

## 2012 FEDERAL LEGISLATIVE REVIEW

By  
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## I. INTRODUCTION

The second session of the 112th United States (U.S.) Congress has the dubious distinction of being the least productive legislative session on record.<sup>1</sup> Two laws passed relating to the care and treatment of animals: provisions included in the National Defense Authorization Act for Fiscal Year 2013 and a law amending the Animal Welfare Act. While several other legislative proposals addressing animal welfare were considered, none of these proposals successfully passed both chambers of Congress.

## II. ANIMALS AND THE ARMED FORCES

### A. *National Defense Authorization Act for Fiscal Year 2013*

#### 1. *Facilitating the Adoption of Military Working Dogs: Incorporating Provisions of the Canine Members of the Armed Forces Act*

Introduced by Senator Richard Blumenthal (D-CT) on February 27, 2012, and by Representative Walter B. Jones, Jr. (R-NC) the following day, the Canine Members of the Armed Forces Act offered several significant improvements for the treatment of working dogs in the U.S. military.<sup>2</sup> Military working dogs (MWDs) are valuable members of the U.S. armed forces,<sup>3</sup> and there are currently

<sup>1</sup> Stephan Dinan, Wash. Times, *Capitol Hill Least Productive Congress Ever: 112th Fought 'About Everything'*, <http://www.washingtontimes.com/news/2013/jan/9/capitol-hill-least-productive-congress-ever-112th/> (Jan. 9, 2013) (accessed Apr. 13, 2013).

<sup>2</sup> Canine Members of the Armed Forces Act, Sen. 2134, 112th Cong. (Feb. 27, 2012) (as referred to the Committee on Armed Services) (available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:S.2134:@@L> (accessed Apr. 13, 2013)) (showing that bill was co-sponsored by twenty senators); Canine Members of the Armed Forces Act, H.R. 4103, 112th Cong. (Mar. 15, 2012) (as referred to the Subcommittee on Readiness) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4103ih/pdf/BILLS-112hr4103ih.pdf> (accessed Apr. 13, 2013)) (showing that bill was co-sponsored by forty-seven representatives); Press Release, Am. Socy. for the Prevention of Cruelty to Animals, *Congress Passes Legislation Protecting Military Dogs* (Dec. 21, 2012) (available at <http://www.asPCA.org/Pressroom/press-releases/122112> (accessed Apr. 13, 2013)).

<sup>3</sup> General David Petraeus, recognizing the importance of MWDs, stated: "The capability they (Military Working Dogs) bring to the fight cannot be replicated by man or machine. By all measures of performance their yield outperforms any asset we have in our inventory. Our Army (and military) would be remiss if we failed to invest more in this incredibly valuable resource." Jeremy Criscoe, Forbes, *Four Legged Soldiers Receives Memorial Day Honor*, <http://www.forbes.com/sites/jeremycriscoe/2012/05/27/four-legged-soldiers-receives-memorial-day-honor/> (May 27, 2012) (accessed Apr. 13, 2013). Duties of MWDs include identifying explosive substances by smell, assisting in searches and rescues, and conducting border patrols; elite dogs even parachute out of planes on missions with Special Forces units. Assn. of Am. Veterinary Med. Colleges, *Providing*

between 2,500 and 2,600 dogs deployed with American troops overseas.<sup>4</sup>

The ability to adopt military dogs after their service is relatively new; until the passage of “Robby’s Law” in 2000, retired MWDs were routinely euthanized and were not eligible for adoption.<sup>5</sup> Although adoption is now possible, the legal classification of MWDs as “equipment” means that their post-retirement care and transport back to the U.S. is dependent upon the individual military unit or adoptive owner’s willingness to bear the cost.<sup>6</sup> Lisa Phillips, a former Army veterinary technician and founder and CEO of the non-profit Retired Military Working Dog Assistance Organization, brought the precarious position of military canines to the attention of legislators.<sup>7</sup>

As originally introduced, the Canine Members of the Armed Forces Act contained four important provisions. First, it would reclassify MWDs from their current status as “equipment”<sup>8</sup> to “canine members of the armed forces.”<sup>9</sup> Second, it would authorize streamlined transfer of retired dogs back to the U.S. in order to facilitate post-service adoption.<sup>10</sup> Third, it would provide for continuing veterinary care after adoption at no cost to taxpayers through coordination with non-profit organizations.<sup>11</sup> Lastly, the bill would create a system to recognize MWDs killed in action and to formally acknowledge exceptionally courageous or meritorious conduct.<sup>12</sup>

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*Military Working Dogs with High-Level Veterinary Care*, <http://www.aavmc.org/Careers-in-Veterinary-Medicine/Veterinary-Spotlight-Dr-Bess-Pierce.aspx> (accessed Apr. 13, 2013).

<sup>4</sup> Laura Sesana, Wash. Times Communities, *Military Working Dogs Today Have Long History of Heroism*, <http://communities.washingtontimes.com/neighborhood/world-our-backyard/2013/jan/11/military-working-dogs-today/> (Jan. 10, 2013) (accessed Apr. 13, 2013).

<sup>5</sup> 10 U.S.C. § 2583 (2006) (formerly § 2582); Larisa Epatko, PBS NewsHour, *Military Working Dogs: What Happens After They Serve?*, <http://www.pbs.org/newshour/run-down/2012/05/military-working-dogs.html> (May 28, 2012) (accessed Apr. 13, 2013).

<sup>6</sup> Press Release, Off. of Sen. Richard Blumenthal, *Blumenthal Highlights Strategic Role of Military Working Dogs* (Jan. 12, 2012) (available at <http://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-highlights-strategic-role-of-military-working-dogs-> (accessed Apr. 13, 2013)) [hereinafter Sen. Blumenthal Press Release].

