetically engineered (GE) fish began when FDA appeared ready to approve the sale of GE fish after nearly ten years of consideration.¹²¹ The chief proponent of approving

¹¹⁵ 76 Fed. Reg. at 79700.

¹¹⁶ Am. Farm Bureau Fedn., *Antibiotics Vital to Animal Health, Food Protection*, <http://www.fb.org/index.php?fuseaction=newsroom.newsfocus&year=2009&file=nr0324.html> (Mar. 24, 2009) (accessed Apr. 7, 2012); Natl. Cattlemen’s Beef Assn., *Preservation of Antibiotics for Medical Treatment Act (PAMTA)*, <http://www.beefusa.org/preservationofantibioticsformedicaltreatmentactpamta.aspx> (accessed Apr. 7, 2012); Natl. Hog Farmer, *USDA ‘Technical Review’ of Antibiotics Falls Short*, <http://nationalhogfarmer.com/health-diseases/usda-technical-review-antibiotics-0622/> (June 22, 2011) (accessed Apr. 7, 2012).

¹¹⁷ Doug Wolf, *Statement from NPPC President Doug Wolf on GAO’s Report on Antibiotic Resistance*, <http://www.nppc.org/2011/09/statement-from-nppc-president-doug-wolf-on-gaos-report-on-antibiotic-resistance/> (Sept. 14, 2011) (accessed Apr. 7, 2012).

¹¹⁸ Rick Jordahl, *PAMTA on Backburner, for Now*, <http://www.dairyherd.com/dairynews/PAMTA-on-back-burner-for-now—132450078.html> (Oct. 24, 2011) (accessed Apr. 7, 2012).

¹¹⁹ Lessing, *supra* n. 103, at 479–81.

¹²⁰ Sandra Hoffmann & William Harder, *Food Safety and Risk Governance in Globalized Markets*, 20 Health Matrix 5, 50 (2010).

¹²¹ Michael Homer, *Frankenfish . . . It’s What’s for Dinner: The FDA, Genetically Engineered Salmon, and the Flawed Regulation of Biotechnology*, 45 Colum. J.L. & Soc. Probs. 83, 85–87, 114–115 (2011); 75 Fed. Reg. 52602, 52603 (Aug. 26, 2010).

GE fish for human consumption, Canadian bioengineering corporation AquaBounty,¹²² argues that producing GE fish will drastically increase the supply of farm-grown fish by introducing heartier fish species, dramatically lower consumer costs for fish, and not endanger wild fish stocks.¹²³ Critics allege that GE fish will endanger native fish populations, pose serious risks to human health, and damage the market for non-GE fish.¹²⁴

In response to FDA's suspected approval of GE fish, legislators of the 112th Congress have unleashed a flurry of legislation that seeks to delay FDA approval, ban GE fish altogether, or require the labeling of GE fish. During January and February 2011, Representative Don Young (R-Alaska) and Senator Mark Begich (R-Alaska) introduced two pairs of companion bills that would either prevent the approval¹²⁵ or require the labeling¹²⁶ of GE fish sold for human consumption.¹²⁷ On June 16, 2011—after previous legislative efforts appeared likely to stall in committee¹²⁸—Representative Young proposed adding language to an agriculture appropriations bill (H. 2112) that would prohibit FDA from approving GE fish.¹²⁹ AquaBounty CEO Ronald Stotish described Representative Young's amendment as "political gamesmanship [that] undermines the science-based system that pro-

¹²² AquaBounty, *The Company*, <http://www.aquabounty.com/company/company-history-292.aspx> (accessed Apr. 7, 2012).

¹²³ Bryan Walsh, *Frankenfish: Is GM Salmon a Vital Part of Our Future?*, *Time*, <http://www.time.com/time/health/article/0,8599,2082630,00.html> (July 12, 2011) (accessed Apr. 7, 2012); Chris McGreal, *GM Salmon May Go on Sale in US after Public Consultation*, *The Guardian* (Aug. 25, 2010) (available at <http://www.guardian.co.uk/environment/2010/aug/25/gm-salmon-us-fda-consultation> (accessed Apr. 7, 2012)).

¹²⁴ Andrew Seidman, *FDA Faces Opposition over Genetically Engineered Salmon*, *L.A. Times* (July 31, 2011) (available at <http://articles.latimes.com/2011/jul/31/nation/la-na-congress-salmon-20110731> (accessed Apr. 7, 2012)).

¹²⁵ Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "genetically engineered fish," select "H.R. 521," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; select from drop down menu "Bill Number," search "S. 230," select "All Information" (accessed Apr. 7, 2012).

¹²⁶ Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "genetically engineered fish," select "H.R. 520," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., *THOMAS, Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; select from drop down menu "Bill Number," search "S. 229," select "All Information" (accessed Apr. 7, 2012).

¹²⁷ See Genetically Engineered Food Right to Know Act, H.R. 3553, 112th Cong. (Dec. 9, 2011) (proposing to require the labeling of all genetically engineered food sold for human consumption).

¹²⁸ See McGreal, *supra* n. 123, at ¶ 12 (explaining that an FDA advisory committee was going to evaluate the evidence).

¹²⁹ H.R. Amend. 449, 112th Cong. (June 15, 2011) (amending H.R. 2112) (available at http://donyoung.house.gov/UploadedFiles/GM_Fish_final_version.pdf) (accessed Apr. 7, 2012); Paul Voosen, *N.Y. Times, House Moves to Ban Modified Salmon*, <http://www.nytimes.com/gwire/2011/06/16/16greenwire-house-moves-to-ban-modified-salmon-84165.html> (June 16, 2011) (accessed Apr. 7, 2012).

protects the nation's health and safety," and he urged that "these types of shenanigans have no place in a complex scientific debate."¹³⁰ After surviving a House vote, Representative Young's amendment did not appear in the final version of the bill passed into law on November 18, 2011.¹³¹

Meanwhile, on October 17, 2011, Senator Begich introduced the Prevention of Escapement of Genetically Altered Salmon in the U.S. Act (PEGASUS) (Sen. 1717), which proposes to ban the possession, purchase, and sale of GE fish.¹³² PEGASUS was grounded later that day upon referral to the Senate Committee on Commerce, Science, and Transportation.¹³³

Prompted by legislative efforts to regulate GE fish, the U.S. Senate Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard held a hearing on December 15, 2011 to assess environmental safety issues surrounding genetically engineered fish, including risks to wild fish stocks, fisheries, and aquatic ecosystems.¹³⁴ Legislators and supporters of regulation testified that approval of GE fish would pose serious environmental risks to native fish populations if accidental releases occurred.¹³⁵

Furthermore, critics argue that FDA's approval process lacks transparency and relies upon "overly simplistic" environmental assessments.¹³⁶ Due to restrictions imposed by the Trade Secrets Act, FDA may not reveal critical information concerning AquaBounty's development of GE fish; public awareness of GE fish derives solely from AquaBounty's voluntary disclosures.¹³⁷ The shroud of secrecy surrounding GE fish development has prompted many to call for revisions to the approval rulemaking process, especially after a report disclosed by AquaBounty in late 2011 revealed that experimental GE fish stocks

¹³⁰ Ronald Stotish, AquaBounty, *Young / Woolsey Amendment to Prohibit Funding for FDA Approval of AquAdvantage Salmon Wrong on Facts, Policy and Process*, http://www.aquabounty.com/documents/press/2011/2011_06.16_-_Statement_by_Ronald_L_Stotish.pdf (June 16, 2011) (accessed Apr. 7, 2012).

¹³¹ Pub. L. No. 112-55, 125 Stat. 552 (2011).

¹³² Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php>; search "Genetically Altered Salmon," select "All Information" (accessed Apr. 7, 2012).

¹³³ *Id.*

¹³⁴ U.S. Sen. Comm. on Commerce, Sci., & Transp., *Environmental Risks of Genetically Engineered Fish*, http://commerce.senate.gov/public/index.cfm?p=Hearings&ContentRecord_id=09660b72-d9b2-4144-81a9-3ac9943b417f&ContentType_id=14f995b9-dfa5-407a-9d35-56cc7152a7ed&Group_id=b06c39af-e033-4cba-9221-de668ca1978a (Dec. 15, 2011) (accessed Apr. 7, 2012); Ctr. for Food Safety, *Coalition Calls for FDA to Halt Approval of Genetically Engineered Salmon*, <http://truefoodnow.org/2011/12/20/coalition-calls-for-fda-to-halt-approval-of-genetically-engineered-salmon/> (Dec. 20, 2011) (accessed Apr. 7, 2012); Fisherman's News, *Senate Hears Criticism of Genetically Engineered Salmon*, <http://fnonlinenews.blogspot.com/2011/12/senate-hears-criticism-of-genetically.html> (Dec. 21, 2011) (accessed Apr. 7, 2012).

¹³⁵ Fisherman's News, *supra* n. 134, at ¶ 2.

¹³⁶ Homer, *supra* n. 121, at 117.

¹³⁷ *Id.* at 107.

had developed a serious viral disease that could infect wild salmon if an accidental release occurred.¹³⁸

With PEGASUS failing to take flight, some commentators have advocated the reintroduction of the Genetically Engineered Foods Act (GEFA).¹³⁹ GEFA would allow FDA to deny approval of GE fish based solely on environmental risks, would require AquaBounty to submit a plan for mitigation following the release of GE fish, and would allow FDA to recall GE fish if problems arise after production.¹⁴⁰

F. Bills Permitting and Opposing the Reintroduction of Horse Slaughter

Before 2007, the three horse slaughter facilities in the U.S. slaughtered nearly 105,000 horses, exporting \$65 million in horsemeat processed for human consumption to European and Asian countries.¹⁴¹ Under the Federal Meat Inspection Act (FMIA),¹⁴² horse slaughter facilities were subject to USDA inspections before horsemeat could enter the chain of commerce.¹⁴³ From 2007 to 2010, legislators eliminated horse slaughter in the U.S. by adding language to USDA appropriations bills that prohibited inspections of horse slaughter facilities.¹⁴⁴ The withdrawal of USDA inspection funding successfully eliminated horse slaughter¹⁴⁵ and complimented state legislation banning horse slaughter.¹⁴⁶

On November 18, 2011, U.S. President Barack Obama signed into law an appropriations bill (H. 2112) allowing USDA to reinstate inspections of horse slaughter facilities.¹⁴⁷ Critics complain that the decision to remove the language protecting horses was clandestinely

¹³⁸ Ethan Huff, *Exposed: Genetically-Modified Salmon Found to Be Contaminated with Infectious Salmon Anemia*, http://www.naturalnews.com/034451_GM_salmon_anemia_infections.html (Dec. 20, 2011) (accessed Apr. 7, 2012).

¹³⁹ Homer, *supra* n. 121, at 131.

¹⁴⁰ *Id.*

¹⁴¹ U.S. GAO, *Horse Welfare: Action Needed to Address Unintended Consequences from Domestic Slaughter* 8, <http://www.gao.gov/new.items/d11228.pdf> (June 2011) (accessed Apr. 7, 2012) [hereinafter GAO Rpt.].

¹⁴² 21 U.S.C. § 601-683 (2011).

¹⁴³ *Id.* at § 603.

¹⁴⁴ Pub. L. No. 109-97, § 794, 119 Stat. 2120 (2006); Pub. L. No. 110-161, § 741, 121 Stat. 1844 (2008); Pub. L. No. 111-8, § 739, 123 Stat. 524 (2009).

¹⁴⁵ Sarah LeTrent, *Horse: Coming Soon to a Meat Case Near You?*, <http://eatocracy.cnn.com/2011/11/30/horse-coming-soon-to-a-meat-case-near-you/> (Nov. 30, 2011) (accessed Apr. 7, 2012).

¹⁴⁶ *Cavel Intern., Inc. v. Madigan*, 500 F.3d 551 (7th Cir. 2007) (holding that an Illinois statute banning horse slaughter comported with the Commerce Clause and was not preempted under FMIA); *Empacadora de Carnes de Fresnillo, S.A. de C.V., v. Curry*, 476 F.3d 326 (5th Cir. 2007) (holding that a Texas statute banning horse slaughter comported with the Commerce Clause and was not preempted under FMIA).

¹⁴⁷ Pub. L. No. 112-55, 125 Stat. 552 (2011); Patrik Jonsson, *Way Cleared for Horse Slaughter to Resume in U.S. after 5-Year Ban*, *The Christian Science Monitor* (Nov. 29, 2011) (available at <http://www.csmonitor.com/USA/2011/1129/Way-cleared-for-horse-slaughter-to-resume-in-US-after-5-year-ban> (accessed Apr. 7, 2012)).

orchestrated by Representative Herb Kohl (D-Wis.), Senator Roy Blunt (R-Mont.), and Representative Jack Kingston (R-Ga.) without proper debate during a House Appropriations Committee meeting.¹⁴⁸ There are currently no operational horse slaughterhouses in the U.S.,¹⁴⁹ but critics have heralded the appropriations bill as the legal mechanism that will effectively reintroduce horse slaughter throughout the U.S.¹⁵⁰

For over a decade, congressional efforts to create legislation explicitly banning horse slaughter in the U.S. were unsuccessful.¹⁵¹ Two companion bills introduced during the 109th Congress as the American Horse Slaughter Prevention Act (the "Act") (H. 503/Sen. 1915) sought to prohibit the transfer and possession of horses for the purpose of "being slaughtered for human consumption."¹⁵² On September 7, 2006, H. 503 was passed by a 263 to 146 vote.¹⁵³ Despite strong support for the House bill, Sen. 1915 stalled in the Senate's Committee on Commerce, Science, and Transportation, causing both bills to die by the end of the 109th Congress.¹⁵⁴ Another attempt to reintroduce the Act during the 110th Congress failed when the House version stalled in committee and the Senate version did not reach a vote.¹⁵⁵ During the 112th Congress, Representative Dan Burton (R-Ind.) and Senator Mary Landrieu (D-La.) sponsored companion bills (H.R. 2966 and Sen. 1176) reintroducing the Act,¹⁵⁶ but, like previous versions of the Act, both bills will likely die in congressional committees.

¹⁴⁸ Vickery Eckhoff, *How Many Congressmen Does It Take to Screw a Horse?*, <http://www.forbes.com/sites/vickeryeckhoff/2011/12/21/how-many-congressmen-does-it-take-to-screw-a-horse/> (Dec. 12, 2011) (accessed Apr. 7, 2012).

¹⁴⁹ Stephen Dinan, *Obama, Congress Restore Horse-Slaughter Industry*, Washington Times (Nov. 30, 2011) (available at <http://www.washingtontimes.com/news/2011/nov/30/obama-congress-restore-us-horse-slaughter-industry/?page=all>) (accessed Apr. 7, 2012)).

¹⁵⁰ Jonsson, *supra* n. 147, at ¶ 2.

¹⁵¹ See Tadlock Cowen, Cong. Research Serv., *Horse Slaughter Prevention Bills and Issues*, <http://www.nationalaglawcenter.org/assets/crs/RS21842.pdf> (Sept. 16, 2011) (accessed Apr. 7, 2012) (describing the history of failed proposals for horse slaughter bills).

¹⁵² H.R. 503, 109th Cong. § 1(c)(2) (Feb. 1, 2005); Sen. 1915, 109th Cong. § 1(c)(2) (Oct. 25, 2005).

¹⁵³ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 109th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=109>; search "Horse Slaughter," select "H.R. 503," select "All Information" (accessed Apr. 7, 2012).

¹⁵⁴ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 109th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=109>; search "Horse Slaughter," select "S. 1915," select "All Information" (accessed Apr. 7, 2012).

¹⁵⁵ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 110th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=109>; search "Horse Slaughter," select "H.R. 503," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 110th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=110>; search "Horse Slaughter," select "S. 311," select "All Information" (accessed Apr. 7, 2012).

¹⁵⁶ Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=112>; search "Horse Slaughter," select "H.R. 2966," select "All Information" (accessed Apr. 7, 2012); Lib. Cong., THOMAS, *Search Bill Summary and Status for the 112th Congress*, <http://>

Critics of the Act—including United Horsemen¹⁵⁷ and People for the Ethical Treatment of Animals¹⁵⁸—purport that banning horse slaughter encourages American horse owners to transport their horses to slaughterhouses in Mexico and Canada.¹⁵⁹ A June GAO report estimated that since the prohibition of domestic horse slaughter in 2007, “[the number of horses exported to Canada and Mexico for slaughter] increased by 148 and 660 percent to Canada and Mexico, respectively.”¹⁶⁰ GAO alleges that banning horse slaughter has also led to a doubling of horse abuse investigations in many states, as horse owners struggle to maintain horses that they cannot afford to humanely euthanize.¹⁶¹ As a result, some critics maintain that slaughter bans burden local and state government equine rescue shelters by increasing the number of horses under state care.¹⁶² Some animal welfare organizations severely criticized these claims as misinterpreting domestic slaughter bans as the reason for increased animal neglect and exportation of domestic horses for slaughter.¹⁶³ For instance, the Animal Law Coalition alleged that “a decline in horse welfare can only be attributed to the terrible economy.”¹⁶⁴

Considering Congress’ legislative emphasis on reforming economic policy, the 112th Congress will likely allow the American Horse Slaughter Prevention Act of 2011 to languish in committee. Accordingly, even after a five-year ban on horse slaughter, the fate of thousands of American horses is uncertain following the renewed funding of USDA inspection of horse slaughter facilities. Groups favoring horse slaughter estimate that the appropriations bill¹⁶⁵ has generated industry interest and project that 120,000 to 200,000 horses will

thomas.loc.gov/home/LegislativeData.php?&n=BSS&c=112; search “Horse Slaughter,” select “S. 1176,” select “All Information” (accessed Apr. 7, 2012).

¹⁵⁷ High Plains J., *United Horsemen: Slaughter Bans Would Increase Horse Suffering, Kill Jobs*, http://www.hpj.com/archives/2011/oct11/oct17/1012Letter1_hmsr.cfm (accessed Apr. 7, 2012).

¹⁵⁸ Rene Lynch, *Horse Slaughter Poised to Resume in U.S.—With PETA’s Approval?* L.A. Times (Dec. 1, 2011) (available at <http://latimesblogs.latimes.com/nationnow/2011/12/peta-horse-slaughter.html>) (accessed Apr. 7, 2012)).

¹⁵⁹ *Id.*

¹⁶⁰ GAO Rpt., *supra* n. 141, at 12.

¹⁶¹ *Id.* at 19–20.

¹⁶² Animal Welfare Council, *The Unintended Consequences of a Ban on the Humane Slaughter (Processing) of Horses in the United States 2–4*, <http://data.opi.mt.gov/legbills/2009/Minutes/Senate/Exhibits/ags55a11.pdf> (May 15, 2006) (accessed Apr. 7, 2012); but see HSUS, *HSUS, Parelli Team Up: Rescued Horses Gain Ally Through This Natural Pairing*, http://www.humanesociety.org/news/news/2009/01/hsus_parelli_team_011309.html (Jan. 13, 2009) (accessed Apr. 7, 2012) (noting that developments in horse rehabilitation programs have considerably advanced the welfare of rescued horses).

¹⁶³ John Holland, *Horse Slaughter Trends from 2006 through 2009 1*, http://www.equinewelfarealliance.org/uploads/Horse_Slaughter_Trends_2006-2009.pdf (Feb. 2010) (accessed Apr. 7, 2012).

¹⁶⁴ Laura Allen, *Animal Law Coalition Responds to GAO Horse Slaughter Report*, <http://rtfitchauthor.com/2011/06/23/animal-law-coalition-responds-to-gao-horse-slaughter-report/> (June 2011) (accessed Apr. 7, 2012).

¹⁶⁵ Pub. L. No. 112-55, 125 Stat. 552 (2011).

be slaughtered annually in the U.S. if Congress allows USDA inspections to resume.¹⁶⁶

II. STATE LEGISLATION

A. *Restrictions on Trapping Methods*

Common trapping devices include steel-jawed leghold traps, body-crushing traps, and snares.¹⁶⁷ Steel-jawed leghold traps, also known as foothold or restraining traps, capture fur-bearing mammals by their extremities to minimize damage to their pelts.¹⁶⁸ Not only do trapped animals suffer excruciating pain on impact, but they may also exacerbate their injuries as they struggle to escape.¹⁶⁹ Body-crushing traps, also known as conibear traps, are made of hinged metal jaws that close like scissors around animals' bodies.¹⁷⁰ Designed for a "quick kill," these devices close on an animal's spinal column or the base of its skull.¹⁷¹ If the trap misses its target, an animal may endure prolonged suffering.¹⁷² Snare traps consist of a wire "noose" attached to a stake or anchor;¹⁷³ the noose constricts around the body of an animal when the snare trap is triggered.¹⁷⁴ Animals caught in snares slowly succumb to strangulation or organ damage.¹⁷⁵

¹⁶⁶ Sonya Colberg & Chris Casteel, *U.S. Horse Slaughter Plants Legal Once Again*, http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20111128_16_A15_Horses785115 (updated Nov. 28, 2011) (accessed Apr. 7, 2012); see also Kelsey Dayton, Casper Star Trib., *Wyoming Rep. Wallis Expects at Least One Horse Slaughterhouse in the State*, http://trib.com/news/state-and-regional/wyoming-rep-wallis-expects-at-least-one-horse-slaughterhouse-in/article_7eb9340e-3b06-5f51-8eba-85a010a86d39.html (Dec. 5, 2011) (accessed Apr. 7, 2012) (alleging that opening one slaughter house would generate approximately 80–100 jobs).