<sup>7</sup> Sen. Blumenthal Press Release, *supra* n. 6. After serving in the Army and adopting a MWD, Ms. Phillips used her experience as the subject of an essay and several speeches for undergraduate coursework. Given her passion and firsthand knowledge about the issue, she was encouraged to broaden the reach of her audience to include the U.S. Congress. Retired Mil. Working Dog Assistance Org., *Leadership*, <http://www.rmwdao.org/Leadership.html> (accessed Apr. 13, 2013).

<sup>8</sup> For example, Air Force Manual 31-219 classifies MWDs as “a highly specialized piece of equipment that supplements and enhances the capabilities of security forces personnel.” U.S. Air Force Mil. Working Dog Program, Air Force Manual 31-219, Doctrine 7.1, 171 (Dept. of the Air Force June 30, 2009) (available at <http://www.e-publishing.af.mil/shared/media/epubs/AFMAN31-219.pdf> (accessed Apr. 13, 2013)).

<sup>9</sup> H.R. 4103, 112th Cong. at § 3(f).

<sup>10</sup> *Id.* at § 3(g).

<sup>11</sup> *Id.* at § 4.

<sup>12</sup> *Id.* at § 5.

The House fully incorporated and passed the bill as an amendment to the National Defense Authorization Act for Fiscal Year 2013 (NDAA), H.R. 4310,<sup>13</sup> but the version of the bill passed by the Senate<sup>14</sup> omitted the reclassification of MWDs as “canine members of the armed forces.”<sup>15</sup>

The version of the NDAA signed into law on January 2, 2013, not only excluded the crucial language reclassifying MWDs, but it further eliminated the section that authorized recognition for dogs killed in action and for meritorious service.<sup>16</sup> Although the transfer of retired MWDs and post-service veterinary care are included in NDAA, the exercise of both provisions are at the discretion of the Secretary of Defense with the specification that no federal government monies be expended for post-service veterinary care of MWDs.<sup>17</sup>

## 2. *Phasing out the Use of Live Animals in Combat Trauma Training*

The NDAA contains another section that should significantly increase animal welfare by actively encouraging a transition away from the use of live animals in medical training for the treatment of combat-trauma injuries.<sup>18</sup> Even though it does not affirmatively require the military to move away from the use of live animals, the enacted law required the Secretary of Defense to report to Congress by March 1, 2013, with a strategy and timeline for replacing the use of live animals with human-based methods.<sup>19</sup>

This provision is a highly modified version of the Battlefield Excellence Through Superior Training (BEST) Practices Act, first intro-

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<sup>13</sup> National Defense Authorization Act for Fiscal Year 2013, H.R. 4310, 112th Cong. § 361 (May 18, 2012) (passed by House) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310eh/pdf/BILLS-112hr4310eh.pdf> (accessed Apr. 13, 2013)).

<sup>14</sup> H.R. 4310, 112th Cong. § 1049 (Dec. 4, 2012) (passed by Senate) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310eas/pdf/BILLS-112hr4310eas.pdf> (accessed Apr. 13, 2013)). At the time of publication, hearings had not been released to the public, so it is unclear which senator is responsible for the amendments to the bill.

<sup>15</sup> *See id.* at § 1049(a)–(c) (The version of H.R. 4310 which passed the Senate contained three provisions of the original Act: (1) transfer of retired MWDs; (2) establishment of veterinary care for retired MWDs, with the caveat that no public funding would be provided for the care; and (3) authorization for recognition of valiant service or sacrifice by MWDs, all at the discretion of the Secretary of Defense).

<sup>16</sup> H.R. 4310, 112th Cong. § 371 (Jan. 3, 2013) (enrolled bill) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4310enr/pdf/BILLS-112hr4310enr.pdf> (accessed Apr. 13, 2013)). *Compare id.* with H.R. 4310, 112th Cong. § 361(a), (c) (May 18, 2012) (passed by House) (the former omitting the provisions for reclassification and recognition contained in the latter at subsections (a) and (c)).

<sup>17</sup> H.R. 4310, 112th Cong. at § 371(a)–(b).

<sup>18</sup> *Id.* at § 736.

<sup>19</sup> *Id.* at § 736(a)(1). “Human-based methods” are defined as “the use of systems and devices that do not use animals, including—(A) simulators; (B) partial task trainers; (C) moulage; (D) simulated combat environments; and (E) human cadavers.” *Id.* at § 736(b)(2). The Secretary’s report was not yet available at the time of publication.

duced in 2009 and then reintroduced in the 112th Congress.<sup>20</sup> Use of live-tissue training for medical personnel managing battlefield injuries is considered outdated and ineffective.<sup>21</sup> Nonetheless, the BEST Practices Act estimated that the Department of Defense uses over 6,000 live animals, usually goats and pigs, each year for training.<sup>22</sup>

### B. Supporting Veterans with Therapy Dogs

Military veterans benefit from a greater understanding of the impact of combat experience on life after service. Private therapy-dog programs have proven to be popular and successful, sparking legislative interest in initiating government programs to explore and implement this avenue of veteran care.<sup>23</sup> The proposed legislation in this Section sought to meet the needs of veterans by increasing access to therapy dogs: the first would promote collaboration between the military and private organizations to provide service dogs to the ever-growing number of veterans suffering from qualifying injuries, while the second would institute a pilot program at Veterans' Affairs medical facilities to further evaluate the benefits of therapy dogs for mental-health injuries.