¹⁶⁷ Fact Sheet, HSUS, *Trapping: The Inside Story* 1–2 (1998) (available at http://www.humanesociety.org/assets/pdfs/WILD_Trapping_The_Inside_Story.pdf) (accessed Apr. 7, 2012)).

¹⁶⁸ *Id.* at 1.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 2.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ HSUS, *supra* n. 167, at 2.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

Legislative bodies introduced bills related to trapping practices in Hawaii,¹⁷⁶ Illinois,¹⁷⁷ Iowa,¹⁷⁸ Nevada,¹⁷⁹ New York,¹⁸⁰ and Washington¹⁸¹ during the 2011 session. The proposed legislation in Hawaii, Illinois, Iowa, Nevada, and New York would have restricted accepted trapping methods.¹⁸² Conversely, the unsuccessful Washington legislation aimed to weaken existing regulations.¹⁸³

¹⁷⁶ Haw. Sen. 96, 26th Legis., 2011 Reg. Sess. (Jan. 21, 2011) (available at http://www.capitol.hawaii.gov/session2011/Bills/SB96_.PDF (accessed Apr. 7, 2012)); *see also* Haw. Sen. 733, 26th Legis., 2011 Reg. Sess. (Jan. 21, 2011) (available at http://www.capitol.hawaii.gov/session2011/Bills/SB733_.PDF (accessed Apr. 7, 2012)); Haw. H. 579, 26th Legis., 2011 Reg. Sess. (Jan. 24, 2011) (available at http://www.capitol.hawaii.gov/session2011/Bills/HB579_.PDF (accessed Apr. 7, 2012)) (companion bills; the latter House bill was amended and passed out of the committee on Water, Land & Ocean Resources as H. 579 H.D. 1).

¹⁷⁷ Ill. Sen. 1704, 97th Gen. Assembly, 2011–2012 Reg. Sess. (Feb. 9, 2011) (available at <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=84&GA=97&DocTypeId=SB&DocNum=1704&GAID=11&LegID=57732&SpecSess=&Session=> (accessed Apr. 7, 2012)).

¹⁷⁸ Iowa H. File 257, 84th Legis., 2011 Reg. Sess. (Feb. 10, 2011) (available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=HF257> (accessed Apr. 7, 2012)).

¹⁷⁹ Nev. Sen. 226, 76th Legis., 2011 Reg. Sess. (Mar. 7, 2011) (available at <http://leg.state.nv.us/Session/76th2011/Bills/SB/SB226.pdf> (accessed Apr. 7, 2012)).

¹⁸⁰ N.Y. Assembly 3801, 2011–2012 Reg. Sess. (Jan. 27, 2011) (available at http://assembly.state.ny.us/leg/?default_fld=&bn=A03801&term=2011&Text=Y (accessed Apr. 7, 2012)).

¹⁸¹ Wash. H. 1137, 62nd Legis., 2011 Reg. Sess. (Jan. 13, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1137.pdf> (accessed Apr. 7, 2012)); Wash. H. 1138, 62nd Legis., 2011 Reg. Sess. (Jan. 13, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1138.pdf> (accessed Apr. 7, 2012)).

¹⁸² *See* Haw. H. 579, 2011 Reg. Sess. at 2 (generally prohibiting the intentional, knowing, or reckless use of a body-crushing trap and a foot or leg-hold trap); Ill. Sen. 1704, 2011–2012 Reg. Sess. at 3–4 (prohibiting the use of “body-gripping traps” within a specified distance of certain public spaces); Iowa H. File 257, 2011 Reg. Sess. at 1 (limiting the use of “[h]umane traps, conibear type traps, or traps designed to kill instantly” to devices with a certain size jaw spread and prohibiting the use of “[c]onibear type traps and snares” within a specified distance of an occupied dwelling without landowner or tenant permission); Nev. Sen. 226, 2011 Reg. Sess. at 3 (making it unlawful to use traps other than box or cage traps in counties with populations above 100,000 and within a certain distance of an occupied dwelling); N.Y. Assembly 3801, 2011–2012 Reg. Sess. at 1 (prohibiting the use of traps that “grip[] a mammal’s body or body part” within a specified distance of certain public spaces and requiring posted signage where trapping is permitted).

¹⁸³ *See* Wash. H. 1137, 2011 Reg. Sess. at 2 (allowing the use of “body-gripping traps” including steel-jawed leg hold traps and neck snares, to any person who completes a course in “safe, humane, and proper trapping”); *see also* Wash. H. 1138, 2011 Reg. Sess. at 2 and 8 (granting the Fish and Wildlife Commission authority over trapping and reestablishing commerce in raw fur). The bills are discussed in more depth *infra* n. 338.

1. *For Wildlife Preservation*

Hawaii lawmakers proposed three bills to ban certain types of traps: Sen. 96 and companion bills H. 579 and Sen. 733.¹⁸⁴ Legislators proposed these bills, in part, to “preserve, protect, and conserve Hawaii’s wildlife.”¹⁸⁵ Sen. 96 would have made it unlawful to “use, set, place, maintain, or tend, or cause to be used, set, placed, maintained, or tended any body-gripping trap.”¹⁸⁶ The proposed legislation broadly defined “body-gripping trap” to include “steel-jawed leghold traps, padded jaw leghold traps, conibear traps, and snares.”¹⁸⁷ In contrast, H. 579 and Sen. 733 would have prohibited only body-crushing traps, foot or leg-hold traps that are “not padded or laminated,” and snares in residential or otherwise prohibited areas.¹⁸⁸ All of the bills exempted rodents from protection.¹⁸⁹

Legislative action was promptly deferred on Sen. 96.¹⁹⁰ Meanwhile, an amended version of H. 579 was approved in committee, with the support of the Humane Society of the United States (HSUS).¹⁹¹ The Nature Conservancy opposed the measure, however, emphasizing trapping as a means of controlling damage caused by non-native species.¹⁹² The committee version of H. 579 eliminated the prohibition pertaining to snares in residential or otherwise off-limits areas; extended the minimum allowable period between checks;¹⁹³ exempted government agencies acting to protect public health, safety, or property; exempted practices for mongoose control; and removed an exemp-

¹⁸⁴ Haw. Sen. 96, 2011 Reg. Sess.; *see also* Haw. Sen. 733, 2011 Reg. Sess.; Haw. H. 579, 2011 Reg. Sess. (companion bills).

¹⁸⁵ *See* Haw. Sen. 733, 2011 Reg. Sess. at 1–2; Haw. H. 579, 2011 Reg. Sess. at 1–2 (both citing findings that body-crushing traps result in “inhumane treatment and cruelty to animals”).

¹⁸⁶ Haw. Sen. 96, 2011 Reg. Sess. at 1.

¹⁸⁷ *Id.*

¹⁸⁸ Haw. Sen. 733, 2011 Reg. Sess. at 2–3; Haw. H. 579, 2011 Reg. Sess. at 2–3.

¹⁸⁹ *See* Haw. Sen. 733, 2011 Reg. Sess. at 4; Haw. H. 579, 2011 Reg. Sess. at 4 (exempting “accepted practices of rodent control”); *see also* Haw. Sen. 96, 2011 Reg. Sess. at 1 (exempting use of traps “for the purpose of controlling wild or domestic rodents”).

¹⁹⁰ *See* Haw. Legis., *2011 Senate Bills Introduced*, 2011 Reg. Sess., <http://www.capitol.hawaii.gov/report.aspx?type=introsb&year=2011> (accessed Apr. 7, 2012) (noting that the Senate Committee on Public Safety, Government Operations & Military Affairs deferred the bill on Feb. 8, 2011).

¹⁹¹ Haw. H. Comm. on Water, Land & Ocean Resources, Standing Comm. Rpt. No. 523, *Re: H. 579 H.D. 1*, 2011 Reg. Sess. 3 (Feb. 18, 2011) (available at http://www.capitol.hawaii.gov/session2011/CommReports/HB579_HD1_HSCR523_.PDF (accessed Apr. 7, 2012)).

¹⁹² *Id.*; Haw. H. Comm. on Water, Land & Ocean Resources, *Hearing Testimony on H. 579*, 2011 Reg. Sess. 5 (Feb. 7, 2011) (written testimony of the Nature Conservancy of Hawaii opposing the bill) (available at http://www.capitol.hawaii.gov/session2011/testimony/HB579_TESTIMONY_WLO_02-07-11_.PDF (accessed Apr. 7, 2012)).

¹⁹³ Haw. H. Comm. on Water, Land & Ocean Resources, Standing Comm. Rpt. No. 523 at 3–4 (a “check” is the process of visiting traps; the committee version of H. 579 indicates that checks are to be conducted no less than once every forty-eight hours as opposed to the previous requirement to conduct checks every twenty-four hours).

tion for private conservation organizations.¹⁹⁴ The committee version of H. 579 did not meet the first deadline to crossover to the Senate for consideration.¹⁹⁵

2. *To Protect Public Safety*

Other states sought to prohibit certain traps in limited areas as a public safety measure. The Illinois bill, Sen. 1704, would have made it unlawful “to place, set, use, or maintain a body-crushing conibear kill-type trap, a leg-hold trap, or a trap of similar construction to either of those traps within one-quarter mile of a residence, school, picnic area, playground, beach, campground, road, highway, public trail, golf course, or parking lot.”¹⁹⁶ Similarly, Iowa’s H. 257 would have prohibited, among other things, the use of a “conibear type trap” or snare trap on the right-of-way of a public road within 200 yards of the entry to a private drive or within five feet of any fence without the permission of the adjacent landowner, occupant, or tenant.¹⁹⁷

Similarly, New York’s Assem. 3801 would have made unlawful the placement of traps that “grip[] a mammal’s body or body part” within 100 feet of a public highway or road, dwelling, school building or playground, day care facility, place of worship, athletic field, or a government-maintained bicycle path, walking path, or hiking trail.¹⁹⁸ Moreover, Assem. 3801 would have permitted body-gripping traps within 500 feet of these locations only with the written consent of the owner or lessee of the property where the trap was set.¹⁹⁹ The bill also would have required local governments to post warning signs on public land where body-gripping traps are authorized.²⁰⁰ Although Assem. 3801 died in committee,²⁰¹ a similar bill passed the Assembly and required precautionary signage on publicly accessible municipal property where any kind of hunting, fishing, or trapping is allowed.²⁰²

¹⁹⁴ *Id.*

¹⁹⁵ See Haw. Legis., *2011 Measures That Passed First Crossover*, 2011 Reg. Sess., <http://www.capitol.hawaii.gov/report.aspx?type=passedfirstx&year=2011> (accessed Apr. 7, 2012) (H. 579 is not included).

¹⁹⁶ Ill. Sen. 1704, 2011–2012 Reg. Sess. at 3–4 (containing an exemption for government employees acting to protect the public safety).

¹⁹⁷ Iowa H. File 257, 2011 Reg. Sess. at 1 (The bill would also have made unlawful the land use of “[h]umane traps, conibear type traps, or traps designed to kill instantly” with a jaw spread exceeding five inches; such traps would be permissible if submerged entirely underwater.).

¹⁹⁸ N.Y. Assembly 3801, 2011–2012 Reg. Sess. at 1.

¹⁹⁹ *Id.* (not applying to traps placed adjacent to public highways or roads).

²⁰⁰ *Id.* at 2.

²⁰¹ N.Y. Assembly, *Bill No.: A03801*, 2011–2012 Reg. Sess. (available at http://assembly.state.ny.us/leg/?default_fld=&bn=A03801&term=2011&Summary=Y&Actions=Y&Votes=&Memo=&Text=Y (accessed Apr. 7, 2012)).

²⁰² See N.Y. Assembly 3743, 2011–2012 Reg. Sess. (Jan. 27, 2011) (a companion bill of Sen. 2664); see also N.Y. Assembly, *Bill No. A03743*, 2011–2012 Reg. Sess. (available at http://assembly.state.ny.us/leg/?default_fld=&bn=A03743&term=2011&Summary=Y&Actions=Y&Votes=&Memo=&Text=Y (accessed Apr. 7, 2012)) (reflecting a nearly unanimous vote in favor of A.B. 3743 on May 23, 2011).

Ultimately, Nevada was the only state to pass trapping legislation.²⁰³ Nevada initiated its legislative efforts in response to an incident where a kitten was caught in a leg-hold trap,²⁰⁴ which caused concerns for domestic animal safety to dominate the committee discussions.²⁰⁵ As introduced, Sen. 226 prohibited the use of a trap, other than a box or a cage trap, in counties with populations greater than 100,000, “within 1,000 yards of an occupied dwelling, if the dwelling is located within an area of the county in which the discharge of firearms is prohibited by a county ordinance.”²⁰⁶ As amended and passed, however, Sen. 226 merely required the Board of Wildlife Commissioners to “adopt regulations governing the trapping of fur-bearing mammals in a residential area of a county whose population is 100,000 or more.”²⁰⁷ Nonetheless, Nevada legislators approved the bill with the support of HSUS²⁰⁸ and Born Free U.S.A.²⁰⁹

B. *Banning the Shark Fin Trade*

The U.S. Shark Conservation Act of 2010 prohibits the removal of shark fins.²¹⁰ Despite the national ban on the shark fin trade, gaps persisted at the state level.²¹¹ Prior to the 2011 legislative session,

²⁰³ 2011 Nev. Stat. 1024 (to be codified at Nev. Rev. Stat. § 501.181) (source bill available *supra* n. 179).

²⁰⁴ See Nev. Sen. Comm. on Nat. Resources, Meeting Minutes (Mar. 30, 2011) (available at <http://www.leg.state.nv.us/Session/76th2011/Minutes/Senate/NR/Final/765.pdf> (accessed Apr. 7, 2012)) (Kitty Jung, Washoe County Board of Commissioners, District 3, advised her concerned constituents to approach Sen. 226 co-sponsor Senator Sheila Leslie to voice support for trapping legislation).

²⁰⁵ *Id.*

²⁰⁶ Nev. Sen. 226, 2011 Reg. Sess. at 2 (defining “box or cage trap” as “any trap that is not designed, built or made to close upon any portion of the body of a fur-bearing mammal”).

²⁰⁷ 2011 Nev. Stat. at 1025 (emphasis added); see Nev. Sen. Comm. on Nat. Resources, Meeting Minutes (Apr. 15, 2011) (available at <http://www.leg.state.nv.us/Session/76th2011/Minutes/Senate/NR/Final/878.pdf> (accessed Apr. 7, 2012)) (emphasis added) (unanimously approving an amendment to Sen. 226 that eliminated the express statutory prohibition with general language requiring the adoption of administrative regulations); see also Nev. Sen. Comm. on Nat. Resources, Meeting Minutes (May 19, 2011) (available at <http://www.leg.state.nv.us/Session/76th2011/Minutes/Assembly/NRAM/Final/1225.pdf> (accessed Apr. 7, 2012)) (unanimously voting in favor of a “do pass” recommendation).

²⁰⁸ Press Release, HSUS, *Animal Advocates Ask Nevada Lawmakers to Protect Animals at Humane Lobby Day 2011 in Carson City* (Mar. 17, 2011) (available at http://www.humanesociety.org/news/press_releases/2011/03/nevada_2011_humane_lobby_day_031711.html (accessed Apr. 7, 2012)).

²⁰⁹ Born Free USA, *Nevada Legislation: (Updated) Sen. 226 Restricts Trapping of Fur-Bearing Mammals*, <http://www.bornfreeusa.org/legislation.php?p=2757&more=1&cat=134> (accessed Apr. 7, 2012).

²¹⁰ Press Release, White House Off. of the Press Sec., *Statement by the Press Sec.: Jan. 4, 2011*, (available at <http://www.whitehouse.gov/the-press-office/2011/01/04/statement-press-secretary> (accessed Apr. 7, 2012)); H. 81, 111th Cong. (Jan. 5, 2010).

²¹¹ Press Release, HSUS, *Hawaii’s Shark Fin Product Ban Takes Effect July 1* (June 28, 2011) (available at http://www.humanesociety.org/news/press_releases/2011/06/hawaii_shark_fin_ban_062811.html (accessed Apr. 7, 2012)).

only Hawaii had passed a ban on the possession, sale, and distribution of illegal shark fins.²¹² HSUS encouraged other states to criminalize the possession of fins in order to close the “potential loopholes that continue to drive this cruel trade.”²¹³

In 2011, three more states followed Hawaii’s lead in prohibiting shark fin trade—California, Oregon, and Washington—by passing similar legislation.²¹⁴ An analogous shark fin bill in New York, however, did not make it out of committee.²¹⁵

1. California

The California shark fin ban, introduced as Assem. 376,²¹⁶ prohibits any person from possessing, selling, offering for sale, trading, or distributing a shark fin.²¹⁷ The law contains three exemptions: (1) for persons who hold a license or permit authorizing possession of a shark fin for scientific or educational purposes; (2) for persons who hold a license or permit for recreational or commercial purposes; and (3) prior to January 1, 2013, for restaurants that possessed the shark fin as of January 1, 2012.²¹⁸

The shark fin bill divided members of California’s Chinese American community.²¹⁹ Assemblyman Paul Fong introduced the measure to stop what he characterized as a “brutal practice,” but Senator Leland Yee criticized Assem. 376 as “an unfair attack on Asian culture and cuisine.”²²⁰ One statewide poll indicated that more than two-thirds of Chinese American voters supported the proposed legislation.²²¹ Because the U.S. imports the majority of its shark fins from

²¹² Audrey McAvoy, *Hawaii’s First Shark Fin Ban Begins This Week*, Seattle Times (June 30, 2010) (available at http://seattletimes.nwsources.com/html/nationworld/2012249783_apussharkfinban.html (accessed Apr. 7, 2012)); Haw. Pub. Act No. 148, § 2 (May 28, 2010) (available at http://www.capitol.hawaii.gov/session2010/bills/GM606_.pdf (accessed Apr. 7, 2012)).

²¹³ HSUS Press Release, *supra* n. 211.

²¹⁴ 2011 Cal. Stat. 524 (to be codified at Cal. Fish & Game Code § 2021) (source bill available *infra* n. 216); 2011 Or. Laws 1297 (to be codified at Or. Rev. Stat. ch. 509 and ch. 498) (source bill available *infra* n. 224); 2011 Wash. Laws 2083 (to be codified at Wash Rev. Code § 77.08.010 and ch. 77.15) (source bill available *infra* n. 229).

²¹⁵ N.Y. Assembly 7707, 2011–2012 Reg. Sess. (May 16, 2011) (available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07707&term=2011&Summary=Y&Actions=&Votes=&Memo=&Text=Y (accessed Apr. 7, 2012)).

²¹⁶ Cal. Assembly 376, 2011–2012 Reg. Sess. (Feb. 14, 2011) (available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0351-0400/ab_376_bill_20110214_introduced.html (accessed Apr. 7, 2012)).

²¹⁷ 2011 Cal. Stat. 524.

²¹⁸ *Id.* (subsection (b) creates the exemption and subsections (c) through (e) outline the specific parameters of the exemptions).

²¹⁹ See Patrick McGreevy, *Brown Law Signing Flurry Includes Shark Fin Ban*, L.A. Times (Oct. 8, 2011) (available at <http://articles.latimes.com/print/2011/oct/08/local/lame-brown-legislation-20111008> (accessed Apr. 7, 2012)) (stating that some leaders in the Chinese American community saw the law “as an assault on Asian culture”).

²²⁰ *Id.*

²²¹ Press Release, Monterey Bay Aquarium, *Poll: California’s Chinese Americans Overwhelmingly Support Ban on Shark Fin Trade* (May 6, 2011) (available at <http://>

Hong Kong via Californian ports, Assem. 376 is expected to have a major impact on the domestic availability of shark fins.²²² Companion bill Assem. 853 allows stores to sell existing stocks of fins until July 1, 2013.²²³

2. Oregon

As introduced, the Oregon shark fin bill, H. 2838, would have banned the possession, sale, trade, and distribution of shark fins.²²⁴ Originally, the bill contained only one exemption to the ban, allowing ownership of shark fins already “*possessed* by a person” on the effective date of the act.²²⁵ As passed, the law contained three additional exemptions: (1) for fins “legally taken or landed under rules adopted by the [Oregon] Department of Fish and Wildlife and in accordance with federal regulations”; (2) for persons holding a commercial fishing license or permit; and (3) for fish processors who hold commercial licenses.²²⁶ Although the shark fin trade within Oregon was never substantial, H.B. 2838 represented an effort to “join West Coast and international efforts intended to shut down the commercial trading of shark fins.”²²⁷

3. Washington

In Washington, legislators effectuated the ban by criminalizing the “unlawful trade in shark fins” (Sen. 5688).²²⁸ While the original version of Sen. 5688 prohibited both the private and commercial shark fin trade, the law as passed only prohibits the commercial shark fin trade.²²⁹ It additionally contains an exemption for “bona fide research or educational purposes.”²³⁰ Like California and Oregon, Washington

www.montereybayaquarium.org/aa/pressroom/web/PressRelease_view.aspx?enc=Rlw2TQ8bY2/WdsO/NKENQ== (accessed Apr. 7, 2012)).

²²² Elisabeth Rosenthal, *Making Headway in the Movement to Protect the World's Sharks*, N.Y. Times A13 (Sept. 11, 2011) (available at <http://www.nytimes.com/2011/09/11/science/earth/11shark.html> (accessed Apr. 7, 2012)).

²²³ McGreevy, *supra* n. 219; see 2011 Cal. Stat. 525 (session law for enacted A.B. 853).

²²⁴ Or. H. 2838, 76th Legis., 2011 Reg. Sess. (Jan. 11, 2011) (available at <http://www.leg.state.or.us/11reg/measpdf/hb2800.dir/hb2838.intro.pdf> (accessed Apr. 7, 2012)).

²²⁵ *Id.* at 1 (emphasis added) (though the person “may not sell, offer for sale, trade or distribute” the fins remaining in his or her possession).

²²⁶ 2011 Or. Laws at 1297–28.

²²⁷ Jeff Barnard, *Oregon House Passes Bill Banning Shark Fin Soup*, Seattle Times (Apr. 29, 2011) (available at http://seattletimes.nwsourc.com/html/localnews/2014913651_aporxgrsharkfinban1stldwritethru.html (accessed Apr. 7, 2012)) (quoting the bill’s chief sponsor).

²²⁸ 2011 Wash. Laws at 2084.

²²⁹ *Compare* Wash. Sen. 5688, 62nd Legis., 2011 Reg. Sess. 2 (Feb. 7, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/5688.pdf> (accessed Apr. 7, 2012)) with 2011 Wash. Laws at 2084.

²³⁰ 2011 Wash. Laws at 2084.

exempts certain shark fin products lawfully taken or acquired prior to the effective date of the law.²³¹

A first-degree violation of the law results in a class C felony charge; a second-degree violation is classified as a gross misdemeanor.²³² An offense is punishable as a second degree violation if the person (a) “sells, offers for sale, purchases, offers to purchase, or otherwise exchanges a shark fin or shark fin derivative product for commercial purposes”; or (b) “prepares or processes a shark fin or shark fin derivative product for human or animal consumption for commercial purposes.”²³³ The same offense rises to the level of a first-degree violation if the market value of the shark product exceeds \$250, if a person knowingly commits the violation, or if the violation occurs within five years of a similar conviction.²³⁴ A conviction of either type results in a one-year suspension of commercial fishing privileges requiring a license.²³⁵

C. *Defining and Criminalizing Animal Hoarding*

Colin Berry, Gary Patronek, and Randall Lockwood define an animal hoarder as “an individual who accumulates a large number of animals, [and] who fails to provide the animals with adequate food, water, sanitation, and veterinary care.”²³⁶ There are currently a number of obstacles to the effective prosecution of animal hoarders. First, the language of typical state anti-cruelty statutes is often insufficient to address the severity of animal hoarding.²³⁷ While a state can criminally charge an animal hoarder for failing to provide proper food, water, and shelter, and may theoretically charge the hoarder with separate counts for each animal, prosecutors often reduces the number of charges to minimize “redundancy.”²³⁸ Therefore, the number of charges may not accurately reflect the number of animals involved.²³⁹ Second, prosecution “may be hindered by a perceived lack of the intent

²³¹ *Id.* at 2084–85 (stating that “[n]othing in this section prohibits the sale, offer for sale, purchase, offer to purchase, or other exchange of shark fins or shark fin derivative products for commercial purposes, or preparation or processing of shark fins or shark fin derivative products for purposes of human or animal consumption for commercial purposes, if the shark fins or shark fin derivative products were lawfully harvested or lawfully acquired prior to July 22, 2011”); *but cf.* 2011 Or. Laws at 1298 (stating in § 5 that the provisions “do not apply to a person who possesses a shark fin on the effective date of this 2011 Act, *except that the person may not sell or offer for sale, trade or distribute the shark fin*”) (emphasis added). The effective date of the Oregon law was January 1, 2012. 2011 Or. Laws at 1298.

²³² 2011 Wash. Laws at 2084.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ Colin Berry et al., *Long-Term Outcomes in Animal Hoarding Cases*, 11 *Animal L.* 167, 168 (2005).

²³⁷ *Id.* at 184.

²³⁸ *Id.* at 184–85.

²³⁹ Megan L. Renwick, Student Author, *Animal Hoarding: A Legislative Solution*, 47 *U. Louisville L. Rev.* 585, 591 (2009).

to harm,” which is required under many anti-cruelty statutes.²⁴⁰ Third, penalties do little to prevent recidivism because they “do not address the underlying causes of hoarding.”²⁴¹ Finally, interpretation of anti-cruelty statutes as applied to animal hoarding cases leads to uneven results.²⁴²

Those obstacles have prompted states to begin exploring hoarding-specific legislation. Illinois passed the first animal hoarding legislation,²⁴³ followed by Hawaii.²⁴⁴ During the 2011 legislative session, three additional states considered enacting variants of these laws: Vermont,²⁴⁵ New York,²⁴⁶ and Wyoming.²⁴⁷ Illinois considered expanding its existing law with H. 1166.²⁴⁸

1. *How Many Animals Is Too Many?*

The Vermont bill defined “animal hoarder” as a person who (a) possesses *five or more* animals; (b) fails to provide for those animals; (c) keeps the animals in an overcrowded environment; and (d) displays “an inability to recognize or understand the nature of or has a reckless disregard for the conditions under which the animals are living and

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.* (noting that general language often leads to constitutional challenges for vagueness by hoarders).

²⁴³ *Id.* at 599 (noting that while hoarding was not explicitly criminalized, the Illinois statute created a definition for “companion animal hoarder” which was incorporated into penalties under the existing anti-cruelty law); *see also* 510 Ill. Comp. Stat. Ann. 70/2.10 (2004) (defining “companion animal hoarder” as “a person who (i) possesses a *large number* of companion animals; (ii) fails to or is unable to provide what he or she is required to provide under Section 3 of this Act; (iii) keeps the companion animals in a severely overcrowded environment; and (iv) displays an inability to recognize or understand the nature of or has a reckless disregard for the conditions under which the companion animals are living and the deleterious impact they have on the companion animals’ and owner’s health and well-being”) (emphasis added).

²⁴⁴ *See* Haw. Rev. Stat. Supp. § 711–1109.6 (2009) (creates the crime of animal hoarding, stating that such an act is committed where a person intentionally, knowingly, or recklessly (a) possesses more than twenty dogs or cats or a combination thereof; (b) fails to provide necessary sustenance for each animal; and (c) fails to correct the injurious conditions to the animals or owner resulting from the failure to provide sustenance).

²⁴⁵ Vt. H. 371, 2011 Gen. Assembly 1–2 (Mar. 8, 2011) (available at www.leg.state.vt.us/docs/2012/bills/Intro/H-371.pdf (accessed Apr. 7, 2012)).

²⁴⁶ N.Y. Assembly 191, 2011–2012 Reg. Sess. (Jan. 5, 2011) (available at assembly.state.ny.us/leg/?sh=printbill&bn=A00191&term=2011 (accessed Apr. 7, 2012)); N.Y. Sen. 3474, 2011–2012 Reg. Sess. (Feb. 23, 2011) (available at open.nysenate.gov/legislation/bill/S3474-2011 (accessed Apr. 7, 2012)) (companion bills).

²⁴⁷ Wyo. Sen. File 100, 61st Legis., 2011 Gen. Sess. (Jan. 13, 2011) (available at legisweb.state.wy.us/2011/Introduced/SF0100.pdf (accessed Apr. 7, 2012)); 2011 Wyo. Laws ch. 177 (to be codified at Wyo. Stat. Ann. § 6-3-203).

²⁴⁸ Ill. H. 1166, 97th Gen. Assembly, 2011–2012 Reg. Sess. 3 (Feb. 8, 2011) (available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1166&GAID=11&DocTypeID=HB&LegId=57088&SessionID=84&GA=97> (accessed Apr. 7, 2012)) (requiring that persons seeking to possess seven or more companion animals, as defined in the Humane Care for Animals Act, must obtain a permit; failure to obtain such a permit will result in a Class B misdemeanor or a Class 4 felony for subsequent violations).

the deleterious impact they have on the animals' health and well-being."²⁴⁹ In contrast, legislation introduced in Illinois would have obligated a person seeking to possess *seven or more* companion animals to obtain a permit or face criminal penalties.²⁵⁰ New York attempted to set a significantly higher threshold, defining a companion animal hoarder as someone who "owns, possesses, or has custody of" more than *twenty-five* companion animals "living in conditions that are likely to jeopardize the health and well being of the animals and/or human beings living in the household."²⁵¹ None of these proposed bills made it out of committee during the 2011 session.²⁵²

2. *Relative Success in Wyoming*

A bill criminalizing animal hoarding passed in Wyoming (Sen. 100), although the prohibition that became law was significantly weaker than the one initially introduced.²⁵³ The original draft of Sen. 100 defined animal hoarding as a form of animal cruelty.²⁵⁴ That version defined an "animal hoarder" as someone: (1) who possesses *fifteen or more* companion animals; (2) keeps any such animal in an "overcrowded environment[;]" and (3) "[d]isplays an inability to recognize or understand the nature of or has a reckless disregard for the conditions under which the companion animal is living and the harmful impact the person has on the animals' health, well-being, and safety."²⁵⁵ Notably, when first introduced, Sen. 100 also identified the ownership or

²⁴⁹ Vt. H. 371, 2011 Gen. Assembly at 1–2 (emphasis added).

²⁵⁰ Ill. H. 1166, 97th Gen. Assembly at 3.

²⁵¹ N.Y. Assembly 191, 2011–2012 Reg. Sess. at 2 (noting that evidence of such conditions includes (a) keeping the animals in a severely overcrowded living environment; (b) failing to maintain the living environment in a sanitary condition for the companion animals and/or persons living in the space (e.g., excessive feces, urine, dirt, garbage, or a lack of basic services such as heat, hot water, ventilation, or electricity); and (c) the presence of companion animals that "without justification" have not received necessary veterinary treatment within a "reasonable period of time").

²⁵² See Vt. Legis., *Current Status of a Specific Bill or Resolution: H. 371, 2011–2012 Reg. Sess.* (available at <http://www.leg.state.vt.us/database/status/summary.cfm?Bill=H.0371&Session=2012> (accessed Apr. 7, 2012)) (died in Agriculture Committee); Ill. Gen. Assembly, *Bill Status of HB 1166, 2011–2012 Reg. Sess.* (available at <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=1166&GAID=11&DocTypeID=HB&SessionID=84&GA=97#actions> (accessed Apr. 7, 2012)) (died in Rules Committee); N.Y. Assembly, *A00191, 2011–2012 Reg. Sess.* (available at http://assembly.state.ny.us/leg/?default_fld=&bn=A00191&term=2011&Summary=Y&Actions=&Votes=&Memo=&Text=Y (accessed Apr. 7, 2012)) (died in Agriculture Committee); N.Y. Sen., *S3474: Relates to Companion Animal Hoarding, 2011–2012 Reg. Sess.* (available at <http://open.nysenate.gov/legislation/bill/S3474-2011> (accessed Apr. 7, 2012)) (died in Agriculture Committee).

²⁵³ Compare Wyo. Sen. File 100, 61st Legis. (as introduced) (available at <http://legisweb.state.wy.us/2011/Introduced/SF0100.pdf> (accessed Apr. 7, 2012)) with 2011 Wyo. Laws ch. 177.

²⁵⁴ Wyo. Sen. File 100, 61st Legis. at 1.

²⁵⁵ *Id.* at 3–4 (note that livestock are excluded from the definition of "companion animal").

operation of a “puppy mill” as a form of animal cruelty.²⁵⁶ It defined “puppy mill” as a dog or cat breeding facility where: (a) the total number of animals is greater than fifty; (b) the animals are kept in substandard conditions; and (c) the facility emphasizes profits above animal welfare.²⁵⁷

After gaining early support, Sen. 100 was met with resistance from the American Kennel Club (AKC).²⁵⁸ The Senate Agriculture Committee unanimously passed the bill as introduced; in response, AKC encouraged “all concerned dog owners and breeders in Wyoming” to contact elected officials in opposition to the bill.²⁵⁹ AKC criticized the bill for “confus[ing] the issue of substandard care with the number of animals a person owns” and offending “responsible breeders” with the use of the term “puppy mill.”²⁶⁰

Ultimately, the Wyoming legislature removed the language that criminalized animal hoarding and puppy mills.²⁶¹ As enacted, the law creates the offense of “household pet animal cruelty,” which a person commits by keeping “any household pet in a manner that results in chronic or repeated serious physical harm to the household pet” or keeping the pet “confined in conditions which constitute a public health hazard.”²⁶² Acts of “household pet animal cruelty” are misdemeanors punishable by a maximum six-month jail sentence, a fine of up to \$750, or both; more severe penalties may be imposed for repeat offenses.²⁶³ Additionally, mistreatment of each animal may constitute a separate violation.²⁶⁴

D. Prohibiting Documentation of Abuse at Animal Facilities

Animal welfare organizations have increasingly used undercover filmmaking to expose the inhumane conditions of animal enterprises.²⁶⁵ These images, obtained by animal welfare advocates posing as employees, have led to meat recalls, facility closings, criminal convictions, and corporate apologies.²⁶⁶ A number of states have re-

²⁵⁶ *Id.* at 2.

²⁵⁷ *Id.* at 4–5.

²⁵⁸ Am. Kennel Club, *Urgent: Wyoming Cruelty Bill Advances*, http://www.akc.org/news/index.cfm?article_id=4289 (Jan. 20, 2011) (accessed Apr. 7, 2012).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ See 2011 Wyo. Laws ch. 177 (nowhere referencing “hoarding” or “puppy mills”).

²⁶² *Id.*

²⁶³ *Id.* (treating subsequent offenses as high misdemeanors punishable by jail time for up to one year, a fine of up to \$5,000, or both).

²⁶⁴ *Id.*

²⁶⁵ A.J. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. Times A15 (Apr. 14, 2011) (available at <http://www.nytimes.com/2011/04/14/us/14video.html> (accessed Apr. 7, 2012)).

²⁶⁶ *Id.*

sponded to this form of whistle blowing, with several attempting to criminalize it during the 2011 legislative session.²⁶⁷

1. *Background: Animal Enterprise Terrorism Act and Model State Legislation*

The Animal Enterprise Terrorism Act (AETA) of 2006 is a federal law designed to protect continued functioning of animal enterprises.²⁶⁸ The AETA derived, in part, from the American Legislative Exchange Council's (ALEC's) model legislation called the Animal and Ecological Terrorism Act.²⁶⁹ The model legislation prohibited "[o]bstructing or impeding the use of an animal facility or the use of a natural resource without the effective consent of the owner" by, for example, "entering an animal or research facility to *take pictures by photograph, video camera, or other means* with the intent to commit criminal activities or defame the facility or its owner."²⁷⁰ However, Congress did not adopt all of ALEC's model language in the AETA, declining to criminalize visual or audio documentation.²⁷¹

Even before 2011, there were numerous efforts in the states to criminalize exactly this type of documentation. Kansas,²⁷² Montana,²⁷³ and North Dakota²⁷⁴ had enacted analogs of the model ALEC legislation prior to the passage of the AETA. While the Kansas and Montana statutes generally resemble the ALEC approach to documentation (i.e., requiring intent to damage the enterprise or commit defamation),²⁷⁵ North Dakota's version does not require malicious intent:

²⁶⁷ *Id.* (discussing bills pending in Iowa, Florida, and Minnesota during the 2011 legislative session).

²⁶⁸ Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified at 18 U.S.C. § 43 (2011)) (amending the Animal Enterprise Protection Act (AEPA) of 1992). See Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 *Animal L.* 53, 57-58 (2007) (noting that "[t]he AEPA created a special offense for any person . . . traveling or using the mail in 'interstate or foreign commerce . . . for the purpose of causing a physical disruption to the functioning of an animal enterprise'" (emphasis omitted)). The AETA expanded the AEPA to cover indirect targets including any "person or entity having a connection to, or relationship with, or transactions with an animal enterprise." *Id.* at 58.

²⁶⁹ McCoy, *supra* n. 268, at 57; see also Dane E. Johnson, Student Author, *Cages, Clinics, and Consequences: The Chilling Problems of Controlling Special-Interest Extremism*, 86 *Or. L. Rev.* 249, 255 (2007) (describing ALEC as a policy collaborative of legislators and private sector representatives that advances conservative policies through model legislation).

²⁷⁰ Am. Legis. Exch. Council, *Animal & Ecological Terrorism in America: Animal & Ecological Terrorism Act (AETA)*, app. A, § 3(A)(2)(e) (2003) (available at http://www.greenisthenewred.com/blog/wp-content/Images/alec_animal_ecological_terrorism_bill.pdf (accessed Apr. 7, 2012)) (emphasis added).

²⁷¹ See 18 U.S.C. § 43 (containing criminal penalties for harms and threats to people or property, but lacking a criminal penalty for visual or audio documentation).

²⁷² Kan. Stat. Ann. § 47-1827 (2011) (enacted 2001).

²⁷³ Mont. Code Ann. § 81-30-103 (2011) (enacted 1991).

²⁷⁴ N.D. Cent. Code § 12.1-21.1-02 (2011) (enacted 1991).

²⁷⁵ See Kan. Stat. Ann. § 47-1827(c)(4) (prohibiting photography within an animal facility "without the effective consent of the owner" and "with the intent to damage the

merely entering an animal enterprise to take photographs or record video without consent constitutes a violation of that state's statute.²⁷⁶

2. Activity During the 2011 Session

Four states introduced bills to prohibit undercover documentation of agricultural operations during the 2011 legislative session.²⁷⁷ In Iowa, which is the Nation's largest producer of eggs and pork, animal welfare investigators had recently targeted several industrial farms.²⁷⁸ In response, the egg-production lobby helped draft the anti-whistleblower legislation introduced in Iowa during 2011.²⁷⁹

The Iowa House passed H. 589, which would have created the crimes of "animal facility interference" and "animal facility fraud."²⁸⁰ A person could be convicted of facility *interference* by willfully "produc[ing] a record which reproduces an image or sound occurring at the animal facility"—e.g., by photography or audio recording—without the consent of the owner.²⁸¹ The bill would have also criminalized the *possession* or *distribution* of such a record.²⁸² A person could be convicted of facility *fraud* by two means: by "obtain[ing] access to an animal facility by false pretenses for the purpose of committing an act not authorized by the owner"; or by "mak[ing] a false statement or representation as part of an application to be employed at the animal facility, if the person knows the statement to be false, and mak[ing] the statement with an intent to commit an act not authorized by the owner."²⁸³

Iowa's legislation stalled in the Senate after the Office of the Attorney General (AG) raised constitutional concerns.²⁸⁴ In particular, the AG was worried that prohibiting the possession and distribution of images captured by undercover filmmakers infringed on free speech.²⁸⁵ The Iowa Senate filed a number of amendments, but the

enterprise conducted at the animal facility") (emphasis added); see also Mont. Code Ann. § 81-30-103(2)(e) (containing similar provisions, but requiring "*the intent to commit criminal defamation*") (emphasis added).

²⁷⁶ See N.D. Cent. Code § 12.21-21.1-02(6) (prohibiting the use or attempted use of a camera, video recorder, or any other video or audio recording equipment without the consent of the facility's owner).

²⁷⁷ See *infra* nn. 280–97 (discussing proposed legislation in Iowa, Minnesota, New York, and Florida).

²⁷⁸ Sulzberger, *supra* n. 265, at ¶¶ 13–21 (describing investigations conducted by HSUS into an Iowa egg-producing facility and PETA at an Iowa pig farm).

²⁷⁹ *Id.* at ¶ 23 (noting that the legislation was supported by "other powerful agricultural groups," including the Iowa Farm Bureau).