#### 1. The Senior Airman Michael Malarsie Act

On December 18, 2012, then-Senator John Kerry (D-MA) introduced the Senior Airman Michael Malarsie Act (Malarsie Act),<sup>24</sup> Sen.

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<sup>20</sup> BEST Practices Act, H.R. 4269, 111th Cong. (Dec. 10, 2009) (referred to the Committee on Armed Services) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4269ih/pdf/BILLS-111hr4269ih.pdf> (accessed Apr. 13, 2013)); BEST Practices Act, H.R. 1417, 112th Cong. § 2 (Apr. 7, 2011) (referred to the Subcommittee on Armed Services) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1417ih/pdf/BILLS-112hr1417ih.pdf> (accessed Apr. 13, 2013)); BEST Practices Act, Sen. 3418, 112th Cong. (July 23, 2012) (referred to the Committee on Armed Services) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3418is/pdf/BILLS-112s3418is.pdf> (accessed Apr. 13, 2013)); see also Jenny Keatinge & Richard Myers, Student Authors, 2010 *Legislative Review*, 17 *Animal L.* 415, 419–20 (2011) (outlining the BEST Practices Act).

<sup>21</sup> Phys. Comm. for Responsible Med., *Legislative Efforts to Replace the Use of Live Animals in Combat Trauma Training*, <http://pcrm.org/research/edtraining/military/hr-1417-the-best-practices-act> (accessed Apr. 13, 2013).

<sup>22</sup> H.R. 1417, 112th Cong. at § 2.

<sup>23</sup> H.R. Subcomm. on Health of Comm. on Veterans' Affairs, *Legislative Hearing on H.R. 198, H.R. 1154, H.R. 1855, H.R. 2074, H.R. 2530, and Draft Legislation*, 112th Cong. 5, 9–10 (July 25, 2011) (available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg68455/pdf/CHRG-112hrg68455.pdf> (accessed Apr. 13, 2013)) [hereinafter *Legislative Hearing on H.R. 198*].

<sup>24</sup> Senior Airman Michael Malarsie was wounded on active duty in Afghanistan in 2010, which resulted in severe injury to his head and neck, and rendered him blind. Despite his injuries, Mr. Malarsie has dedicated himself to remaining on active duty and testing for promotion—including the physical training test—with his colleagues. His intensely positive attitude made him an inspiration for other wounded veterans. Malarsie was chosen by the Air Force Recovery Care for Wounded, Ill and Injured program to establish the Recovering Airman Mentorship Program to aid recovering service members. Chris Powell, *'I'm Still Here'*, <http://usaftacp.org/2011/im-still-here> (Dec. 1, 2011) (accessed Apr. 13, 2013).

3689, to further promote the use and availability of service animals for members of the armed forces and military veterans. On the same day, Sen. 3689 was referred to the Senate Committee on Veterans' Affairs.<sup>25</sup> The Malarsie Act seeks to enlist eligible private entities to cooperatively design and establish a program to meet the growing demand for service dogs by military veterans.<sup>26</sup> The Malarsie Act acknowledges the work of non-profit organizations dedicated to providing service animals to veterans, and seeks to stabilize funding for such programs through the establishment of the Senior Airman Michael Malarsie Program.<sup>27</sup> Training a service dog can cost up to \$45,000.<sup>28</sup>

Seeking to address the difficulties that veterans face in finding service animals, the Malarsie Act cites the 2011 annual survey of Assistance Dogs International, which found a backlog of 188 veterans waiting for guide and service dogs, only seventy-two of whom received service animals.<sup>29</sup> The Malarsie Act states that in 2011, 269 veterans received service dogs, but that the number of veterans who need service dogs is expected to increase as troops come home from deployment.<sup>30</sup> This demand will continue into the future; younger veterans will require several service dogs throughout their lifetime because each service dog typically works for only ten years.<sup>31</sup>

## 2. *The Veterans Dog Training Therapy Act*

The Veterans Dog Training Therapy Act (Veterans Act) was initially introduced in the House by Representative and U.S. military veteran Michael Grimm (R-NY) as H.R. 198 in 2011; it was subsequently reintroduced on January 4, 2013, as H.R. 183.<sup>32</sup> Although portions of H.R. 198 were included in a larger piece of health-care legislation for veterans—H.R. 2074, which passed the House on October 11, 2011, by

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<sup>25</sup> Senior Airman Michael Malarsie Act, Sen. 3689, 112th Cong. (Dec. 18, 2012) (referred to Committee on Veterans' Affairs) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3689is/pdf/BILLS-112s3689is.pdf> (accessed Apr. 13, 2013)).

<sup>26</sup> *Id.* at § 2.

<sup>27</sup> *Id.* at § 3. Grant recipients shall use the funds to provide assistance dogs for members and veterans who have disabilities, which include blindness or visual impairment, loss of limb, paralysis or significant mobility issues, loss of hearing, and any other disability approved for the program by the Secretary of Defense and the Secretary of Veterans' Affairs. *Id.* at § 3(e)(2).

<sup>28</sup> *Id.* at § 2(6).

<sup>29</sup> *Id.* at § 2(5).

<sup>30</sup> *Id.* at § 2(2)–(3).

<sup>31</sup> Sen. 3689, 112th Cong. at § 2(8).