²⁸⁰ Iowa H. File 589, 84th Legis., 2011 Reg. Sess. 5–6 (Mar. 17, 2011) (available at http://coolice.legis.state.ia.us/linc/84/external/hf589_Reprinted.pdf (accessed Apr. 7, 2012)).

²⁸¹ *Id.* at 5.

²⁸² *Id.*

²⁸³ *Id.* at 6.

²⁸⁴ Sulzberger, *supra* n. 265, at ¶ 11.

²⁸⁵ *Id.*

chamber did not vote on the bill before the conclusion of the 2011 session.²⁸⁶

In Minnesota, H. 1369 and Sen. 1118 would have created the crimes of “animal facility interference” and “animal facility fraud.”²⁸⁷ The language of the Minnesota bills was nearly identical to that of the proposed Iowa legislation.²⁸⁸ However, neither H. 1369 nor Sen. 1118 made it out of committee.²⁸⁹

The New York Senate considered slightly different language in Sen. 5172, which would have criminalized “unlawful tampering with farm animals.”²⁹⁰ The proposed legislation defined “unlawful tampering” as “any interference with a farm animal or farm through the injection of any unauthorized substance, the release of a farm animal, the unauthorized feeding or *unauthorized video, audio recording, or photography* done without the farm owner’s written consent.”²⁹¹

As introduced, Florida’s legislation represented the broadest attempt to criminalize animal abuse documentation: Sen. 1246 made *any* unauthorized entry onto agricultural property a first-degree felony offense.²⁹² The bill was expressly designed to protect domestic animal breeding facilities,²⁹³ and would have made unauthorized photography and video recording of such facilities a first-degree felony as well.²⁹⁴ Moreover, Sen. 1246 initially contained no exemptions and required no

²⁸⁶ Iowa Legis., *Bill History for HF 589*, 84th Legis. (available at <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0642C&GA=84> (accessed Apr. 7, 2012)).

²⁸⁷ Minn. H. File 1369, 87th Legis., 2011–2012 Reg. Sess. 4–5 (Apr. 4, 2011) (available at <http://wdoc.house.leg.state.mn.us/leg/LS87/HF1369.0.pdf> (accessed Apr. 7, 2012)); Minn. Sen. File 1118, 87th Legis., 2011–2012 Reg. Sess. 4–5 (Apr. 7, 2011) (available at <https://www.revisor.mn.gov/data/senate/bills/ls87/1100/S1118.0.pdf> (accessed Apr. 7, 2012)) (companion bills).

²⁸⁸ Compare Iowa H. File 589, 84th Legis., 2011 Reg. Sess. at 5–6 with Minn. H. File 1369, 87th Legis., 2011 Reg. Sess. at 4–5.

²⁸⁹ Minn. Legis., *H.F. 1369 Status in House for Legislative Session 87*, 87th Legis., https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=House&f=HF1369&ssn=0&y=2011&ls=87 (accessed Apr. 7, 2012); Minn. State Legis., *S.F. 1118 Status in Senate for Legislative Session 87*, 87th Legis., https://www.revisor.mn.gov/revisor/pages/search_status/status_detail.php?b=Senate&f=SF1118&ssn=0&y=2011&ls=87 (accessed Apr. 7, 2012).

²⁹⁰ N.Y. Sen. 5172, 2011–2012 Reg. Sess. (May 3, 2011) (available at <http://open.nysenate.gov/legislation/bill/S5172-2011> (accessed Apr. 7, 2012)).

²⁹¹ See *id.* (emphasis added) (creating misdemeanor penalties for a person who knowingly or intentionally commits such acts “after notice has been given that the farm prohibits unlawful tampering”).

²⁹² See Fla. Sen. 1246, 2011 Reg. Sess. (Feb. 21, 2011) (as introduced) (available at <http://www.flsenate.gov/Session/Bill/2011/1246/BillText/Filed/PDF> (accessed Apr. 7, 2012)) (“A person who enters onto a farm or other property where legitimate agriculture operations are being conducted without the written consent of the owner, or an authorized representative of the owner, commits a felony of the first degree.”).

²⁹³ *Id.* (defining “farm” as “any tract of land cultivated for the purpose of agricultural production, the raising and breeding of domestic animals, or the storage of a commodity”).

²⁹⁴ *Id.*

consideration of intent.²⁹⁵ However, Florida legislators decreased the bill's severity by making unauthorized recording of "legal farm operations" only a misdemeanor offense.²⁹⁶ The amended version of Sen. 1246 passed the Florida Senate but did not make it to a vote in the House.²⁹⁷

E. Combating Animal Abuse

1. Imposing Additional Criminal and Civil Obligations

In 2011, five states considered bills to enhance the criminal penalties and obligations of convicted animal abusers: California,²⁹⁸ Florida,²⁹⁹ Maryland,³⁰⁰ Mississippi,³⁰¹ and Texas.³⁰² These laws passed

²⁹⁵ *Id.*

²⁹⁶ Fla. Sen. 1246, 2011 Reg. Sess. (May 6, 2011) (as amended) (available at <http://www.flsenate.gov/Session/Bill/2011/1246/BillText/e2/PDF> (accessed Apr. 7, 2012)).

²⁹⁷ Fla. Sen., *CS/SB 1246: Farms*, 2011 Reg. Sess., <http://www.flsenate.gov/Session/Bill/2011/1246> (accessed Apr. 7, 2012); see also Fla. Sen., *Floor Vote: CS/SB 1246, 1st Eng. Third Reading*, 2011 Reg. Sess., <http://www.flsenate.gov/Session/Bill/2011/1246/FloorVotes/QeEMOeipAmxOixXd%2FEkvzkmVPo%3D%7C7%2FPublic%2FVotes%2FBill%2F20110506%2FSenateVote%5Fs1246e1012%2EPDF> (May 6, 2011) (accessed Apr. 7, 2012) (comprising a record of Senate floor vote).

²⁹⁸ Cal. Assembly 1117, 2011–2012 Reg. Sess. (Feb. 18, 2011) (available at http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1101-1150/ab_1117_bill_20110218_introduced.pdf (accessed Apr. 7, 2012)) (permitting, as a condition of probation, that the convicted person be prohibited from owning, possessing, caring for, or having contact with animals); Cal. Sen. 917, 2011–2012 Reg. Sess. (Feb. 18, 2011) (available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0901-0950/sb_917_bill_20110218_introduced.pdf (accessed Apr. 7, 2012)) (increasing criminal abuse and neglect penalties for animal abusers).

²⁹⁹ Fla. Sen. 676, 2011 Reg. Sess. (Jan. 27, 2011) (available at <http://www.flsenate.gov/Session/Bill/2011/0676/BillText/Filed/PDF> (accessed Apr. 7, 2012)); Fla. H. 359, 2011 Reg. Sess. (Jan. 24, 2011) (available at <http://www.flsenate.gov/Session/Bill/2011/0359/BillText/Filed/PDF> (accessed Apr. 7, 2012)) (companion bills permitting a county or municipality to collect a \$15 surcharge upon each civil penalty imposed for each violation of an animal control or cruelty ordinance).

³⁰⁰ Md. Sen. 115, 2011 Reg. Sess. (Jan. 21, 2011) (available at <http://mlis.state.md.us/2011rs/bills/sb/sb0115f.pdf> (accessed Apr. 7, 2012)); Md. H. 227, 2011 Reg. Sess. (Jan. 28, 2011) (available at <http://mlis.state.md.us/2011rs/bills/hb/hb0227f.pdf> (accessed Apr. 7, 2012)) (companion bills permitting, as a condition of sentencing, that a defendant convicted of certain violations involving the abuse or neglect of animals be prohibited from owning, possessing, or residing with an animal for a specified period).

³⁰¹ Miss. Sen. 2821, 2011 Reg. Sess. (Apr. 26, 2011) (available at <http://bill-status.ls.state.ms.us/documents/2011/pdf/SB/2800-2899/SB2821SG.pdf> (accessed Apr. 7, 2012)) (permitting a court to order a person convicted of aggravated cruelty to a dog or cat to receive psychiatric or psychological counseling or perform community service and also allowing the court to enjoin that person from being employed in a position that involves contact with dogs and cats).

³⁰² Tex. H. 1103, 82d Legis., 2011 Reg. Sess. (Feb. 2, 2011) (available at <http://www.legis.state.tx.us/tlodocs/82R/billtext/pdf/HB01103I.pdf#navpanes=0> (accessed Apr. 7, 2012)) (permitting a judge who grants community supervision to a person convicted of crimes against animals to require the person to attend a "responsible pet owner course" sponsored by the local animal shelter).

in California,³⁰³ Maryland,³⁰⁴ Mississippi,³⁰⁵ and Texas.³⁰⁶ As passed, California's Assem. 1117 allows courts to order that, as a condition of probation, the convicted person must "be prohibited from owning, possessing, caring for, or having contact with animals of any kind."³⁰⁷ Similarly, the passage of Maryland's Sen. 115 permits a court to prohibit a person convicted of animal abuse, neglect, or cruelty from "owning, possessing, or residing with an animal."³⁰⁸

The Mississippi law, introduced as Sen. 2821, authorizes courts to order the convicted individual receive "a psychiatric or psychological evaluation and counseling or treatment" for a discretionary period of time.³⁰⁹ The statute stipulates that the cost of any such evaluation, counseling, or treatment be paid by the individual upon court order.³¹⁰ It further authorizes the court to require the offender to perform community service.³¹¹ Finally, the statute allows a judge to enjoin the offender from employment "in any position that involves the care of a dog or cat, or in any place where dogs or cats are kept or confined, for a period that the court deems appropriate."³¹²

The Texas legislature authorized judges to require animal abuse offenders on community supervision to attend a "responsible pet owner course" sponsored by a municipal animal shelter.³¹³ As introduced, H. 1103 did not require offenders to attend such a course; rather, it authorized judges to require offenders to pay \$100 to a designated animal shelter.³¹⁴ The original version attracted criticism for imposing an "illegal penalty" on offenders disguised as a fee.³¹⁵ Accordingly, the Sen-

³⁰³ 2011 Cal. Stat. 553; 2011 Cal. Stat. 131 (to be codified at Cal. Penal Code § 597) (source bills available *supra* n. 298).

³⁰⁴ 2011 Md. Laws 27; 2011 Md. Laws 26 (to be codified at Md. Crim. Law. Code Ann. § 10-604, §10-606) (source bills available *supra* n. 300).

³⁰⁵ 2011 Gen. Laws Miss. 536 (to be codified at Miss. Code § 97-41) (source bill available *supra* n. 301).

³⁰⁶ 2011 Tex. Gen. Laws. 957 (to be codified at Tex. Code Crim. Proc. Ann. art. 42.12(11)(m)) (source bill available *supra* n. 302).

³⁰⁷ 2011 Cal. Stat. 553 (providing that regardless of whether probation is granted, courts must require the convicted person "to immediately deliver all animals in his or her possession to a designated public entity for adoption or other lawful disposition or provide proof to the court that the person no longer has possession, care, or control of any animals").

³⁰⁸ 2011 Md. Laws 26.

³⁰⁹ 2011 Gen. Laws Miss. 536.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ 2011 Tex. Gen. Laws. 957.

³¹⁴ Tex. H. 1103, 82d Legis., 2011 Reg. Sess. at 1.

³¹⁵ Tex. H. Research Org., *Bill Analysis: H. 1103*, 82d Legis., 2011 Reg. Sess. (Apr. 20, 2011) (available at <http://www.hro.house.state.tx.us/pdf/ba82r/hb1103.pdf#navpanes=0> (accessed Apr. 7, 2012)).

ate substituted the language requiring offenders to attend a pet owner course.³¹⁶

Meanwhile, the Florida legislature failed to increase penalties for animal abuse.³¹⁷ Florida's unsuccessful bills, Sen. 676 and H. 359, would have permitted local governing bodies to impose and collect a surcharge of \$15 for each civil penalty imposed for each violation of an animal control or cruelty ordinance.³¹⁸ The surcharge proceeds would be used to cover the costs of training animal-control officers and to subsidize the costs of spaying and neutering dogs and cats.³¹⁹ Neither bill made it out of committee.³²⁰

2. *Providing for the Inclusion of Pets in Domestic Violence Orders*

During the 2011 legislative session, five states considered bills providing for the inclusion of pets in domestic violence orders.³²¹ Of those five, Arkansas, Maryland, Oregon, and Texas passed the legislation.³²² A similar bill failed in New Jersey.³²³

³¹⁶ Tex. Sen., Amend. H. 1103, 82nd Legis., 2011 Reg. Sess. (May 24, 2011) (available at <http://www.legis.state.tx.us/tlodocs/82R/senateamend/pdf/HB01103A.pdf#navpanes=0> (accessed Apr. 7, 2012)).

³¹⁷ Fla. H. 359, 2011 Reg. Sess. at 1; Fla. Sen. 676, 2011 Reg. Sess. at 1.

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ See Fla. H., *HB 359: Animal Control or Cruelty Ordinances*, 2011 Reg. Sess., <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=45221> (accessed Apr. 7, 2012) (indicating that the bill died in the House Agriculture & Natural Resources Subcommittee on May 7, 2011); Fla. Sen., *SB 676: Animal Control or Cruelty Ordinances*, 2011 Reg. Sess., <http://www.flsenate.gov/Session/Bill/2011/0676> (accessed Apr. 7, 2012) (indicating that the bill died in the Senate Community Affairs Committee on May 7, 2011).

³²¹ Ark. H. 2001, 88th Gen. Assembly, 2011 Reg. Sess. (Mar. 7, 2011) (available at <http://www.arkansashouse.org/bill/2011R/HB2001> (accessed Apr. 7, 2012)); Fla. Sen. 206, 2011 Reg. Sess. (Dec. 3, 2010) (available at <http://www.flsenate.gov/Session/Bill/2011/0206/BillText/Filed/PDF> (accessed Apr. 7, 2012)); Md. H. 407, 2011 Reg. Sess. (Feb. 4, 2011) (available at <http://mlis.state.md.us/2011rs/bills/hb/hb0407f.pdf> (accessed Apr. 7, 2012)); Md. Sen. 747, 2011 Reg. Sess. (Feb. 4, 2011) (available at <http://mlis.state.md.us/2011rs/bills/sb/sb0747f.pdf> (accessed Apr. 7, 2012)); Or. Sen. 616, 76 Legis., 2011 Reg. Sess. (Feb. 3, 2011) (available at <http://www.leg.state.or.us/11reg/measpdf/sb0600.dir/sb0616.intro.pdf> (accessed Apr. 7, 2012)); Tex. Sen. 279, 82d Legis., 2011 Reg. Sess. (Dec. 20, 2010) (available at <http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=82R&Bill=SB279> (accessed Apr. 7, 2012)).

³²² 2011 Ark. Act 1049 (to be codified at Ark. Code Ann. § 9-15-205); 2011 Md. Laws 1415, 2011 Md. Laws 1421 (to be codified at Md. Fam. Law. Code. Ann. §§ 4-501, 4-504, 4-505, 4-506); 2011 Or. Laws 855 (to be codified at Or. Rev. Stat. § 107.718); 2011 Tex. Gen. Laws ch. 136 (to be codified at Tex. Fam. Code. Ann. §§ 85.021-85.022) (all source bills available *supra* n. 321).

³²³ See N.J. Assembly 1633, 214th Legis., 2010–2011 Reg. Sess. (Jan. 12, 2010) (available at http://www.njleg.state.nj.us/2010/Bills/A2000/1633_I1.PDF (accessed Apr. 7, 2012)); N.J. Sen. 540, 214th Legis., 2010–2011 Reg. Sess. (Jan. 12, 2010) (available at http://www.njleg.state.nj.us/2010/Bills/S1000/540_I1.PDF (accessed Apr. 7, 2012)) (both authorizing judges to craft domestic violence orders directing the care and custody of pets, and preventing defendants from interfering with or harming the animals).

Arkansas and Texas each passed fairly specific statutes. The Arkansas law authorizes a judge, upon a finding of domestic abuse, to “[d]irect the care, custody, or control of any pet owned, possessed, leased, kept, or held by either party residing in the household.”³²⁴ The Texas statute authorizes protective orders to “prohibit a party from . . . removing a pet, companion animal, or assistance animal . . . from the possession of a person named in the order.”³²⁵

In contrast, the general language of Oregon’s law leaves more room for judicial discretion. Upon the requisite finding of abuse in a petition for a restraining order, the statute authorizes the court to order “[o]ther relief that the court considers necessary” in order to “[p]revent the neglect and protect the safety of any service or therapy animal or any animal kept for personal protection or companionship, but not an animal kept for any business, commercial, agricultural or economic purpose.”³²⁶ Notably, however, the original language of the Oregon bill did not exempt those animals kept for “business, commercial, agricultural or economic” purposes³²⁷—the Judiciary Committee added this exception later.³²⁸

Maryland passed a statute containing significantly weaker language than its original bills. As introduced, the bills would have authorized interim protective orders obligating the alleged abuser to “remain away from the pet or service animal” and “refrain from cruelty or aggravated cruelty toward the pet or service animal.”³²⁹ If the alleged abuser had possession of the animal at the time of the hearing, the order could direct the alleged abuser to give the animal “to the person eligible for relief, to a family member of the person eligible for relief, or to a suitable third party.”³³⁰ The version that became law simply provides that the order may “award temporary possession of any pet of the person eligible for relief or the respondent.”³³¹ The final language of Maryland’s law neither provides for legal protection of any animals nor requires that the respondent surrender animals in his or her possession.³³²

³²⁴ 2011 Ark. Act 1049.

³²⁵ Tex. Gen. Laws. 136, Tex. Sen. 279 (emphasis added).

³²⁶ 2011 Or. Laws at 856 (emphasis added).

³²⁷ Compare Or. Sen. 616, 76th Legis., 2011 Reg. Sess. (as introduced) (available at <http://www.leg.state.or.us/11reg/measpdf/sb0600.dir/sb0616.intro.pdf> (accessed Apr. 7, 2012)) with 2011 Or. Laws 856 (demonstrating that the original version of S.B. 616 allowed courts to consider relief to provide for the safety and welfare of “any animal of the parties”) (emphasis added).

³²⁸ Or. Sen. Jud. Comm., *Sen. Amendments to Sen. Bill 616*, 76th Legis., 2011 Reg. Sess. (Apr. 27, 2011) (available at <http://www.leg.state.or.us/11reg/measpdf/sb0600.dir/sb0616.lsa.pdf> (accessed Apr. 7, 2012)).

³²⁹ Md. H. 407, 2011 Reg. Sess. at 5–6; Md. Sen. 747, 2011 Reg. Sess. at 5–6.

³³⁰ Md. H. 407, 2011 Reg. Sess. at 5–6; Md. Sen. 747, 2011 Reg. Sess. at 5–6.

³³¹ Md. H. 407, 2011 Reg. Sess. at 5–6; Md. Sen. 747, 2011 Reg. Sess. at 5–6.

³³² Md. H. 407, 2011 Reg. Sess. at 5–6; Md. Sen. 747, 2011 Reg. Sess. at 5–6.

F. *Legislative Attempts to Overturn Citizen Initiatives*

In recent decades, animal advocates brought welfare issues directly to the voters via citizen initiatives and referendums with relative success.³³³ During the 2011 session, legislators attempted to overturn animal welfare measures that voters had previously approved in four states: Oregon,³³⁴ Washington,³³⁵ Colorado,³³⁶ and Missouri.³³⁷

1. *Oregon and Washington: Hunting Cougars with Hounds*

Oregon and Washington lawmakers targeted Measure 18 and Initiative 655, respectively, by which voters in both states had approved certain prohibitions on hunting cougars with dogs.³³⁸ Oregon's Mea-

³³³ See e.g. Colo. Amend. 10 (1992) (prohibiting certain methods and spring hunting of bears); Mo. Proposition B (2010) (available at <http://www.sos.mo.gov/elections/2010petitions/2010-085.asp> (accessed Apr. 7, 2012)) (establishing new standards for dog breeders); Or. Ballot Measure 18 (1994) (available at <http://www.ncsl.org/legislatures-elections/elections-campaigns/ballot-measures-database.aspx> (accessed Apr. 7, 2012)) (banning the hunting of cougars with dogs); Wash. Initiative 655 (1996) (available at <http://www.sos.wa.gov/elections/initiatives/text/i655.pdf> (accessed Apr. 7, 2012)) (banning the hunting of cougars with dogs).

³³⁴ Or. H. 2337, 76th Legis., 2011 Reg. Sess. (Jan. 11, 2011) (available at <http://www.leg.state.or.us/11reg/measpdf/hb2300.dir/hb2337.intro.pdf> (accessed Apr. 7, 2012)) (proposing to overturn Measure 18 and permit the hunting of cougars with dogs under certain circumstances).

³³⁵ Wash. Sen. 5356, 62d Legis., 2011–2012 Reg. Sess. (Jan. 21, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/5356.pdf> (accessed Apr. 7, 2012)); Wash. H. 1124, 62d Legis., 2011–2012 Reg. Sess. (Jan. 12, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1124.pdf> (accessed Apr. 7, 2012)) (companion bills proposing to overturn Initiative 655 and make permanent a previously approved cougar hunting pilot program).

³³⁶ Colo. H. 1294, 68th Gen. Assembly, 1st Reg. Sess. (Apr. 7, 2011) (available at http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/783C09074F91CF828725780100604031?open&file=1294_01.pdf (accessed Apr. 7, 2012)) (proposing to overturn Amendment 10 and repeal its prohibition on the spring hunting of black bears).

³³⁷ Mo. Sen. 113, 96th Gen. Assembly, 1st Reg. Sess. (Jan. 13, 2011) (available at <http://www.senate.mo.gov/11info/pdf-bill/intro/SB113.pdf> (accessed Apr. 7, 2012)) (proposing to eliminate numerous protections for dogs in breeding facilities contained in Proposition B).

³³⁸ Or. Ballot Measure 18 (1994) (banning the hunting of cougars with dogs); Wash. Initiative 655 (1996) (containing a similar ban). In 2011, Washington lawmakers also targeted the citizen-approved Initiative 713, which prohibited the use of “any steel-jawed leghold trap, neck snare, or other body-gripping trap to capture any mammal for recreation or commerce in fur.” See Wash. H. 1137, 2011 Reg. Sess. at 2 (allowing the use of body-gripping traps including the steel-jawed leg hold trap and neck snares, to any person who completes a course in “safe, humane, and proper trapping”); see also Wash. H. 1138, 2011 Reg. Sess. at 8 (granting the Fish and Wildlife Commission authority over trapping and reestablishing commerce in raw fur). Neither bill made it out of committee. See Wash. Legis., *Dig. & History of Bills of the Sen. & H.*, 62d Legis., 2011 Reg. Sess. & 1st Spec. Sess., vol. 1, 311 (July 8, 2001) (available at http://www.leg.wa.gov/LIC/Documents/SubscriptionsEndOfSessionHistorical/Final_Digest_and_History_of_Bills_Vol1.pdf (accessed Apr. 7, 2012)) (showing that both bills died in the House Committee on Agriculture and Natural Resources).

sure 18 generally prohibited persons from using “one or more dogs to hunt or pursue . . . cougars,” with several express exceptions.³³⁹ Washington’s Initiative 655 made it unlawful “to hunt or pursue . . . cougar . . . with the aid of a dog or dogs,” again with narrow exceptions.³⁴⁰ In 2011, both laws came under fire from lawmakers.

In response to Oregon’s Measure 18, H. 2337 would have created “a pilot program” for “select cougar management zones” in which hunters could use dogs to pursue cougars.³⁴¹ The proposed Oregon program mirrored a limited plan that Washington legislators first approved in 2004,³⁴² and later extended through 2011.³⁴³ The Oregon bill passed the House overwhelmingly, approved by a vote of 45–14.³⁴⁴ The Oregon lawmaker who carried H. 2337 to the House floor alleged that an “abundance” of cougars were “threatening people, pets, livestock and other wildlife” and that the use of hounds is the “only effective way to hunt cougars.”³⁴⁵ Opponents of the bill, however, questioned the scientific validity of the proposed plan.³⁴⁶ The Oregon Senate referred H. 2337 after the 2011 session; Oregon cougars therefore retained Measure 18’s voter-approved protections from hunters using hounds.³⁴⁷

In Washington, where an existing pilot program was scheduled to expire,³⁴⁸ lawmakers introduced Sen. 5356 and H. 1124.³⁴⁹ These bills

³³⁹ See Or. Ballot Measure 18 (1994) (codified at Or. Rev. Stat. § 498.164 (2009)) (exempting government agents acting in their official capacities, agents appointed by the Oregon Department of Fish and Wildlife, and persons acting in accordance with Oregon Revised Statute section 498.012 (relating to wildlife causing damage)).

³⁴⁰ See Wash. Initiative 655 (1996) (codified at Wash. Rev. Code § 77.15.245 (2010)) (exempting the following: government agents acting in their official capacities; owners or tenants of real property acting consistent with a permit; and public agencies, universities, or scientific educational institutions acting pursuant to a permit issued for the protection of a listed threatened or endangered species).

³⁴¹ Or. H. 2337, 76th Legis., 2011 Reg. Sess. at 1 (stating that “[t]he pilot program’s primary goals are to reduce cougar conflicts and to assess cougar populations”).

³⁴² See Press Release, Wash. Dept. of Fish & Wildlife, *Commission Approves Pilot Program for Use of Hounds in NE Washington Cougar Season* (Oct. 1, 2004) (available at <http://wdfw.wa.gov/news/oct0104a/> (accessed Apr. 7, 2012)) (describing the plan as a “three-year pilot program for cougar hunting in five northeastern Washington counties” and stating that it was prompted by “[t]he outgrowth of state legislation passed earlier this year in response to public safety and livestock depredation concerns”).

³⁴³ Molly Rosbach, *Bill Aims to Make Cougar-Hunting Program Permanent*, Seattle Times (Feb. 14, 2011) (available at http://seattletimes.nwsources.com/html/localnews/2014222506_apwaxgrcougarhunting1stldwritethru.html (accessed Apr. 7, 2012)).

³⁴⁴ Or. H., *Status Rpt. Upon Adjournment*, 76th Legis., 2011 Reg. Sess. 42 (June 30, 2011) (available at <http://www.leg.state.or.us/11reg/pubs/HouseUponAdjournment11.pdf> (accessed Apr. 7, 2012)).

³⁴⁵ Jonathan J. Cooper, Associated Press, *Bill Would Lift Ban on Hunting Cougars with Dogs*, <http://www.kval.com/news/local/120298544.html> (Apr. 20, 2011) (accessed Apr. 7, 2012) (quoting Oregon Representative Sherrie Sprenger).

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Wash. Dept. of Fish & Wildlife, *supra* n. 342.

³⁴⁹ Wash. Sen. 5356, 62d Legis., 2011 Reg. Sess. at 2; Wash. H. 1124, 62d Legis., 2011 Reg. Sess. at 2.

would have effectively made the pilot program permanent by authorizing the Washington Fish and Wildlife Commission to promulgate rules for regular cougar hunting seasons.³⁵⁰ After public hearings, the relevant Senate and House Committee each proposed substitute bills.³⁵¹ The Senate substitute incorporated the original bill's objectives and proposed a five-year extension of the existing pilot program.³⁵² In contrast, the House substitute retained the original objective but simply made explicit that the bill would transition the pilot program into a "permanent program for cougar control."³⁵³ The substitute bill, Sen. 5356, passed the Senate³⁵⁴ but then stalled in the House.³⁵⁵ Accordingly, the pilot program remained on track to expire in 2011.³⁵⁶

³⁵⁰ Wash. Sen. 5356, 62d Legis., 2011 Reg. Sess. at 2–3; Wash. H. 1124, 62d Legis., 2011 Reg. Sess. at 2–3; *see also* Rosbach, *supra* n. 343, at ¶ 8 (stating that “[t]he bill would essentially make [the pilot program] permanent by letting the commission determine cougar hunting seasons, set quotas on cougar kills and decide who is permitted to hunt cougars, be it licensed hunters, state agents or contracted hunters.”); *see also* Wash. Sen. Comm. on Nat. Resources & Marine Waters, Sen. Bill Rpt., *SB 5356*, 62d Legis., 2011 Reg. Sess. 2 (Feb. 9, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/5356%20SBA%20NRMW%2011.pdf> (accessed Apr. 7, 2012)) (noting that public comments in opposition criticized Sen. 5356 as “not [an] extension of the pilot [program], but instead . . . a permanent and broader bill”).

³⁵¹ *See* Wash. Legis., *Dig. & History of Bills of the Sen. & H.*, 62d Legis., 2011 Reg. Sess. & 1st Spec. Sess., vol. 1 at 91, 306 (showing at 91 that the Senate Natural Resources & Marine Waters Committee proposed a substitute bill for H.B. 5356 after a public hearing on February 7, 2011, and showing at 306 that the House Committee on Agriculture & Natural Resources proposed a substitute bill for H.B. 1124 after a public hearing on January 18, 2011).

³⁵² Wash. Sen. Comm. on Nat. Resources & Marine Waters, *Substitute Sen. 5356*, 62d Legis., 2011 Reg. Sess. (Feb. 16, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Bills/5356-S.pdf> (accessed Apr. 7, 2012)).

³⁵³ Wash. H. Agric. & Nat. Resources Comm., *Substitute H. 1124*, 62d Legis., 2011 Reg. Sess. (Feb. 16, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/House%20Bills/1124-S.pdf> (accessed Apr. 7, 2012)); *see* Wash. H. Agric. & Nat. Resources Comm., *H. Bill Rpt.: H. 1124*, 62d Legis., 2011 Reg. Sess. 3 (Feb. 16, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/House/1124%20HBR%20AGNR%2011.pdf> (accessed Apr. 7, 2012)) (noting that the substitute bill would make the pilot a permanent program for cougar control, in contrast to the original bill which made no reference to the pilot).

³⁵⁴ Wash. Sen. Comm. on Nat. Resources & Marine Waters, *Sen. Bill Rpt.: Sen. 5356*, 62d Legis., 2011 Reg. Sess. (Mar. 7, 2011) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/5356-S%20SBR%20APS%2011.pdf> (accessed Apr. 7, 2012)).

³⁵⁵ *See* Wash. Legis., *Dig. & History of Bills of the Sen. & H.*, 62d Legis., 2011 Reg. Sess. & 1st Spec. Sess., vol. 1 at 91, 306 (showing at 91 that Sen. 5356–S was approved by the Senate but remained in the House Rules Committee at the end of the session and showing at 306 that the House did not vote on H.B. 1124–S in 2011).

³⁵⁶ *See* Wash. Sen. *Bill Rpt. Sen. 5356*, 62d Legis., 2011 Reg. Sess. at 2 (noting in 2008 the pilot project was extended for three additional years); Wash. H., *Bill Rpt. H. 1124*, 62d Legis., 2011 Reg. Sess. at 2 (containing a similar note).

2. Colorado: Bear Hunts

In 1992, Colorado voters overwhelmingly approved Amendment 10, which was designed “to prohibit the taking of black bears by the use of bait or dogs at any time, and to prohibit the taking of black bears by any means between March 1 and September 1 of any calendar year.”³⁵⁷ Seventy percent of Colorado voters supported the measure.³⁵⁸ Despite public support for the restrictions, state lawmakers proposed legislation in 2011 to override Amendment 10.³⁵⁹

As introduced, H. 1294 would have eliminated the seasonal prohibition on takings and replaced it with language authorizing state wildlife commission to “[d]etermine the appropriate seasonal restrictions on the taking of black bears.”³⁶⁰ As stated in the bill, the assembly intended to restore the authority that the wildlife commission possessed before the passage of Amendment 10.³⁶¹ In its findings, H. 1294 explained that Amendment 10 had “reduce[d] the regulatory flexibility needed” to ensure “informed, current, and responsive wildlife management.”³⁶²

The legislature scaled back the bill by removing the language granting absolute discretion to the wildlife commission.³⁶³ The amended version of H. 1294 shortened the voter-approved prohibition to March 1 through May 31 of any calendar year (rather than through September 1).³⁶⁴ The bill won committee approval,³⁶⁵ but the House adjourned before bringing it to a vote.³⁶⁶

³⁵⁷ Colo. Rev. Stat § 33-4-101.3; Cynthia A. Loker & Daniel J. Decker, *Colorado Black Bear Hunting Referendum: What Was Behind the Vote?*, 23 *Wildlife Socy. Bull.* 370, 370–71 (1995).

³⁵⁸ *Id.* at 371.

³⁵⁹ Colo. H. 1294, 68th Gen. Assembly, 1st Reg. Sess. at 1.

³⁶⁰ *Id.* at 3.

³⁶¹ *Id.*

³⁶² *Id.* at 2 (noting, among other things, the growth in the black bear population since 1992 and the associated bear-related property damage). The bill would not, however, affect other elements of the law; the ban on using dogs and bait would remain in place. Kyle Glazier, *Panel Passes Bill That Could Restore Spring Bear Hunt*, *Denver Post* (Apr. 18, 2011) (available at http://www.denverpost.com/breakingnews/ci_17875725 (accessed Apr. 7, 2012)).

³⁶³ Compare Colo. H. 1294, 68th Gen. Assembly at 3 (as introduced) (available at http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/783C09074F91CF828725780100604031?open&file=1294_01.pdf (accessed Apr. 7, 2012)) (authorizing state wildlife commission to determine “appropriate seasonal restrictions” on black bear hunting) with Colo. H. 1294, 68th Gen. Assembly, 1st Reg. Sess. 3 (May 4, 2011) (as amended) (available at http://www.leg.state.co.us/clics/clics2011a/csl.nsf/fsbillcont3/783C09074F91CF828725780100604031?open&file=1294_eng.pdf (accessed Apr. 7, 2012)) (shortening the take prohibition to March 1 through May 31).

³⁶⁴ Colo. H. 1294, 68th Gen. Assembly at 3 (as amended).

³⁶⁵ Colo. H. Comm. on Agric., *Livestock & Nat. Resources Rpt.*, 68th Gen. Assembly, 2011 Reg. Sess. (Apr. 18, 2011) (making a “do pass” recommendation).

³⁶⁶ John Romero, *Bear Hunting Bill Fails*, <http://www.koaa.com/news/bear-hunting-bill-fails/> (May 10, 2011) (accessed Apr. 7, 2012).

3. Missouri: Puppy Mill Cruelty Prevention Act of 2010

Unlike lawmakers in Oregon, Washington, and Colorado, Missouri legislators succeeded in overturning a voter-approved animal protection law in 2011.³⁶⁷ Missourians passed Proposition B, the Puppy Mill Cruelty Prevention Act, in 2010.³⁶⁸ Scheduled to take effect in 2011, the law created certain obligations for persons possessing more than ten female dogs for the purpose of breeding and selling the offspring as pets.³⁶⁹ The Act protects dogs by requiring breeders to provide: “sufficient food and water”; “necessary veterinary care”; “sufficient housing, including protection from the elements”; “sufficient space to turn and stretch freely, lie down, and fully extend his or her limbs”; “regular exercise”; and “adequate rest between breeding cycles.”³⁷⁰ The statute would also have prohibited any person from having custody of more than fifty dogs.³⁷¹

Prior to Proposition B, Missouri law “allow[ed] dogs to be kept in wire enclosures only slightly larger than their bodies” and placed limits neither on the number of dogs that a breeder could own nor on the number of times that a dog could be bred without rest.³⁷² The changes proposed by Proposition B, the “Puppy Mill Cruelty Prevention Act,” sparked massive controversy.³⁷³ Supporters included HSUS, which described Missouri as the “puppy mill’ capital of the nation.”³⁷⁴ In opposition, breeders emphasized the “[twenty-two] pages of regulations already on the books” and noted that Proposition B includes no funding provisions.³⁷⁵ Breeders took particular issue with the prohibition on possessing more than fifty breeding dogs, claiming that this would

³⁶⁷ Colum. Daily Trib. Staff, *Governor Signs Compromise Dog-Breeding Measure*, Colum. Daily Trib. A1 (Apr. 28, 2011) (available at <http://www.columbiatribune.com/news/2011/apr/28/governor-signs-compromise-dog-breeding-measure/> (accessed Apr. 7, 2012)).

³⁶⁸ Mo. Sec. of St., *Missouri Proposition B: 2010 Approved Initiative Petitions, Relating to Dog Breeders*, <http://www.sos.mo.gov/elections/2010petitions/2010-085.asp> (accessed Apr. 7, 2012).

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See T.J. Greaney, *‘Puppy Mill’ Proposition Divides State*, Colum. Daily Trib. A12 (Oct. 23, 2010) (available at <http://www.columbiatribune.com/news/2010/oct/23/puppy-mill-proposition-divides-state/> (accessed Apr. 7, 2012)) (stating that Missouri has become a “battleground over the issue of dog cruelty”) [hereinafter Greaney, *Proposition Divides*].

³⁷³ *Id.*

³⁷⁴ *Id.* at ¶ 3; see also T.J. Greaney, *Puppy Mill Restrictions Barely Pass*, Colum. Daily Trib. A14 (Nov. 3, 2010) (available at <http://www.columbiatribune.com/news/2010/nov/03/puppy-mill-restrictions-barely-pass/> (accessed Apr. 7, 2012)) (noting that welfare groups estimate “about 30 percent to 40 percent of dogs found in pet stores come from Missouri,” which houses more than “one-fifth of U.S. commercial dog-breeding sites”) [hereinafter Greaney, *Restrictions Barely Pass*].

³⁷⁵ Greaney, *Proposition Divides*, *supra* n. 372, at ¶ 8 (referencing the Missouri Animal Care Facilities Act).

“put good breeders out of business” and “cause the price of dogs . . . to skyrocket.”³⁷⁶ Proposition B ultimately passed by a narrow margin.³⁷⁷

In 2011, the Missouri legislature proposed several bills to modify the Puppy Mill Cruelty Prevention Act: Sen. 4, Sen. 95 and Sen. 113.³⁷⁸ Sen. 95 would have *strengthened* the statutory protections by extending the law beyond commercial dog breeders; as introduced, the bill would have applied to *any person* with more than ten female dogs over six months of age.³⁷⁹ It would also have eliminated the exemption for animal shelters and renamed the statute the “Puppy Cruelty Prevention Act.”³⁸⁰ Sen. 4, on the other hand, would have repealed the Puppy Mill Cruelty Prevention Act in its entirety.³⁸¹ Sen. 113 would have weakened the existing law by, among other things, eliminating the fifty-dog limitation; shortening the mandatory rest period between breeding cycles; and delegating the definition of “regular exercise,” “sufficient housing,” and “sufficient space” to the state department of agriculture.³⁸²

The legislature consolidated the provisions of Sen. 95 and Sen. 113 in committee.³⁸³ The consolidated version passed the Senate by a vote of 20–14³⁸⁴ and passed the House by a vote of 85–71.³⁸⁵ Sen. 113/Sen. 95 overturned significant aspects of the Puppy Mill Cruelty Act of 2010 and Missouri Governor Jay Nixon signed it into law.³⁸⁶ Ultimately, however, the legislature also passed Sen. 161, which reinstated many of Proposition B’s provisions while allotting breeders additional time to phase in some of the more expensive changes.³⁸⁷ Sen. 161 divided the

³⁷⁶ *Id.* at ¶ 14.

³⁷⁷ Greaney, *Restrictions Barely Pass*, *supra* n. 374, at ¶ 1.

³⁷⁸ *See infra* nn. 379–89 (discussing the proposed legislation).

³⁷⁹ Mo. Sen. 95, 96th Gen. Assembly, 1st Reg. Sess. 1 (Jan. 12, 2011) (available at <http://www.senate.mo.gov/11info/pdf-bill/intro/SB95.pdf> (accessed Apr. 7, 2012)).

³⁸⁰ *Id.*

³⁸¹ Mo. Sen. 4, 96th Gen. Assembly, 1st Reg. Sess. (Jan. 5, 2011) (available at <http://www.senate.mo.gov/11info/pdf-bill/intro/SB4.pdf> (accessed Apr. 7, 2012)).

³⁸² Mo. Sen. 113, 96th Gen. Assembly, 1st Reg. Sess. 2–3 (Jan. 13, 2011) (available at <http://www.senate.mo.gov/11info/pdf-bill/intro/SB113.pdf> (accessed Apr. 7, 2012)). Sen. 113 would also have removed the requirement that water must not be frozen and must be free of “debris, feces, algae, and other contaminants.” *Id.*

³⁸³ Mo. Sen. 113 & 95, 96th Gen. Assembly, 1st Reg. Sess. (Feb. 10, 2011).

³⁸⁴ *See* Mo. Sen., *J. of the Sen.*, 96th Gen. Assembly, 1st Reg. Sess. 431 (Mar. 10, 2011) (available at <http://www.senate.mo.gov/11info/pdf-jrn/DAY35.pdf#page=8> (accessed Apr. 7, 2012)) (showing breakdown of Senate vote).

³⁸⁵ *See* Mo. H., *J. of the H.*, 96th Gen. Assembly, 1st Reg. Sess. 1250–51 (Apr. 13, 2011) (available at <http://www.house.mo.gov/billtracking/bills111/jrnpdf/jrn054.pdf#page=8> (accessed Apr. 7, 2012)) (showing breakdown of House vote).

³⁸⁶ Pamela M. Prah, *Missouri’s Puppy Mill Politics: Dog Breeders Outmaneuver Animal-Rights Movement*, *Seattle Times* (May 25, 2011) (available at http://seattle-times.nwsourc.com/html/living/2015150141_webanimal.html (accessed Apr. 7, 2012)).