<sup>32</sup> Veterans Dog Training Therapy Act, H.R. 198, 112th Cong. (July 25, 2011) (subcommittee hearings held) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr198ih/pdf/BILLS-112hr198ih.pdf> (accessed Apr. 13, 2013)); Veterans Dog Training Therapy Act, H.R. 183, 113th Cong. (Jan. 22, 2013) (referred to Subcommittee on Health) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr183ih/pdf/BILLS-113hr183ih.pdf> (accessed Apr. 13, 2013)); Press Release, Off. of Congressman Michael Grimm, *Rep. Grimm's Veterans Dog Training Therapy Act Passes the House* (Oct. 11, 2011) (available at <http://grimm.house.gov/press-release/rep-grimm's-veterans-dog-therapy-training-act-passes-house> (accessed Apr. 13, 2013)).

a two-thirds affirmative voice vote—the legislation did not move forward in the Senate.<sup>33</sup>

The Veterans Act directs the Secretary of Defense to create a three- to five-year pilot program to assess the effectiveness of training dogs as service animals in support of military veterans struggling with post-traumatic stress disorder (PTSD) and other post-deployment mental health conditions.<sup>34</sup> A significant percentage of returning veterans suffer from PTSD.<sup>35</sup> Extensive anecdotal evidence suggests that veterans benefit from the companionship of therapy dogs.<sup>36</sup> Clinical studies are being conducted to evaluate the effectiveness of therapy dogs, but definitive evidence is not yet available.<sup>37</sup> The Veterans Act provides a mechanism for establishing that evidence.<sup>38</sup>

An advocacy group, Vietnam Veterans of America, raised two issues that the proposed legislation failed to address: First, it questioned what certification standards would be used to ensure the ability of the dogs to provide the essential skills specified in the proposed legislation; and, second, it asked what quantitative metric would be used in evaluating the effectiveness of service dogs as therapy in the pilot pro-

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<sup>33</sup> Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) H.R.2074 CRS Summary*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02074:@@D&summ2=m&> (accessed Apr. 13, 2013); Veterans Sexual Assault Prevention and Health Care Enhancement Act, H.R. 2074, 112th Cong. §§ 5–6 (Oct. 12, 2011) (referred to the Committee on Veterans' Affairs) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2074rfs/pdf/BILLS-112hr2074rfs.pdf> (accessed Apr. 13, 2013)); see also 157 Cong. Rec. H6692–3 (daily ed. Oct. 11, 2011) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2011-10-11/pdf/CREC-2011-10-11-pt1-PgH6689.pdf> (accessed Apr. 13, 2013)) (Representative Grimm enthusiastically supported inclusion of H.R. 198 in H.R. 2074. H.R. 1154, the Equal Treatment for Service Dogs Act, was also included in H.R. 2074.).

<sup>34</sup> H.R. 198, 112th Cong. at § 2(a)–(b).

<sup>35</sup> Natl. Insts. of Health, NIH MedlinePlus, *PTSD: A Growing Epidemic*, <http://www.nlm.nih.gov/medlineplus/magazine/issues/winter09/articles/winter09pg10-14.html> (Winter 2009) (accessed Apr. 13, 2013).

<sup>36</sup> Elliott McLaughlin, CNN, *War Vets Find Solace in Four-Legged Friends*, <http://www.cnn.com/2012/11/09/us/cnnheroes-ptsd-service-dogs/index.html> (Nov. 12, 2012) (accessed Apr. 13, 2013); see also Rebecca Huss, *Why Context Matters: Defining Service Animals under Federal Law*, 37 Pepp. L. Rev. 1163, 1168–69 (2010) (discussing the positive health benefits of companion animals and service animals).

<sup>37</sup> Rebecca Ruiz, NBC News, *Veterans Rave about PTSD Service Dogs but Research Lags*, [http://usnews.nbcnews.com/\\_news/2012/08/03/12971693-veterans-rave-about-ptsd-service-dogs-but-research-lags?lite](http://usnews.nbcnews.com/_news/2012/08/03/12971693-veterans-rave-about-ptsd-service-dogs-but-research-lags?lite) (Mar. 8, 2013) (accessed Apr. 13, 2013); see also Steve Wood, Army Times, *Trained Dogs Help Veterans Suffering From PTSD*, <http://www.armytimes.com/news/2012/11/gannett-dogs-help-veterans-cope-ptsd-111212/> (Nov. 3, 2012) (accessed Apr. 13, 2013) (“Dogs trained to support vets with PTSD are considered service dogs under the American Disabilities Act, but they are not covered by VA benefits because the department says there is not enough scientific evidence to prove the effectiveness of dogs to treat and heal PTSD. Training a service dog is not cheap, costing between \$10,000 and \$20,000 to protect a PTSD sufferer, about \$25,000 to assist the disabled, and as much as \$60,000 to lead the blind. Only four out of 10 canines make it as a guide dog.”).

<sup>38</sup> H.R. 198, 112th Cong. at § 2(g).

gram.<sup>39</sup> Another advocacy group, Veterans of Foreign Wars (VFW), opposed H.R. 198 in the July 25, 2011 subcommittee hearing, stating a preference for cooperative work with private-sector organizations under congressional oversight, rather than the proposed pilot program within medical centers operated by the U.S. Department of Veterans' Affairs (VA).<sup>40</sup> When asked to address the VFW statement, Representative Grimm—the sponsor of the bill—responded that once the proposed pilot program was established, it could be expanded to include community participation, which he supports.<sup>41</sup> He stated that a primary purpose of the legislation was to document the effectiveness of therapy dogs as a healing tool for veterans, and the ability of the VA to control the environment of the initial program was essential to that end.<sup>42</sup>

### III. BILLS AMENDING THE ANIMAL WELFARE ACT

In 2012, both the Senate and the House considered Farm Bill legislation that incorporated amendments to the Animal Welfare Act (AWA), but only the Senate passed its respective bill.<sup>43</sup> One provision, contained only in the Senate version, would amend the AWA definition of “exhibitors”;<sup>44</sup> another, contained in both the Senate and House versions, would criminalize attendance at animal fights.<sup>45</sup> Although the 112th Congress failed to pass a comprehensive Farm Bill, the “exhibitor” amendment ultimately passed Congress and become law as a free-standing bill.<sup>46</sup> The animal-fight attendance provision failed to pass both chambers in 2012, and remains an unresolved issue to be addressed by the 113th Congress.<sup>47</sup>

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<sup>39</sup> *Legislative Hearing on H.R. 198*, *supra* n. 23, at 16–17 (July 25, 2011) (noting that there are eleven essential skills listed in the legislation for the therapy dogs to acquire).