³⁸⁷ Mo. Sen. 161, 96th Gen. Assembly, 1st Reg. Sess. 5–6 (Jan. 24, 2011) (available at <http://www.senate.mo.gov/11info/pdf-bill/tat/SB161.pdf> (accessed Apr. 7, 2012)).

animal welfare community, receiving the endorsement of the Humane Society of Missouri³⁸⁸ but drawing opposition from HSUS.³⁸⁹

III. 2011 FEDERAL ADMINISTRATIVE ACTION REVIEW

The seventy-sixth volume of the Federal Register includes all “rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents” published during 2011.³⁹⁰ Numerous items contained in this volume affect animals in some way. Some connections are readily apparent, as is the case with an Endangered Species Act (ESA) management decision or an adjustment to a fishery quota. In other instances, however, the connection is a bit more obscure, as with a notice announcing the removal of tariffs on a variety of specialty foods from the European Union. The goal of this Part is to highlight a few select federal notices of action or proposed action, and their consequences for animals.

A. *Fish and Wildlife Service: Wolf Management*

In 2011, the Fish and Wildlife Service (FWS) published several proposed and final rules to remove populations of gray wolves from the list of endangered and threatened species. This Section includes discussion of the delisting of the Northern Rocky Mountain population in the western U.S. (with the exception of Wyoming), the proposed delisting of the Wyoming population, and the delisting of the Western Great Lakes population in Minnesota.

1. *Delisting of the Northern Rocky Mountain Population*

On May 5, 2011, FWS published a final rule that reissued a final rule originally published on April 2, 2009 (2009 Final Rule).³⁹¹ The

³⁸⁸ See Press Release, Humane Socy. of Mo., *Humane Society of Missouri Declares Victory for Puppy Mill Dogs*, (Apr. 27, 2011) (available at <http://www.hsmo.org/news/humane-society-of-missouri-2.html> (accessed Apr. 7, 2012)) (announcing passage of the law and declaring it a “victory for all dogs living in the state’s commercial breeding facilities”).

³⁸⁹ See HSUS, *Prop B Still Under Attack*, http://action.humanesociety.org/site/MessageViewer?em_id=22001.0&dlv_id=0 (Apr. 26, 2011) (accessed Apr. 7, 2012) (decrying the Governor’s proposal as a “faux reform”; it became law the following day); see also HSUS, *Comparison of Missouri Proposition B, SB 113, and Governor’s Bill* (available at <http://hsus.typepad.com/files/propbcomparison.pdf> (accessed Apr. 7, 2012)) (outlining the differences between each proposal).

³⁹⁰ See U.S. Govt. Printing Off., *FDsys: Federal Register*, <http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=FR>; select About the Federal Register (accessed Apr. 7, 2012) (noting that “FDsys contains Federal Register volumes from [fifty-nine] (1994) to the present”).

³⁹¹ Reissuance of Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 76 Fed. Reg. 25590 (May 5, 2011); Final Rule to Identify the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and to Revise the List of Endangered and Threatened Wildlife, 74 Fed. Reg. 15123 (Apr. 2, 2009).

2009 Final Rule identified a Northern Rocky Mountain (NRM) Distinct Population Segment (DPS) of gray wolves within Montana, Idaho, and Wyoming, and portions of Washington, Oregon, and Utah.³⁹² The rule removed the wolves in the NRM DPS from the endangered species list, except for those wolves in Wyoming.³⁹³ The agency kept the wolves in Wyoming listed because it found that Wyoming lacked adequate regulations to prevent extirpation of the species from a significant portion of its range.³⁹⁴

Environmentalists challenged the partial delisting of the NRM DPS.³⁹⁵ Federal Judge Donald W. Molloy of the District of Montana vacated the 2009 Final Rule, stating in his opinion that “[n]othing in the legislative history of the [ESA] lends credence to the idea that [FWS] can list a DPS, subdivide it, but then provide the mandated protections to only part of the DPS.”³⁹⁶ Judge Molloy concluded that the rule was unlawful “for failing to list and protect the entire DPS.”³⁹⁷ The subdivision of the NRM DPS may have been a “pragmatic solution to the legal problem raised by the inadequacy of Wyoming’s regulatory mechanisms,” but it failed to comply with the ESA, and was therefore invalid.³⁹⁸

The State of Wyoming, Park County, and the Wyoming Wolf Coalition brought a different challenge to the 2009 Final Rule, disputing FWS’s rejection of the state’s wolf management plan and its refusal to delist the gray wolf in Wyoming.³⁹⁹ The state’s proposed plan had called for a “dual classification (trophy and predator)” that would have permitted unregulated takes in over 88% of Wyoming.⁴⁰⁰ The agency

³⁹² 74 Fed. Reg. at 15123.

³⁹³ *Id.*

³⁹⁴ *Id.* The agency was compelled to give the Wyoming regulatory mechanisms closer scrutiny following an injunction issued against a previous version of the final rule published February 27, 2008. *Id.* at 15124. The 2008 rule had removed the NRM DPS from the List of Endangered and Threatened Wildlife after finding that Wyoming’s wolf management plan provided “adequate regulatory protections.” Final Rule Designating the Northern Rocky Mountain Population of Gray Wolf as a Distinct Population Segment and Removing This Distinct Population Segment from the Federal List of Endangered and Threatened Wildlife, 73 Fed. Reg. 10514 (Feb. 27, 2008). Shortly thereafter, however, the U.S. District Court for Montana enjoined implementation and held that FWS “acted arbitrarily and capriciously when [the agency] approved Wyoming’s 2007 statute and wolf management plan because the State failed to commit to managing for at least [fifteen] breeding pairs and Wyoming’s 2007 statute allowed the [Wyoming Game & Fish Commission] to diminish the trophy game area if it ‘determines the diminution does not impede the delisting of gray wolves and will facilitate Wyoming’s management of wolves.’” 76 Fed. Reg. at 15124 (discussing *Defenders of Wildlife v. Hall*, 565 F. Supp. 2d 1160, 1174 (D. Mont. 2008)). Following the ruling, FWS requested that the rule be vacated and remanded, which the court did on October 14, 2008. 76 Fed. Reg. at 15125.

³⁹⁵ *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207, 1228 (D. Mont. 2010).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Wyo. v. U.S. Dept. of Interior*, 2010 WL 4814950 at *1 (D. Wyo. 2010).

⁴⁰⁰ *Id.* at **1, 6.; see also *id.* at **6–7 (noting that under the “predatory” designation, “wolves may be taken by anyone, anywhere at any time without limit and by nearly any

rejected this approach in the 2009 Final Rule, conditioning its approval on Wyoming's adoption of the more restrictive "trophy game" classification statewide.⁴⁰¹

The plaintiffs alleged that FWS's decision was "not based upon the best scientific or commercial information" and instead was driven by "improper political considerations."⁴⁰² The Wyoming District Court seemed to agree, holding that the agency's condition on approval was arbitrary and capricious.⁴⁰³ The court then remanded the matter to FWS to review the agency's decision regarding the adequacy of the state's proposed trophy game area.⁴⁰⁴

Notwithstanding the Wyoming ruling, the Montana court's decision reinstated federal protections for the NRM DPS⁴⁰⁵—that is, until Congress stepped in. On April 15, 2011, President Obama signed the Department of Defense and Full-Year Continuing Appropriations Act 2011.⁴⁰⁶ The appropriations law contained section 1713, which stated, in part:

Before the end of the [sixty]-day period beginning on the date of enactment of this Act, the Secretary of the Interior shall reissue the [2009 Final Rule] . . . without regard to any other provision of statute or regulation that applies to issuance of such rule. Such reissuance (including this section) shall not be subject to judicial review and shall not abrogate or otherwise have any effect on the order and judgment issued by the [U.S.] District Court for the District of Wyoming⁴⁰⁷

With this single paragraph—in a bill over 150 pages long—Congress effectively overturned Judge Molloy's decision and prevented future lawsuits challenging the delisting of wolves in the NRM DPS outside of Wyoming.⁴⁰⁸

Fulfilling the mandate from Congress, FWS reissued the 2009 Final Rule, effective upon publication.⁴⁰⁹ The new rule retained protections for gray wolves in the Wyoming portion of the NRM DPS.⁴¹⁰

means." A "trophy game" designation, in contrast, "allows for the regulation of the methods of take, hunting seasons, types of allowed takes and numbers of wolves that could be killed").

⁴⁰¹ *Id.* at *3.

⁴⁰² *Id.* at *6.

⁴⁰³ *Id.* at *45.

⁴⁰⁴ *Wyo. v. U.S. Dept. of Interior*, 2010 WL 4814950 at *45.

⁴⁰⁵ Reinstatement of Protections for the Gray Wolf in the Northern Rocky Mountains in Compliance with a Court Order, 75 Fed. Reg. 65574 (Oct. 26, 2010).

⁴⁰⁶ H.R. 1473, 112th Cong. (signed Apr. 15, 2011); Lib. Cong., *THOMAS, Advanced Bill Status Summary & Status Search for the 112th Congress*, <http://thomas.loc.gov/bss/d112query.html>; select Bill Number, search "hr 1473," select All Information (accessed Apr. 7, 2012).

⁴⁰⁷ Pub. L. No. 112-10, § 1713 (Apr. 15, 2011).

⁴⁰⁸ See *Defenders of Wildlife v. Hall.*, 807 F. Supp. 2d 972, 976 (D. Mont. 2011) (describing § 1713 of the Act as "direct[ing] the Service to reissue the delisting rule this Court had earlier vacated"); see also Pub. L. No. 112-10 at § 1713 (stating that the reissuance of the final rule shall not be subject to judicial review).

⁴⁰⁹ 76 Fed. Reg. 25590.

⁴¹⁰ *Id.* at 25591.

However, the Wyoming District Court's decision—that FWS's requirements for approval of Wyoming's wolf management plan were arbitrary and capricious—now had congressional endorsement.

2. *Proposed Delisting of the Wyoming Population*

On August 3, 2011, FWS announced that it had reached an agreement with Wyoming over the state's wolf management regulations.⁴¹¹ Wyoming agreed to alter its wolf management plan to satisfy the objections stated by FWS in the 2009 Final Rule.⁴¹² On October 5, 2011, FWS published a proposed rule that would delist the Wyoming portion of the NRM DPS.⁴¹³

Wyoming addressed FWS's first objection, regarding the status of the Wolf Trophy Game Management Area (WTGMA), by establishing it as permanent and also agreeing to a seasonal expansion.⁴¹⁴ In the WTGMA, which covers 15.7% of the state, Wyoming has agreed to permanently "regulate methods of take, hunting seasons, types of allowed take, and numbers of wolves that could be killed."⁴¹⁵ To address the agency's concern that the size of the WGTMA might negatively impact "natural connectivity and genetic exchange," the agreement also included a seasonal expansion for fifty miles on the WTGMA's southwest border "from October 15 to the last day of February (28th or 29th) to facilitate natural dispersal of wolves between Wyoming and Idaho."⁴¹⁶ Thus, for those four-and-a-half months, wolves will be able to travel under increased protection as "trophy animals" instead of as "predators" through an additional 1.3% of the state.⁴¹⁷

⁴¹¹ Press Release, FWS, *Salazar, Ashe Finalize Agreement with Wyoming on Revised Gray Wolf Management Plan* (Aug. 3, 2011) (available at <http://www.doi.gov/news/pressreleases/Salazar-Ashe-Finalize-Agreement-with-Wyoming-on-Revised-Gray-Wolf-Management-Plan.cfm> (accessed Apr. 7, 2012)); see also Removal of the Gray Wolf in Wyoming from the Federal List of Endangered and Threatened Wildlife and Removal of the Wyoming Wolf Population's Status as an Experimental Population, 76 Fed. Reg. 61782, 61785–88 (proposed Oct. 5, 2011) (describing the framework of the agreement).

⁴¹² 76 Fed. Reg. at 61785 (The 2009 Final Rule stated that "[u]ntil Wyoming revises their statutes, management plan, and associated regulations, and is again Service approved, wolves in Wyoming shall remain protected by Act." The specific FWS objections stated in the 2009 Final Rule were: "(1) The size and permanency of Wyoming's Wolf Trophy Game Management Area (WTGMA); (2) conflicting language within the State statutes concerning whether Wyoming would manage for at least 15 breeding pairs and at least 150 wolves, exactly 15 breeding pairs and 150 wolves, or only 7 breeding pairs and 70 wolves; and (3) liberal depredation control authorizations and legislative mandates to aggressively manage the population down to minimum levels.").

⁴¹³ *Id.* at 61782.

⁴¹⁴ *Id.* at 61785–87.

⁴¹⁵ *Id.* at 61806 (This area includes: "[Yellowstone National Park], Grand Teton National Park, John D. Rockefeller Memorial Parkway, adjacent U.S. Forest Service-designated Wilderness Areas, adjacent public and private lands, the National Elk Refuge, and the Wind River Indian Reservation." In these areas, wolves will be "permanently managed as game animals or protected (*e.g.*, in National Parks).").

⁴¹⁶ *Id.* at 61787, 61801.

⁴¹⁷ *Id.* at 61801.

Upon delisting, “Wyoming will allow property owners inside the WTGMA to immediately kill a wolf doing damage to private property.”⁴¹⁸ Wyoming may also grant “lethal take permits” to allow property owners to kill up to two wolves when “chronic wolf depredation” occurs in the WTGMA.⁴¹⁹ Outside of the WTGMA, wolves will be classified as “predators” and will “experience unregulated human-caused mortality, although mortality in this area will be monitored through mandatory reporting within [ten] days of the kill.”⁴²⁰ In the proposed rule, FWS noted that wolves are likely to be extirpated from “predator” areas.⁴²¹ Still, FWS concluded that the state management plan would maintain an adequate population of wolves.⁴²²

The second objection raised by FWS in the 2009 Final Rule also related to Wyoming’s ability to maintain sufficient wolf population levels.⁴²³ Accordingly, Wyoming agreed to “maintain a population of at least 10 breeding pairs and at least 100 wolves in areas under State jurisdiction.”⁴²⁴ FWS noted that the “objective of at least 15 breeding pairs and at least 150 wolves Statewide” would be met through a combination of the state’s minimum populations and the populations in Yellowstone National Park, and on land belonging to the sovereign nations.⁴²⁵

FWS’s third objection to the previous Wyoming management plan centered on the state’s requirement that the wolf population outside the national parks be brought down to the minimum level.⁴²⁶ As part of its agreement with FWS, Wyoming committed to eliminate its statutory mandates for this kind of “aggressive management.”⁴²⁷

The 2011 proposed rule to delist the Wyoming population included a comment period open until January 13, 2012, an announcement of a public hearing held on November 15, 2011 in Riverton, Wyoming, and notice that the proposal would undergo peer review.⁴²⁸

3. *Delisting of the Western Great Lakes Population*

On May 5, 2011, FWS published a proposed rule that would “identify the Minnesota [wolf] population as a Western Great Lakes (WGL)

⁴¹⁸ 76 Fed. Reg. at 61806.

⁴¹⁹ *Id.* at 61807.

⁴²⁰ *Id.*

⁴²¹ *Id.* at 61807. Illegal killing of wolves is also a significant source of wolf mortality. FWS stated that “[w]hile wolves were listed, illegal killing removed an estimated 10[%] of the population annually. . . . We expect illegal killing will continue at current levels post-delisting.” *Id.*

⁴²² *See id.* (stating that “Wyoming’s overall management strategy has been improved to such an extent that such mortality can occur without compromising the recovered status of the population in Wyoming”).

⁴²³ *Id.* at 61785, 61788.

⁴²⁴ 76 Fed. Reg. at 61788.

⁴²⁵ *Id.*

⁴²⁶ *Id.* at 61785, 61788.

⁴²⁷ *Id.* at 61788.

⁴²⁸ *Id.* at 61782–83.

Distinct Population Segment (DPS) of the gray wolf and . . . remove this DPS from the List of Endangered and Threatened Wildlife.”⁴²⁹ The proposed rule noted recent studies suggesting a change to the taxonomic status of the eastern timber wolf (known as *Canis lupus lycaon*), from a subspecies of the gray wolf (*Canis lupus*) to the separate species *Canis lycaon*.⁴³⁰ This change, based on “the best available taxonomic information,” was supported by “[t]he results of recent molecular genetic analyses.”⁴³¹ The new data suggested that FWS experienced difficulty identifying the gray wolf’s range because there were two different species of wolf to consider.⁴³² Using this new genetic data as a basis, FWS stated that the “1978 listing of the gray wolf throughout the [forty-eight] States and Mexico was partially in error.”⁴³³ FWS determined that it had mistakenly listed both the gray wolf and the eastern timber wolf solely as the gray wolf in much of the eastern half of the U.S.; FWS proposed to remove the wolves in some or all of twenty-nine states from the endangered species list.⁴³⁴ The agency would consider whether or not to list the eastern timber wolf in

⁴²⁹ Proposed Rule to Revise the List of Endangered and Threatened Wildlife for the Gray Wolf (*Canis lupus*) in the Eastern United States, Initiation of Status Reviews for the Gray Wolf and for the Eastern Wolf (*Canis lycaon*), 76 Fed. Reg. 26086, 26102 (proposed May 5, 2011) (The WGL DPS is described as “all of Minnesota, Wisconsin, and Michigan; the portion of North Dakota north and east of the Missouri River upstream to Lake Sakakawea and east of the centerline of Highway 83 from Lake Sakakawea to the Canadian border; the portion of South Dakota north and east of the Missouri River; the portions of Iowa, Illinois, and Indiana north of the centerline of Interstate Highway 80; and the portion of Ohio north of the centerline of Interstate Highway 80 and west of the Maumee River at Toledo.”).

⁴³⁰ *Id.* at 26141 (The agency noted that in the area of the proposed WGL DPS evidence shows “that *C. lycaon* intercrosses with *C. lupus* in the western Great Lakes region, resulting in a mixed population composed of *C. lupus*, *C. lycaon*, and their hybrids.” However, FWS clarified that: “Our proposed action here is to establish the existence of a WGL distinct population segment of *C. lupus* that is neither endangered nor threatened, despite its proximity to a closely related species, *C. lycaon*—a species whose status we will evaluate for possible protection under the Act in the near future. Because *C. lycaon* was recently recognized as a unique species (rather than a subspecies of *C. lupus*), a complete status review of this species has never been conducted. Therefore, we are initiating a status review for *C. lycaon* throughout its range in the [U.S.] and Canada.”).

⁴³¹ *Id.* at 26088.

⁴³² *Id.* at 26088.

⁴³³ *Id.* at 26142.

⁴³⁴ *See id.* at 26088, 26142 (noting that *Canis lupus* did not actually occupy large portions of the eastern U.S.; rather, “the northeastern [U.S.] was occupied by the eastern wolf (*C. lycaon*), now considered a separate species of *Canis* rather than a subspecies of *lupus*” The twenty-nine states are: “Maine, Massachusetts, Connecticut, New Hampshire, Rhode Island, Vermont, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, Ohio (the part outside WGL DPS), West Virginia, Kentucky, Tennessee, Alabama, Mississippi, Louisiana, Texas (east of Interstate Highway 35), Oklahoma (east of Interstate Highway 35 and southeast of Interstate Highway 44 north of Oklahoma City), Arkansas, Missouri (southeast of Interstate Highway 44 and southeast of Interstate Highway 70 east of St. Louis), Indiana (the part outside WGL DPS), and Illinois (the part outside WGL DPS).”).

the future, but the species would not receive ESA protections until FWS made such a determination.⁴³⁵ The notice of the proposed rule announced acceptance of comments; notice of two public hearings in Wisconsin and Maine; and notice that the proposed rule would be subject to peer review.⁴³⁶

On December 28, 2011, FWS published a final rule containing two substantive changes.⁴³⁷ First, FWS dropped the proposal to elevate *C. Lycaon* from a subspecies to a species.⁴³⁸ The agency stated that “[i]n light of the ongoing scientific debate, and the lack of clear resolution concerning the taxonomy of wolves in the western Great Lakes, we are at this time continuing to recognize *C. lupus* as the only species that occurs in the WGL.”⁴³⁹ Second, the final rule stated that FWS decided to “separat[e] the] determination on the delisting of the Western Great Lakes DPS from the determination on [the] proposal regarding all or portions of the [twenty-nine] eastern States we considered to be outside the historical range of the gray wolf.”⁴⁴⁰ Thus, FWS delayed any changes to either the taxonomic or listing statuses of the wolves in the eastern U.S. until 2012 or later.