<sup>40</sup> *Id.* at 13–14.

<sup>41</sup> *Id.* at 9.

<sup>42</sup> *Id.*

<sup>43</sup> Federal Agriculture Reform and Risk Management Act of 2012, H.R. 6083, 112th Cong. (Sept. 13, 2012) (as reported by House Committee on Agriculture) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr6083rh/pdf/BILLS-112hr6083rh.pdf> (accessed Apr. 13, 2013)); Agriculture Reform, Food, and Jobs Act of 2012, Sen. 3240, 112th Cong. (June 21, 2012) (as passed by Senate) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3240es/pdf/BILLS-112s3240es.pdf> (accessed Apr. 13, 2013)).

<sup>44</sup> Sen. 3240, 112th Cong. at § 12212.

<sup>45</sup> H.R. 6083, 112th Cong. at § 12303; Sen. 3240, 112th Cong. at § 12213.

<sup>46</sup> Sen. 3666, 112th Cong. (Jan. 1, 2013) (as passed by Congress) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3666enr/pdf/BILLS-112s3666enr.pdf> (accessed Apr. 13, 2013)); Pub. L. No. 112-261, 126 Stat. 2428 (2013) (available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ261/pdf/PLAW-112publ261.pdf> (accessed Apr. 13, 2013)).

<sup>47</sup> The Animal Fighting Spectator Prohibition Act was reintroduced in both chambers of the 113th Congress. H.R. 366, 113th Cong. (introduced Jan. 23, 2013) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr366ih/pdf/BILLS-113hr366ih.pdf> (accessed Apr. 13, 2013)); Sen. 666, 113th Cong. (introduced Apr. 8, 2013) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s666is/pdf/BILLS-113s666is.pdf> (accessed Apr. 13, 2013)).



A. *Congress Amends the AWA Definition of “Exhibitors”*

Congress passed a freestanding law amending the AWA by modifying the definition of “exhibitor”<sup>48</sup> to allow individuals serving as extras in movies and television to use their own pets in the production without requiring paperwork to prove the humane care of the animals.<sup>49</sup> Containing only one section, the law amends Section 2(h) of the AWA by adding “an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner[,]” as an exception to the definition of “exhibitor.”<sup>50</sup> Sponsored by Senator David Vitter (R-LA), Sen. 3666 was introduced in the Senate on December 6, 2012, and passed by unanimous consent the same day.<sup>51</sup> It was introduced

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<sup>48</sup> Prior to the passage of this bill, the AWA provision defining “exhibitor” stated [t]he term ‘exhibitor’ means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

7 U.S.C. § 2132(h) (2006).

<sup>49</sup> Sen. 3666, 112th Cong.; Pub. L. No. 112-261, 126 Stat. 2428. *See also* Ramsey Cox, The Hill: Floor Action Blog, *Senate Passes a Bill Allowing Movie Extras to Use Their Pets Without Filing Paperwork*, <http://thehill.com/blogs/floor-action/senate/271743-senate-passes-a-bill-allowing-movie-extras-to-use-their-pets-without-filing-paperwork> (Dec. 7, 2012) (accessed Apr. 13, 2013) (discussing the purpose of the bill and quoting a statement from Senator Vitter’s press secretary, Luke Bolar, who confirmed the bill’s intent by stating: “Currently, if you’re a movie extra and have your dog with you—you’re subject to burdensome paperwork and approval from a [USDA] bureaucrat. Sen. Vitter’s bill eliminates the unnecessary regulation.”).

<sup>50</sup> Sen. 3666, 112th Cong.; Pub. L. No. 112-261, 126 Stat. 2428. With the new modification, Section 2(h) of the AWA will now state:

The term ‘exhibitor’ means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, *an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner*, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

*Id.* (emphasis added); 7 U.S.C. § 2132(h).

<sup>51</sup> *Amending the Animal Welfare Act*, 158 Cong. Rec. S7688 (daily ed. Dec. 6, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-12-06/pdf/CREC-2012-12-06.pdf>)

and passed by a two-thirds vote in the House on December 31, 2012, a date notable for being the pinnacle of the “fiscal cliff” scare.<sup>52</sup>

While the Senate had no debate or discussion on the bill, the House had limited debate in which two representatives spoke in support of the bill: Representative Jim Costa (D-CA) and Representative Rick Crawford (R-AR).<sup>53</sup> Representative Costa conveyed that the intended scope of the law was to exclude the pets of individual actors from the AWA in the limited instance when the animals themselves are used as extras in the film.<sup>54</sup> Representative Costa went on to clarify: “[A]nimals that play a key movie or television role will not be affected by this legislation. They will continue to be regulated by the Animal Welfare Act.”<sup>55</sup> Both speakers stressed that the bill would relieve the U.S. Department of Agriculture (USDA) of its perceived obligation under the current AWA to regulate individual pet owners.<sup>56</sup> While this might suggest an application to all actors, a closer reading of the discussion reveals that the legislation may in fact focus only on extras.<sup>57</sup>

In addition to the uncertainty of the intended scope, this law is unique for several reasons. First, it is not clear under the AWA that actors or extras are even subject to regulations as exhibitors, and no court has ever explicitly dealt with this issue.<sup>58</sup> Second, on a practical level, the AWA extends protection to animals used in film only by requiring private parties in the business of renting “animal actors” to

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(accessed Apr. 13, 2013)) (reflecting full Senate testimony and consideration of Sen. 3666).

<sup>52</sup> *Amending the Animal Welfare Act*, 158 Cong. Rec. H7495 (daily ed. Dec. 31, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-12-31/pdf/CREC-2012-12-31-house.pdf> (accessed Apr. 13, 2013)) (reflecting full House testimony and consideration of Sen. 3666); Leigh Ann Caldwell, CBS News, *It's Official: Deal Reached on "Fiscal Cliff"*, [http://www.cbsnews.com/8301-250\\_162-57561465/its-official-deal-reached-on-fiscal-cliff/](http://www.cbsnews.com/8301-250_162-57561465/its-official-deal-reached-on-fiscal-cliff/) (Dec. 31, 2012) (accessed Apr. 13, 2013).

<sup>53</sup> In the House, Representative Crawford moved to suspend the rules and to pass the bill. Accordingly, “pursuant to the rule,” Representatives Crawford and Costa were each given twenty minutes to “control.” Both representatives made statements and then a vote was taken. 158 Cong. Rec. at H7495.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (quoting Representative Crawford’s statement that if a hired human extra “has their pet with them during the filming, the current interpretation of the Animal Welfare Act is that the extra would be designated an animal exhibitor under Federal law and must therefore be licensed, inspected, and comply with all the administrative and record-keeping requirements of the act”).

<sup>57</sup> In his statement, Representative Crawford defined extras as “people who appear in the background of film scenes and may work on the film set for a couple of hours at a time or a day or two at the most.” *Id.*

<sup>58</sup> See Vincent Rizzo, Animal Leg. & Historical Ctr., *Detailed Discussion of the Legal Protections of Animals in Filmed Media* pt. IV(A)(ii) (2012) (available at <http://animal-law.info/articles/ddusfilmanimals.htm> (accessed Apr. 13, 2013)) (“This broad interpretation of the AWA’s definition of ‘exhibitor’ could include film producers. Consequently, it can be argued that film producers may be subject to and regulated by the AWA, but neither case law nor any statute explicitly states this.”).

obtain a license from the USDA.<sup>59</sup> Finally—unlike all other animal-related legislation discussed by Congress—this law is remarkable for the lack of controversy, discussion, or even attention it received. Thus, the impact it will have on the welfare on animals used in entertainment is uncertain.<sup>60</sup>

### B. *The Animal Fighting Spectator Prohibition Act*

The Animal Fighting Spectator Prohibition Act of 2011 (Animal Fighting Act) addresses a loophole in the existing federal law<sup>61</sup> by amending the AWA to prohibit any person from knowingly attending an animal-fighting venture or knowingly causing a minor (a person under the age of 18) to attend such a venture.<sup>62</sup> Initially introduced in 2011 as Sen. 1947 and H. 2492,<sup>63</sup> the Senate version of the Animal Fighting Act was subsequently reintroduced in 2012 as an amendment to the Farm Bill in both the House<sup>64</sup> and Senate.<sup>65</sup>

The Senate passed the provision twice, both as an amendment to the Farm Bill and as a freestanding bill,<sup>66</sup> but neither piece of legisla-

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<sup>59</sup> 7 U.S.C. § 2134. “Class ‘C’ licensee (exhibitor) means a person subject to the licensing requirements under part 2 and meeting the definition of an “exhibitor” (§ 1.1), and whose business involves the showing or displaying of animals to the public.” 9 C.F.R. § 1.1 (2012). The regulations specifically exclude certain individuals from the licensing requirement, and many actors or movie producers would seem to fit under several exclusions such as: “Any person who maintains a total of three (3) or fewer breeding female dogs, cats, and/or small exotic or wild mammals . . . which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license.” *Id.* at § 2.1(3)(iii).

<sup>60</sup> It does appear, however, that given the lack of regulation and welfare standards applicable to animal actors during filming prior to this law, this law has the potential to be abused. *See Rizzo, supra* n. 58, at pt. IV (stating that although “it can be argued that film producers may be subject to and regulated by the AWA . . . [o]nly those movie producers who own, or . . . transport and receive remuneration for the animal actors, seem subject to the AWA”).

<sup>61</sup> Currently, sponsorship and promotion of animal fights, as well as buying, selling, or transporting animals to participate in fights, is federally criminalized. 7 U.S.C. § 2156.

<sup>62</sup> *Id.* The Animal Fighting Spectator Prohibition Act of 2011 amends Section 26 of the AWA. Sen. 1947, 112th Cong. § 2 (Dec. 6, 2011) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1947is/pdf/BILLS-112s1947is.pdf> (accessed Apr. 13, 2013)); H.R. 2492, 112th Cong. § 2 (July 11, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr2492ih/pdf/BILLS-112hr2492ih.pdf> (accessed Apr. 13, 2013)).

<sup>63</sup> Sen. 1947, 112th Cong.; H.R. 2492, 112th Cong. *See generally* Patrick Graves et al., Student Authors, *2011 Legislative and Administrative Review*, 18 *Animal L.* 361, 364–66 (2012) (extensively discussing Sen. 1947 and H.R. 2492).

<sup>64</sup> H.R. 6083, 112th Cong. § 12303 (Sept. 13, 2012) (as reported by House Committee on Agriculture).