The final rule did identify the WGL DPS—consisting of the gray wolves in Minnesota, Wisconsin, Michigan, and portions of adjacent states—and then removed those wolves from the list of Endangered and Threatened Wildlife.⁴⁴¹ The management of the WGL DPS was turned over to the respective states, but, as required by section 4(g)(1) of the ESA, FWS will continue to monitor the status of this DPS for at least five years.⁴⁴²

B. Fish and Wildlife Service: ESA Listing Determination Settlements

On September 27, 2011, FWS took a significant step towards fulfilling obligations it incurred in two settlements.⁴⁴³ The agency pub-

⁴³⁵ 76 Fed. Reg. at 26094 (describing *C. lycaon* as “a species whose status we will evaluate for possible protection under the Act in the near future”).

⁴³⁶ *Id.* at 26086–87.

⁴³⁷ Revising the Listing of the Gray Wolf (*Canis lupus*) in the Western Great Lakes, 76 Fed. Reg. 81666, 81687 (Dec. 28, 2011).

⁴³⁸ *Id.* at 81669.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at 81666.

⁴⁴¹ *Id.* at 81723.

⁴⁴² *Id.*

⁴⁴³ Stip. Settle. Agreement, *In re Endangered Species Act Sec. 4 Deadline Litig.*, http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/pdfs/proposed_settlement_agreement.pdf (D. D.C. July 12, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 7, 2012) [hereinafter CBD Settlement]; Stip. Settle. Agreement, *In re Endangered Species Act Sec. 4 Deadline Litig.*, http://www.wildearthguardians.org/site/DocServer/FWS_ESA_Settlement_Agreement_As_Filed_5.10.11.pdf?docID=2493&AddInterest=1262 (D. D.C. May 10, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 7, 2012) [hereinafter WildEarth Guardians Settlement]. The court approved both agreements on September 9, 2011. Or. Granting Jt. Mot. for Approval of Settle. Agreement & Or. of Dismissal of Ctr. For Biological Diversity’s Claims, *In re Endangered*

lished notice of “a partial [ninety] day finding” regarding a listing petition for 404 species in the southeast.⁴⁴⁴ It had determined that “for 374 of the 404 species, the petition presents substantial scientific or commercial information indicating that listing may be warranted.”⁴⁴⁵ Thus, FWS requested comments consisting of “scientific and commercial information” on the species under consideration for status reviews culminating in twelve-month findings.⁴⁴⁶

The agency reached the findings on the petition “in accordance with a historic settlement agreement” between the agency and Center for Biological Diversity (CBD).⁴⁴⁷ The settlement was announced on July 12, 2011 and was approved by a federal court on September 9th.⁴⁴⁸ The settlement with CBD supplemented an earlier settlement—approved by the court on the same day—with WildEarth Guardians.⁴⁴⁹ The CBD settlement committed FWS to making listing determinations for 757 petitioned species over an agreed to seven-year timeline.⁴⁵⁰

On October 6, 2011, FWS announced another “partial [ninety] day finding” on the same petition.⁴⁵¹ This determination, however, stated that there was not sufficient information to warrant continued consideration of eleven species in the petition.⁴⁵² Thus, FWS ended review of

Species Act Sec. 4 Deadline Litig., http://www.fws.gov/endangered/improving_ESA/order_re_approval_of_CBD_agreement_.PDF (D. D.C. Sept. 9, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 7, 2012) [hereinafter CBD Orders]; Or. Granting Jt. Mot. for Approval of Settle. Agreement & Or. of Dismissal of WildEarth Guardians’ Claims, *In re Endangered Species Act Sec. 4 Deadline Litig.*, http://www.fws.gov/endangered/improving_ESA/order_re_approval_of_WEG_agreement_.PDF (D. D.C. Sept. 9, 2011) (Misc. Action No. 10-377 (EGS)) (accessed Apr. 7, 2012) [hereinafter WildEarth Guardians Orders].

⁴⁴⁴ Partial 90-Day Finding on a Petition to List 404 Species in the Southeastern United States as Endangered or Threatened with Critical Habitat, 76 Fed. Reg. 59836, 59836 (Sept. 27, 2011).

⁴⁴⁵ *Id.*; see also Press Release, Ctr. for Biological Diversity, *374 Southeast Species Move Toward Endangered Species Act Protection* (Sept. 26, 2011) (available at http://www.biologicaldiversity.org/news/press_releases/2011/southeast-freshwater-species-09-26-2011.html (accessed Apr. 7, 2012)) (stating that the 374 species selected for status review include “89 species of crayfish and other crustaceans; 81 plants; 78 mollusks; 51 butterflies, moths, caddisflies and other insects; 43 fish; 13 amphibians; 12 reptiles, [4] mammals and [3] birds. They are found in 12 states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.”).

⁴⁴⁶ 76 Fed. Reg. at 59836.

⁴⁴⁷ Ctr. for Biological Diversity, *supra* n. 445.

⁴⁴⁸ CBD Settlement, *supra* n. 443; CBD Orders, *supra* n. 443.

⁴⁴⁹ WildEarth Guardians Settlement, *supra* n. 443; WildEarth Guardians Orders, *supra* n. 443.

⁴⁵⁰ Press Release, Ctr. for Biological Diversity, *Landmark Agreement Moves 757 Species Toward Federal Protection* (July 12, 2011) (available at http://www.biologicaldiversity.org/programs/biodiversity/species_agreement/index.html (accessed Apr. 7, 2012)).

⁴⁵¹ Partial 90-Day Finding on a Petition to List 404 Species in the Southeastern United States as Threatened or Endangered with Critical Habitat, 76 Fed. Reg. 62260, 62260 (Oct. 6, 2011).

⁴⁵² *Id.*

the species but welcomed any relevant new information from the public.⁴⁵³

C. Fish and Wildlife Service: Listing the Bighead Carp as Injurious Fish

On March 22, 2011, FWS published a final rule adding bighead carp (*Hypophthalmichthys nobilis*)—an invasive species originally from Asia—to the list of “injurious fish, mollusks, and crustaceans.”⁴⁵⁴ The listing prohibits any importation into the country or interstate transportation of living specimens, gametes, viable eggs, or hybrids of bighead carp.⁴⁵⁵

An act of Congress necessitated FWS’s action. On December 14, 2010, President Obama signed the Asian Carp Prevention Act into law (public law number 111-307).⁴⁵⁶ This law amended the Lacey Act⁴⁵⁷ to add bighead carp to the statutory list of injurious animals.⁴⁵⁸ FWS responded by adding the species to the list of injurious animals.⁴⁵⁹

A coalition of certain members of Congress from Great Lakes states had long sought for the bighead carp to be added to the list by the Service.⁴⁶⁰ The coalition first petitioned the agency to list black, silver, and bighead carp in 2002; both the black and silver carp were listed in 2007.⁴⁶¹ At least one member of Congress, however, was not pleased with the listing: Senator Mark Pryor of Arkansas was quoted as believing that the law is unfair to fish farmers, who might release their remaining bighead carp into the Mississippi basin, leading to increased environmental degradation in that ecosystem.⁴⁶²

Arkansas fish farmers have a long history with bighead carp; it was an Arkansas man seeking better water quality and increased productivity in culture ponds that first brought the species to the U.S. in

⁴⁵³ *Id.*

⁴⁵⁴ Listing the Bighead Carp (*Hypophthalmichthys nobilis*) as Injurious Fish, 76 Fed. Reg. 15857, 15857 (Mar. 22, 2011).

⁴⁵⁵ *Id.* (Exceptions exist for permitted “zoological, education[al], medical, or scientific purposes[] or by Federal agencies without a permit solely for their own use.”).

⁴⁵⁶ Sen. 1421, 112th Cong. (signed Dec. 14, 2011); Pub. L. No. 111-307 (Dec. 14, 2011); Lib. Cong., THOMAS, *Search Bill Summary & Status 111th Congress*, <http://thomas.loc.gov/bss/d111query.html>; *select* Bill Number, *search* “s 1421,” *select* All Information (accessed Apr. 7, 2012).

⁴⁵⁷ Pub. L. No. 111-307 at intro. (stating that it is “An Act To amend section 42 of title 18, United States Code); 18 U.S.C.A. 42 (2010) (Lacey Act).

⁴⁵⁸ 76 Fed. Reg. at 15857.

⁴⁵⁹ *Id.*

⁴⁶⁰ *See id.* at 15857 (noting that in October 2002, FWS “received a petition signed by members of Congress representing the Great Lakes region to add bighead, silver, and black carp to the list of injurious wildlife,” and that in two separate 2007 final rulings, FWS added silver and black carp).

⁴⁶¹ *Id.*

⁴⁶² United Press Intl., *Pryor: Ban on Asian Carp Could Backfire*, http://www.upi.com/Top_News/US/2011/03/23/Pryor-Ban-on-Asian-carp-could-backfire/UPI-13651300923175/#ixzz1HcdbkMiI (Mar. 23, 2011) (accessed Apr. 7, 2012).

1972.⁴⁶³ Today, the species has spread to waters in at least eighteen states.⁴⁶⁴

D. Department of the Interior, Bureau of Land Management, and Department of Energy: Supplement to the Draft Programmatic Environmental Impact Statement for Solar Energy Development

On October 28, 2011, the U.S. Bureau of Land Management (BLM) and U.S. Department of Energy (DOE) jointly published notice that a Supplement to the Draft Programmatic Environmental Impact Statement regarding solar energy development in the southwest was available.⁴⁶⁵ The Supplement came in response to over 80,000 comments the agencies received after publication of the draft programmatic Environmental Impact Statement.⁴⁶⁶ The notice announced improvements to the solar development approval process, aiming to minimize environmental harms.⁴⁶⁷

The Supplement included reductions to the “solar energy ‘fast track’ zones in the Western [U.S.] by nearly 60%, [due to] a lack of transmission infrastructure and potential conflicts with environmental groups.”⁴⁶⁸ The agencies’ concerns regarding conflicts with environmental groups arose from objections repeatedly raised to the effects such projects may have on the threatened desert tortoise.⁴⁶⁹

BLM halted construction on one project, the Ivanpah solar plant, after determining that the project’s effects on desert tortoises greatly exceeded initial projections.⁴⁷⁰ The agency then issued a revised biological assessment including an acknowledgement that over 1,000 tor-

⁴⁶³ Leo Nico & Pam Fuller, USGS Nonindigenous Aquatic Species Database, *Hypophthalmichthys nobilis*, <http://nas.er.usgs.gov/queries/FactSheet.aspx?speciesID=551> (updated Sept. 16, 2011) (accessed Apr. 7, 2012).

⁴⁶⁴ *Id.*

⁴⁶⁵ Notice of Availability of the Supplement to the Draft Programmatic Environmental Impact Statement for Solar Energy Development in Six Southwestern States and Notice of Public Meetings, 76 Fed. Reg. 66958 (Oct. 28, 2011).

⁴⁶⁶ *Id.*

⁴⁶⁷ See *id.* at 66959 (stating that BLM “has identified a need to respond in a more efficient and effective manner to the high interest in siting utility-scale solar energy development on BLM-administered lands and ensure consistent application of measures to avoid, minimize, or mitigate the adverse impacts of such development”; similarly, DOE “proposes to further integrate environmental considerations into its analysis and selection of solar projects through the development of programmatic environmental guidance”).

⁴⁶⁸ Sayeh Tavangar, *BLM Slashes Size of ‘Fast Track’ Solar Zones by 60%*, WUSA9.com, <http://www.wusa9.com/news/local/story.aspx?storyid=172962> (Oct. 31, 2011) (accessed Apr. 7, 2012).

⁴⁶⁹ See Mojave Desert Blog, *BLM Lifts Hold on Ivanpah Construction but Hurdles Loom*, <http://www.mojavedesertblog.com/2011/06/blm-lifts-hold-on-ivanpah-construction.html> (June 14, 2011) (accessed Apr. 7, 2012) (describing several legal challenges to individual solar projects).

⁴⁷⁰ Brian Ertz, *Ivanpah Solar Project Would Disturb Thousands of Desert Tortoises*, The Wildlife News, <http://www.thewildlifeneeds.com/2011/04/29/ivanpah-solar-project-would-disturb-thousands-of-desert-tortoises/> (Apr. 29, 2011) (accessed Apr. 7, 2012). This discovery led to a lawsuit filed by the Western Watersheds Project. Compl., *West-*

toises would be harassed or disturbed by the project.⁴⁷¹ The developers then resumed work on the Ivanpah project, leaving environmental groups questioning if the project would have happened absent the “fast track” approval that it originally received.⁴⁷²

In his book, *Powering the Future*, Nobel Laureate in physics Robert B. Laughlin addressed the ongoing conflict over solar projects. Laughlin stated:

The environmental issue . . . that’s likely to escalate in seriousness as time passes is saving the world’s deserts from being paved over with solar plants. Not everybody has a soft spot in their heart for desert wilderness, of course, but many people do, and they are concerned that it’s disappearing.⁴⁷³

Accordingly, the green energy movement is not completely congruent with the greater environmental movement. An ongoing balancing of interests will continue, with the familiar consequences of conventional energy development being weighed against the still largely unknown consequences of green energy development. In the meantime, desert tortoises are caught in the middle.

E. Food and Drug Administration: Withdrawal of Notices of Opportunity for a Hearing

On December 22, 2011, the Food and Drug Administration (FDA) published a notice announcing the withdrawal of two Notices of Opportunity for a Hearing (NOOHs) that were originally published in 1977.⁴⁷⁴ Publication of the NOOHs followed seven years of study of the effects of subtherapeutic antibiotic use in animal feed.⁴⁷⁵

Antimicrobial drugs are used “subtherapeutically” in animal feed to increase production.⁴⁷⁶ The drugs are arguably responsible for sig-

ern Watersheds Project v. Salazar, http://www.westernwatersheds.org/legal/11/california/IvanpahComplaint_1-12-11.pdf (C.D. Cal. Jan. 12, 2011) (accessed Apr. 7, 2012).

⁴⁷¹ Ertz, *supra* n. 470; Sundance Biology, Inc. & Kiva Biological Consulting, *Revised Biological Assessment for the Ivanpah Solar Electric Generating System (Ivanpah SEGS) Project* 4–5 (Apr. 19, 2011) (available at <http://www.westernwatersheds.org/cal/ivanpah/04-19-11-ISEGS-revised-BA.pdf> (accessed Apr. 7, 2012)) (report prepared for BLM).

⁴⁷² See Ertz, *supra* n. 470 (discussing the now-anticipated effects on desert tortoises and noting that “[h]ad BLM, [FWS,] and developers underwent the appropriate and lawful environmental review this would have been anticipated” but “[u]nfortunately, the ‘fast-track’ approval process insisted upon by Secretary of the Interior Ken Salazar missed it, and now [FWS] finds itself in a predicament”).

⁴⁷³ Robert B. Laughlin, *Powering the Future: How We Will (Eventually) Solve the Energy Crisis and Fuel the Civilization of Tomorrow* 119 (Basic Bks. 2011).

⁴⁷⁴ Withdrawal of Notices of Opportunity for a Hearing; Penicillin and Tetracycline Used in Animal Feed, 76 Fed. Reg. 79697, 79698 (Dec. 22, 2011).

⁴⁷⁵ See *id.* at 79697–98 (noting that the task force was established in 1970 to “review the use of antibiotic drugs in animal feeds” and that the process “culminated in the 1977 publication of two NOOHs”).

⁴⁷⁶ FDA et al., *Draft Guidance for Industry #209: The Judicious Use of Medically Important Antimicrobial Drugs in Food-Producing Animals* 4 (June 28, 2010) (available

nificant gains in the health of the world's human and nonhuman animal populations, and when given in ongoing, small doses in animal feed, can make already healthy animals grow larger, faster.⁴⁷⁷ Overuse, however, can result in drug-resistant microbes that constitute a significant health risk to the human population.⁴⁷⁸

In 1977, FDA proposed withdrawal of approval for all uses of penicillin in animal feed and of all subtherapeutic uses of tetracyclines in animal feeds.⁴⁷⁹ Before any hearings under the NOOHs could be held, Congress directed FDA to delay any withdrawal of approval until the agency completed additional research.⁴⁸⁰ The approvals were not withdrawn until 2011.⁴⁸¹

In 2011, FDA announced that the withdrawal of the NOOHs was appropriate because the agency is utilizing other regulatory means to address the question, the NOOHs were out of date, and any proceedings under the NOOHs would require scrutiny.⁴⁸² The agency also made clear that it remains concerned about consequences of antibiotic overuse and retains the ability to withdrawal approval.⁴⁸³

FDA further stated that it will “focus its efforts for now on the potential for voluntary reform and the promotion of the judicious use of antimicrobials in the interest of public health.”⁴⁸⁴ It then discussed the June 2010 draft guidance in which the agency explains to industry how to achieve “judicious use” of antibiotics.⁴⁸⁵ That guidance features two principles. First, “the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that are considered necessary for assuring animal health.” Second, “the use of medically important antimicrobial drugs in food-producing animals should be limited to those uses that include veterinary oversight or consultation.”⁴⁸⁶ Finally, the agency restated that it could still with-

at <http://www.fda.gov/downloads/animalveterinary/guidancecomplianceenforcement/guidanceforindustry/ucm216936.pdf> (accessed Apr. 7, 2012)).

⁴⁷⁷ See *id.* at 3–4 (noting that antimicrobial drugs have yielded “tremendous benefits to both human and animal health” and that they “enhanc[e] the production of animal-derived products” by, for example, “increasing rate of weight gain”).

⁴⁷⁸ *Id.* at 3 (stating that “[m]isuse and overuse of antimicrobial drugs creates selective evolutionary pressure that enables antimicrobial susceptible bacteria and thus increases the opportunity for individuals to become infected by resistant bacteria”).

⁴⁷⁹ 76 Fed. Reg. at 79698 (The NOOHs would have exempted oxytetracycline and chlortetracycline from the prohibition on subtherapeutic uses of tetracycline, but only for certain enumerated purposes.).

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ See *id.* (clarifying that the action “should not be interpreted as a sign that FDA no longer has safety concerns or that FDA will not consider re-proposing withdrawal proceedings in the future, if necessary”).

⁴⁸⁴ *Id.* at 79698.

⁴⁸⁵ 76 Fed. Reg. at 79699; see generally FDA et al., *supra* n. 476, at 3 (representing FDA’s “current thinking” on the topic).

⁴⁸⁶ *Id.* at 79699.

drawal approval of penicillin use and subtherapeutic tetracycline use following a new notice in the Federal Register.⁴⁸⁷

Harsh criticism followed the announcement. One critic was Avinash Kar, an attorney for the Natural Resources Defense Council (NRDC).⁴⁸⁸ In *The Guardian*, Kar asserted that FDA's action was merely an attempt to moot a lawsuit that NRDC had brought against the agency in May for failing to finalize withdrawal of the approvals, which had not been acted on for over thirty years.⁴⁸⁹ By withdrawing the NOOHs, FDA effectively removed NRDC's cause of action.

F. National Oceanic and Atmospheric Administration: Aquaculture Policy

On February 16, 2011, the National Oceanic and Atmospheric Administration (NOAA) released a draft aquaculture policy for comment.⁴⁹⁰ Following the comment period, NOAA announced adoption of the policy on June 9, 2011.⁴⁹¹

In its announcement, NOAA observed that “[f]oreign aquaculture accounts for about half of the 84[%] of seafood imported by the U.S., contributing to the \$9 billion trade deficit in seafood.”⁴⁹² The policy notes that aquaculture now produces over 50% of the world's seafood.⁴⁹³ However, domestic aquaculture production accounts for only a tiny fraction of seafood consumed in the U.S.⁴⁹⁴

The policy directs NOAA to, *inter alia*, “[e]ncourage and foster sustainable aquaculture development . . . that is in harmony with healthy, productive, and resilient marine ecosystems”⁴⁹⁵ The policy also calls for efficient, science-based management decisions, a commitment to educate the public about sustainable aquaculture, and “learn[ing] from aquaculture best practices around the world.”⁴⁹⁶ In an appendix, NOAA lists seven goals for aquaculture in federal waters:

⁴⁸⁷ *Id.* at 79700–01.

⁴⁸⁸ See Karen McVeigh, *FDA Draws Criticism after U-turn on Antibiotics in Animal Feed*, *The Guardian* (Dec. 29, 2011) (available at <http://www.guardian.co.uk/world/2011/dec/29/fda-u-turn-antibiotics-animal-feed?newsfeed=true> (updated Jan. 3, 2012) (accessed Apr. 7, 2012)) (reporting that Kar described the move as a “step backwards” for FDA).

⁴⁸⁹ *Id.*; Compl., *Nat. Resources Def. Council v. U.S. Food & Drug Administration*, http://docs.nrdc.org/health/files/hea_11052501a.pdf (S.D.N.Y. July 7, 2011) (No. 11 CIV 3562 (RMB)) (accessed Apr. 7, 2012).

⁴⁹⁰ Draft NOAA National Aquaculture Policy, 76 Fed. Reg. 9210 (Feb. 16, 2011).