<sup>65</sup> Sen. 3240, 112th Cong. at § 12213 (Senate Farm bill as passed); *see also* 158 Cong. Rec. S4351 (daily ed. June 20, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-06-20/pdf/CREC-2012-06-20-senate.pdf> (accessed Apr. 13, 2013)) (reflecting adoption of the animal-fighting prohibition as Amendment No. 2363 to the Senate Farm Bill).

<sup>66</sup> *Compare* Sen. 3240, 112th Cong. at § 12213 (Senate Farm Bill as passed) *with* Animal Fighting Spectator Prohibition Act of 2011, Sen. 1947, 112th Cong. (Dec. 4,

tion succeeded in the House.<sup>67</sup> In the Senate, the provision was included in the Farm Bill, Sen. 3240, which passed the Senate on June 21, 2012, by a vote of 64–35.<sup>68</sup> The House Agriculture Committee also approved the provision as an amendment to the Farm Bill by a vote of 26–19.<sup>69</sup> Ultimately, however, the House failed to pass Farm Bill legislation in 2012,<sup>70</sup> and the animal-fighting provision was not enacted.

Following the failure of the House Farm Bill, the Senate passed the freestanding Animal Fighting Act, Sen. 1947, by a voice vote on December 4, 2012.<sup>71</sup> The measure was subsequently sent to the House where leaders failed to call a floor vote, despite the fact that it had 228 co-sponsors, “more than half of the House.”<sup>72</sup>

The Animal Fighting Act has broad support and has been endorsed by nearly 300 national, state, and local law-enforcement agencies spanning all fifty states.<sup>73</sup> Since forty-nine states have outlawed spectatorship at animal fights,<sup>74</sup> fights generally occur in secret loca-

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2012) (freestanding bill as passed Senate) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1947es/pdf/BILLS-112s1947es.pdf> (accessed Apr. 13, 2013)).

<sup>67</sup> See Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) Sen. 1947 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01947:@@X> (accessed Apr. 13, 2013) (reflecting that the Animal Fighting Spectator Prohibition Act did not make it out of committee in the House); Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) H.R. 6083 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR06083:@@X> (accessed Apr. 13, 2013) (reflecting that the House Farm Bill did not move after being reported out of committee).

<sup>68</sup> Sen. 3240, 112th Cong. at § 12213; Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) S.3240 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN03240:@@X> (accessed Apr. 13, 2013).

<sup>69</sup> H.R. 6083, 112th Cong. at § 12303; H. Comm. on Agric., *Roll Call # 19*, <http://agriculture.house.gov/sites/republicans.agriculture.house.gov/files/pdf/legislation/FARRMRollCall19.pdf> (accessed Apr. 13, 2013).

<sup>70</sup> Jennifer Steinhauer, N.Y. Times, *Pile of Bills is Left behind as Congress Goes to Campaign*, <http://www.nytimes.com/2012/08/03/us/politics/house-passes-short-term-farm-relief-bill.html> (Aug. 2, 2012) (accessed Apr. 13, 2013) (a version of this article appeared in the national print edition on August 3, 2012, at A1 with the headline *Bills Unfinished, Congress Breaks for Campaigning*).

<sup>71</sup> Sen. 1947, 112th Cong.; see 158 Cong. Rec. S7393 (daily ed. Dec. 4, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-12-04/pdf/CREC-2012-12-04.pdf> (accessed Apr. 13, 2013)) (reflecting voice vote).

<sup>72</sup> Michael Markarian, Humane Socy. Legis. Fund, *Unfinished Business: Cracking Down on Animal Fighting Spectators*, [http://hslf.typepad.com/political\\_animal/2013/01/cracking-down-on-animal-fighting-spectators.html](http://hslf.typepad.com/political_animal/2013/01/cracking-down-on-animal-fighting-spectators.html) (Jan. 23, 2012) (accessed Apr. 13, 2013).

<sup>73</sup> *Id.*

<sup>74</sup> Stacy Fox, *khou.com, Animal Attraction: U.S. Senate Cracks down on Animal Fighting Spectators*, <http://www.khou.com/community/blogs/animal-attraction/Animal-Attraction—182159271.html> (Dec. 5, 2012) (accessed Apr. 13, 2013); cf. James Eng, NBC News, *Cockfighting: Feds Should Butt Out, Defendants Argue*, [http://usnews.nbcnews.com/\\_news/2012/01/24/10227291-cockfighting-feds-should-butt-out-defendants-argue](http://usnews.nbcnews.com/_news/2012/01/24/10227291-cockfighting-feds-should-butt-out-defendants-argue) (Jan. 24, 2012) (accessed Apr. 13, 2013) (discussing the arguments of defendants who are appealing their May 2010 federal convictions for cockfighting in South Carolina). Currently there are ten states that lack felony penalties for cockfighting. Wayne Pacelle, Humane Socy. of the U.S., *Where Does Your State Stand on Animal Welfare?*,

tions, limiting the possibility that the Animal Fighting Act would ensnare “innocent bystanders.”<sup>75</sup> Extending the prohibition to spectators is necessary because, as Wayne Pacelle, President and CEO of the Humane Society of the U.S. has stated: “Spectators are participants and accomplices who enable the crime of animal fighting, make the enterprise profitable through admission fees and wagering, and help conceal and protect the handlers and organizers.”<sup>76</sup> The Animal Fighting Act, which was reintroduced in 2013,<sup>77</sup> will enable law enforcement to impose stricter penalties on individuals who conduct or view dogfights in the presence of children.<sup>78</sup>

#### IV. AN HISTORIC ALLIANCE: THE EGG PRODUCTS INSPECTION ACT AMENDMENTS

In an historic alliance between welfare and industry groups, the Humane Society of the U.S. (HSUS) and the United Egg Producers (UEP) came together to support the Egg Products Inspection Act Amendments of 2012 (EPIAA).<sup>79</sup> HSUS joined forces with UEP after conducting a series of state-by-state campaigns to improve the welfare of egg-laying hens. Prior to the introduction of the federal legislation, HSUS had conducted a successful initiative campaign in California,<sup>80</sup>

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<http://hsus.typepad.com/wayne/2013/01/humane-state-ranking-animal-welfare.html> (Jan. 15, 2013) (accessed Apr. 13, 2013).