⁴⁹¹ Press Release, NOAA, *Commerce and NOAA Release National Aquaculture Policies to Increase Domestic Seafood Production, Create Sustainable Jobs, and Restore Marine Habitats* (June 9, 2011) (available at http://www.noanews.noaa.gov/stories2011/20110609_aquaculture.html (accessed Apr. 7, 2012)).

⁴⁹² *Id.*

⁴⁹³ Natl. Oceanic & Atmospheric Admin., *Marine Aquaculture Policy* 4 (June 2011) (available at http://aquaculture.noaa.gov/pdf/noaa_aquaculture_policy_2011.pdf (accessed Apr. 7, 2012)).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* at 1–2.

⁴⁹⁶ *Id.* at 2.

ecosystem compatibility, compatibility with other uses, use of best available science and information, social and economic benefits, industry accountability, an efficient and transparent approval process, and publicly available information.⁴⁹⁷ Notably, while the policy includes protecting wild species and utilizing best practices, it does not directly address the quality or welfare of the fish to be farmed.

G. U.S. Trade Representative: EC Beef Hormone Dispute

On May 27, 2011, the Office of the U.S. Trade Representative (USTR) announced an early, if tentative, end to a decades-long trade war with Europe.⁴⁹⁸ The dispute centered on a European Union (EU) ban refusing imports of meat from animals treated with growth hormones.⁴⁹⁹ While the relevant U.S. regulatory agencies—FDA and the U.S. Department of Agriculture (USDA)—insist that consumers face no ill effects from hormone-treated beef, the European Commission banned imports of such meat in 1989 in accordance with the precautionary principle.⁵⁰⁰ The precautionary principle holds that action should be taken to prevent a suspected harm, even before scientific consensus is reached.⁵⁰¹ As applied in this case, the European Commission banned hormone-treated beef based on consumer concerns, before definitive studies existed to support the decision.⁵⁰²

The U.S. retaliated with 100% *ad valorem* tariffs on a variety of European agricultural goods.⁵⁰³ The tariffs remained in place until 1996, when both parties sought World Trade Organization (WTO) me-

⁴⁹⁷ *Id.* at 9–12.

⁴⁹⁸ Termination of Action and Further Monitoring in Connection with the EC-Beef Hormones Dispute, 76 Fed. Reg. 30987–88 (May 27, 2011) (announcing that the USTR will terminate the “additional duties” first imposed on certain European Union products back in 1999 as a result of the *EC-Beef Hormones* dispute).

⁴⁹⁹ Renée Johnson & Charles E. Hanrahan, *The U.S.-EU Beef Hormone Dispute*, Cong. Research Serv. Rpt. R40449, 1 (Dec. 6, 2010) (available at <http://www.nationalaglawcenter.org/assets/crs/R40449.pdf> (accessed Apr. 7, 2012)).

⁵⁰⁰ *Id.* at 1–2.

⁵⁰¹ *Id.* at 2 (stating that the precautionary principle “supports taking protective action before there is complete scientific proof of a risk”); see also Malcolm MacGarvin et al., *Late Lessons from Early Warnings: The Precautionary Principle 1896–2000* 13 (Poul Harremoës et al. eds., European Env'tl. Agency 2001) (available at http://www.eea.europa.eu/publications/environmental_issue_report_2001_22/Issue_Report_No_22.pdf (accessed Apr. 7, 2012)) (“The main element of the precautionary principle . . . was a general rule of public policy action to be used in situations of potentially serious or irreversible threats to health or the environment, where there is a need to act to reduce potential hazards *before* there is strong proof of harm, taking into account the likely costs and benefits of action and inaction.”).

⁵⁰² See Johnson & Hanrahan, *supra* n. 499, at 2–3, 5 (explaining that the EU ban was enacted in response to consumer concerns as well as political and economic considerations, and noting that scientific reviews of the issue were not commissioned by the EU until after the 1997 WTO decision in favor of the U.S.).

⁵⁰³ *Id.* at 5; see also WTO, *A Glossary Term: Ad Valorem Tariff*, http://www.wto.org/english/thewto_e/glossary_e/ad_valorem_tariff_e.htm (accessed Apr. 7, 2012) (defining an *ad valorem* tariff as a “tariff rate charged as percentage of the price”).

diation.⁵⁰⁴ The WTO dispute resolution panel held that the EU ban was in violation of another agreement, but the WTO appellate body allowed the EU to prepare a risk assessment.⁵⁰⁵ The EU did not meet the imposed deadline for completion of the risk analysis; nevertheless, it declined to lift the ban.⁵⁰⁶ With WTO approval, the U.S. then imposed new tariffs on European agricultural products.⁵⁰⁷

In response, the EU issued several studies to support the hormone-treated beef ban.⁵⁰⁸ However, U.S. trade and veterinary officials rejected the studies.⁵⁰⁹ Beginning in 2004, the EU initiated several new WTO panels, claiming that new research further justified the ban.⁵¹⁰ Following a panel report that faulted each of the three parties—the EU, U.S., and Canada—for various reasons, the WTO Appellate Body reached a decision in 2008 that cemented the status quo: the EU ban could remain in place, and the U.S. and Canada could continue to impose tariffs.⁵¹¹ The U.S. responded in early 2009 by announcing that it would make changes to the tariff schedule, which the EU called an “escalation” of the situation.⁵¹² The USTR then delayed the changes until the Obama Administration had time to review the action.⁵¹³

The new administration announced a Memorandum of Understanding (MOU) in May of 2009.⁵¹⁴ The MOU called for a three-phase process that would first require the EU to accept up to 20,000 pounds of U.S. non-hormone treated beef duty-free and require the U.S. to refrain from imposing any additional tariffs.⁵¹⁵ The U.S. would then have the opportunity to enter into a second phase with an expanded quota if conditions were such “that would allow the U.S. beef industry to make full use of the additional quota.”⁵¹⁶ The agreement allowed for

⁵⁰⁴ Johnson & Hanrahan, *supra* n. 499, at 5.

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*; see also MacGarvin et al., *supra* n. 501z at 153 (addressing the beef hormone controversy and stating that “[t]he dispute raises the issue of where the benefit of doubt should lie. An issue of concern is that attempts to resolve the problem are being made in the absence of any formal mechanisms for trading risks and benefits for the public. Potential environmental impacts or animal welfare issues have not been considered in this dispute.”).

⁵⁰⁷ Johnson & Hanrahan, *supra* n. 499, at 5, 29.

⁵⁰⁸ *Id.* at 5.

⁵⁰⁹ *Id.* at 6.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.* at 7.

⁵¹³ Johnson & Hanrahan, *supra* n. 499, at 7.

⁵¹⁴ 76 Fed. Reg. at 30988.

⁵¹⁵ Press Release, Off. of USTR, *USTR Announces Agreement with European Union in Beef Hormones Dispute* (May 2009) (available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/may/ustr-announces-agreement-european-union-beef-hormones-> (accessed Apr. 7, 2012)).

⁵¹⁶ *Id.*

a third phase contingent upon negotiations regarding “duration, withdrawal, and the status of WTO litigation on the EU’s compliance.”⁵¹⁷

While the U.S. had the support of the beef industry throughout the dispute, not all domestic business interests agreed. Gilda Industries, Inc., an importer of EU goods, including the ad valorem-affected Spanish toasted breads, brought a series of challenges to the policy to the U.S. Court of International Trade.⁵¹⁸ In 2007, Gilda filed a complaint stating that 19 U.S.C. section 2417(c)(1) requires that retaliatory trade actions “terminate after four years unless a representative of the domestic industry ‘which benefits from’ the action submits a written request for continuation of the action.”⁵¹⁹ Gilda had brought a similar claim after the initial four-year deadline in 2003; however, the courts rejected the earlier challenge because the beef industry had requested an extension of the tariffs.⁵²⁰

In response to Gilda’s 2007 suit, the Court of International Trade held that the industry had not requested a second extension. Therefore, the authority to impose the tariffs ended as a matter of law.⁵²¹ Following the Federal Circuit opinion, the USTR announced an end to the tariffs.⁵²² Both the USTR and the EU stated that they were pleased with the progress made under the MOU.⁵²³ The USTR announced termination of the tariffs as well as a commitment to continued monitoring of the situation.⁵²⁴ The USTR made clear that if the EU failed to fulfill its obligations under the MOU, the USTR retained the ability to pursue sanctions.⁵²⁵

The increased market for non-hormone treated beef in the EU will likely result in greater participation in the USDA’s Non-Hormone Treated Cattle (NHTC) Program. The program, which certifies beef from non-hormone treated cows, began after the EU ban was first im-

⁵¹⁷ *Id.*

⁵¹⁸ *Gilda Indus., Inc. v. U.S.*, 622 F.3d 1358, 1361 (Fed. Cir. 2010) [hereinafter *Gilda II*] (also discussing *Gilda Indus., Inc. v. U.S.*, 446 F.3d 1271 (Fed. Cir. 2006) [hereinafter *Gilda I*]).

⁵¹⁹ *Gilda II*, 622 F.3d at 1361 (quoting *Gilda I*, 446 F.3d at 1277–78).

⁵²⁰ *Gilda II*, 622 F.3d. at 1361 (discussing *Gilda I*, 446 F.3d. at 1271).

⁵²¹ *Gilda II*, 622 F.3d at 1364. The government first tried to argue that because the USTR had not provided proper notification of the impending termination, the industry was entitled to request another continuation of the statutory tariff period. *Id.* In the alternative, the government contended that the failure to notify was excusable because it was based on an incorrect statutory interpretation; after learning of the proper interpretation, the USTR had provided proper notice and the industry requested continuation of the retaliatory action. *Id.* at 1366. The court rejected both of the government’s arguments, and the Federal Circuit affirmed its holding on appeal. *Id.* at 1364, 1367.

⁵²² 76 Fed. Reg. at 30989.

⁵²³ Juliane von Reppert-Bismarck, *U.S. Lifts Sanctions in EU Beef Hormone Row*, Reuters (May 27, 2011) (available at <http://www.reuters.com/article/2011/05/27/us-sanctions-beef-hormone-idUSTRE74Q63L20110527?feedType=RSS&feedName=everything&virtualBrandChannel=11563> (accessed Apr. 7, 2012)).

⁵²⁴ 76 Fed. Reg. at 30989.

⁵²⁵ *Id.*

posed in 1989.⁵²⁶ Participation in the NHTC program is required for those exporting beef from the U.S. to the EU.⁵²⁷ As of September 26, 2011, there were fourteen feedlots, ranches, farms, and cattle management groups approved by the NHTC program.⁵²⁸

H. Federal Trade Commission: Fur Products Labeling Act

On March 14, 2011 the Federal Trade Commission (FTC) published an Advanced Notice of Proposed Rulemaking (ANPR) and request for comments regarding the FTC's regulations under the Fur Products Labeling Act (Fur Act).⁵²⁹ The passage of the Truth in Fur Labeling Act (TFLA) necessitated the new rulemaking.⁵³⁰ Congress passed TFLA in December 2010 and the law became effective on March 18, 2011.⁵³¹ Previously, the Fur Act allowed the FTC to set a *de minimis* exemption from the labeling requirements.⁵³² Thus, any product that contained fur worth \$150 or less was exempt from the fur-content label requirement.⁵³³

The new statute removed FTC's discretion to establish the exemption but created a new exception for "furs sold directly by trappers and hunters to end-use customers in certain face-to-face transactions."⁵³⁴ Additionally, TFLA required the FTC to "to review and allow comment on the Fur Products Name Guide."⁵³⁵ The Fur Products Name Guide contains the officially recognized names of fur-producing animals, which must be included in the information fur manufacturers disclose to consumers.⁵³⁶

The FTC also announced an enforcement policy with a "forbearance period."⁵³⁷ Although the FTC had no statutory authority to continue the *de minimis* exception,⁵³⁸ it stated that it would not undertake enforcement actions against retailers who previously fell under the exemption if: "(1) the product containing a *de minimis*

⁵²⁶ Johnson & Hanrahan, *supra* n. 499, at 18.

⁵²⁷ *Id.*

⁵²⁸ USDA, Agric. Marketing Serv., *Official Listing of Approved Sources of Non-Hormone Treated Cattle*, <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELPRD3107503> (updated Feb. 2, 2012) (accessed Apr. 7, 2012).

⁵²⁹ Fur Products Labeling Act, 76 Fed. Reg. 13550, 13551–52 (Mar. 14, 2011).

⁵³⁰ *Id.* at 13551; see also Jennifer O'Brien & Randall Szabo, Student Authors, 2009 *Legislative Review*, 16 *Animal L.* 371, 379–81 (2010) (for background on TFLA).

⁵³¹ 76 Fed. Reg. at 13551.

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ *Id.*

⁵³⁶ Press Release, FTC, *FTC to Hold Public Hearing on Fur Products Name Guide* (Nov. 16, 2011) (available at <http://ftc.gov/opa/2011/11/furlabeling.shtm> (accessed Apr. 7, 2012)) (describing the Name Guide as "list[ing] the common animal names that are allowed on fur labels").

⁵³⁷ FTC, *FTC Enforcement Policy: Labels for Fur Products Previously Covered by the FTC's De Minimis Exemption* (Mar. 2011) (available at <http://ftc.gov/os/2011/03/110316furactpolicy.pdf> (accessed Apr. 7, 2012)).

⁵³⁸ See *id.* (noting that the TFLA eliminates the FTC's exemption authority).

amount of fur was delivered to the retailer on or before March 18, 2011 and sold by March 18, 2012; and (2) the product is not mislabeled under the old requirements.”⁵³⁹ This policy was intended to ease the regulatory burden on fur industry members who balked at the cost of rapid compliance.⁵⁴⁰ The enforcement policy also recommends that retailers convey the information by other means, such as signage near displays.⁵⁴¹ The policy expresses hope that this will “balance the Commission’s interest in full compliance with the law with the legitimate concerns raised by industry.”⁵⁴²

Subsequently, on November 22, 2011, the FTC published notice that it would hold a public hearing to discuss an issue raised by the comments submitted following the ANPR.⁵⁴³ The Humane Society of the U.S. submitted a comment stating that *Nyctereutes procyonoides*, currently listed in the name guide as “Asiatic Raccoon,” should—according to the federal government’s own Integrated Taxonomic Information System—be referred to as the “Raccoon Dog.”⁵⁴⁴ Members of the fur industry objected to the name change, stating that labeling fur from *nyctereutes procyonoides* as “Raccoon Dog” would dramatically decrease demand.⁵⁴⁵ The FTC scheduled a hearing to discuss the matter for December 6, 2011.⁵⁴⁶

I. National Institutes of Health: Adoption of New Edition of Guide for Laboratory Animals

On February 24, 2011, the National Institutes of Health (NIH) published notice and a request for public comments on “adoption of the eighth edition of the *Guide for the Care and Use of Laboratory Animals* (Guide) as a basis for evaluation of institutional programs receiving or proposing to receive Public Health Service (PHS) support for activities involving animals.”⁵⁴⁷ The Guide has been in use since 1963 as “a widely accepted primary reference on animal care and use.”⁵⁴⁸ Beginning in 1985, PHS has required any institution with PHS grants for “animal activities” to “base their animal care and use programs” on the

⁵³⁹ *Id.*

⁵⁴⁰ *See id.* (announcing the forbearance period and noting that “industry members have expressed concern that compliance with the . . . deadline will cause significant economic loss” and that “the Commission also recognizes that new obligations may sometimes create significant burdens on parties that have relied in good faith on previous requirements”).

⁵⁴¹ *Id.*

⁵⁴² *Id.*

⁵⁴³ Regulations under the Fur Products Labeling Act, 76 Fed. Reg. 72132 (Nov. 22, 2011).

⁵⁴⁴ *Id.* at 72133–34.

⁵⁴⁵ *Id.* at 72134.

⁵⁴⁶ *Id.* at 72132–34.

⁵⁴⁷ Laboratory Animal Welfare: Proposed Adoption and Implementation of the Eighth Edition of the Guide for the Care and Use of Laboratory Animals, 76 Fed. Reg. 10379 (Feb. 24, 2011).

⁵⁴⁸ *Id.*

Guide, as well as comply with applicable laws or regulations.⁵⁴⁹ The eighth edition of the Guide includes, among other revisions, increased minimum space recommendations, a separation of aquatic and terrestrial species guidelines, and an introduction to “the concept of *animal biosecurity* and . . . its central role in ensuring the health of laboratory animals.”⁵⁵⁰ The notice invited comment on the eighth edition of the Guide and on NIH’s proposed timeline that required an evaluation of facilities using the standards of the new edition by March 31, 2012.⁵⁵¹

On December 1, 2011, NIH announced that it had adopted the eighth edition of the Guide.⁵⁵² After reviewing the received comments, NIH concluded that “the [Eighth] Edition of the Guide empowers continued advancement in the humane care and use of vertebrate animals in research, research training, and biological testing.”⁵⁵³ Notably, however, the majority of comments actually opposed adoption.⁵⁵⁴ In response, NIH announced the availability of position statements to:

[C]larify the ways in which NIH expects Assured institutions to implement the [Eighth] Edition of the Guide by addressing the following concerns: cost of implementing the [Eighth] Edition of the Guide; animal housing specifications; use of nonpharmaceutical-grade compounds; food and fluid restrictions; multiple surgical procedures; and application of the [Eighth] Edition of the Guide to agricultural animals used in biomedical research. In addition, there is a summary of [the Office of Laboratory Animal Welfare’s] position on performance standards and practice standards.⁵⁵⁵

Although the comment period on the eighth edition of the Guide had closed, NIH announced that it would accept comments on the position statements for sixty days.⁵⁵⁶ In effect, instead of modifying the Guide in response to the comments, NIH provided responses to the comments and then accepted comments on those responses. The Guide, however, remained unchanged following its initial publication.⁵⁵⁷

⁵⁴⁹ *Id.* at 10379–80.

⁵⁵⁰ Natl. Research Council, *Guide to the Care and Use of Laboratory Animals* xvii–xix (8th ed., Natl. Academies Press 2011) (available at <http://grants.nih.gov/grants/olaw/Guide-for-the-Care-and-Use-of-Laboratory-Animals.pdf> (accessed Apr. 7, 2012)).

⁵⁵¹ 76 Fed. Reg. at 10380.

⁵⁵² Laboratory Animal Welfare: Adoption and Implementation of the Eighth Edition of the Guide for the Care and Use of Laboratory Animals, 76 Fed. Reg. 74803 (Dec. 1, 2011).

⁵⁵³ *Id.*

⁵⁵⁴ U.S. Dept. of Health & Human Servs., Off. of Lab Animal Welfare, *Position Statements: OLAW Responds to Concerns Regarding Adoption of the Guide for the Care and Use of Laboratory Animals: Eighth Edition*, <http://grants.nih.gov/grants/olaw/2011positionstatement.htm> (updated Jan. 11, 2012 (accessed Apr. 7, 2012)).

⁵⁵⁵ 76 Fed. Reg. 74803.

⁵⁵⁶ *Id.*

⁵⁵⁷ See generally Natl. Research Council, *supra* n. 550 (showing that the publication date for the Guide is 2011 and no revised version is available).

J. Department of the Army: Patent Licensing Availability

On October 14, 2011, the Department of the Army announced that an invention under provisional patent titled “A Device and Method for Inducing Brain Injury in Animal Test Subjects” was available for licensing.⁵⁵⁸ The notice provided the supplementary information that “[t]he invention relates a device and method for inducing brain injury in animal test subjects through inflicting pressure-wave or projectile-mediated concussions.”⁵⁵⁹ The Army welcomed offers to license the invention on either an exclusive or non-exclusive basis.⁵⁶⁰

The invention is presumably a product of the dramatic increase in traumatic brain injuries soldiers have suffered in Iraq and Afghanistan as compared to previous conflicts.⁵⁶¹ Just how the Army has used the invention—and whether there have been any resulting discoveries of value—is not publically available.

⁵⁵⁸ Notice of Availability for Exclusive, Non-Exclusive, or Partially-Exclusive Licensing of an Invention Concerning a Device and Method for Inducing Brain Injury in Animal Test Subjects, 76 Fed. Reg. 63910 (Oct. 14, 2011).

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ U.S. Dept. of Vets. Affairs, *Traumatic Brain Injury and PTSD*, <http://www.ptsd.va.gov/professional/pages/traumatic-brain-injury-ptsd.asp> (updated Dec. 20, 2011) (accessed Apr. 7, 2012); see generally Natl. Inst. of Neurological Disorders & Stroke, *Traumatic Brain Injury: Hope Through Research*, http://www.ninds.nih.gov/disorders/tbi/detail_tbi.htm (updated Jan. 30, 2012) (accessed Apr. 7, 2012) (for an overview of the causes, symptoms, treatment, and research pertaining to traumatic brain injury).