<sup>75</sup> Fox, *supra* n. 74.

<sup>76</sup> Press Release, Humane Socy. of the U.S., *U.S. Senate Approves Animal Fighting Amendment: Amendment Closes Loophole in Federal Law by Outlawing Attendance at Dogfights and Cockfights* (June 20, 2012) (available at [http://www.humanesociety.org/news/press\\_releases/2012/06/senate\\_approves\\_animal\\_fighting\\_amendment.html](http://www.humanesociety.org/news/press_releases/2012/06/senate_approves_animal_fighting_amendment.html) (accessed Apr. 13, 2013)).

<sup>77</sup> H.R. 366, 113th Cong. (Jan. 23, 2013) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr366ih/pdf/BILLS-113hr366ih.pdf> (accessed Apr. 13, 2013)).

<sup>78</sup> See Press Release, Off. of Congressman Tom Marino, *Marino Reintroduced Bill to Curb Animal Fighting* (Jan. 23, 2013) (available at <http://marino.house.gov/press-release/marino-reintroduced-bill-curb-animal-fighting> (accessed Apr. 13, 2013)) (“We must ensure there are consequences for those adults who take impressionable children to witness these heinous acts.”). The bill would impose a criminal penalty of one year in prison for attending a fight and would increase the penalty to three years for causing a minor to attend. *Id.*

<sup>79</sup> Press Release, Humane Socy. of the U.S., *HSUS, Egg Industry Agree to Promote Federal Standards for Hens: Historic Agreement Sets New Way Forward; Suspends Ballot Measures in Washington, Oregon* (July 7, 2011) (available at [http://www.humanesociety.org/news/press\\_releases/2011/07/egg\\_agreement.html](http://www.humanesociety.org/news/press_releases/2011/07/egg_agreement.html) (accessed Apr. 13, 2013)).

<sup>80</sup> See Cal. Gen. Election, *Official Voter Information Guide: Proposition 2 Standards for Confining Farm Animals* (2008) (available at <http://voterguide.sos.ca.gov/past/2008/general/title-sum/prop2-title-sum.htm> (accessed Apr. 13, 2013)) (providing link to text of California’s Proposition 2); Press Release, Humane Socy. of the U.S., *Californians Deliver Decisive Victory to Prevent Factory Farm Cruelty by Passing Prop 2* (Nov. 5, 2008) (available at [http://www.humanesociety.org/news/press\\_releases/2008/11/californians\\_deliver\\_decisive\\_victory\\_on\\_prop\\_2\\_110508.html](http://www.humanesociety.org/news/press_releases/2008/11/californians_deliver_decisive_victory_on_prop_2_110508.html) (accessed Apr. 13, 2013)). Notably, Proposition 2 was aimed at farm animals generally; however, since California does not have a significant veal or pork industry, the focus in that state was on egg-laying

negotiated a battery cage ban in Michigan,<sup>81</sup> and negotiated an agreement to halt construction of new battery cages in Ohio.<sup>82</sup> By 2011, HSUS was also pursuing ballot initiatives in Oregon<sup>83</sup> and Washington,<sup>84</sup> although it agreed to halt these efforts pursuant to the agree-

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hens. Jesse McKinley, N.Y. Times, *A California Ballot Measure Offers Rights for Farm Animals*, <http://www.nytimes.com/2008/10/24/us/24egg.html> (Oct. 23, 2008) (accessed Apr. 13, 2013) (a version of this article appeared in the New York print edition on October 24, 2008, at A12).

<sup>81</sup> Mich. Comp. Laws Serv. § 287.746 (Lexis 2012); Mich. H. 5127, 95th Legis., Reg. Sess. (Oct. 12, 2009) (as signed by the Governor) (available at <http://www.legislature.mi.gov/documents/2009-2010/publicact/pdf/2009-PA-0117.pdf> accessed Apr. 13, 2013)); see also Press Release, Humane Socy. of the U.S., *Barren, Cramped Cages: Life for America's Egg-Laying Hens* (Apr. 19, 2012) (available at [http://www.humanesociety.org/issues/confinement\\_farm/facts/battery\\_cages.html](http://www.humanesociety.org/issues/confinement_farm/facts/battery_cages.html) (accessed Apr. 13, 2013)) (crediting the passage of the laws, in part, to HSUS negotiations with agricultural leaders).

<sup>82</sup> Press Release, Humane Socy. of the U.S., *Landmark Ohio Animal Welfare Agreement Reached among HSUS, Ohioans for Humane Farms, Gov. Strickland, and Leading Livestock Organizations* (June 30, 2010) (available at [http://www.humanesociety.org/news/press\\_releases/2010/06/landmark\\_ohio\\_agreement\\_063010.html](http://www.humanesociety.org/news/press_releases/2010/06/landmark_ohio_agreement_063010.html) (accessed Apr. 13, 2013)). This deal was particularly significant because Ohio is the nation's second-largest producer of table eggs, after Iowa. Joel L. Green & Tadlock Cowan, *Table Egg Production and Hen Welfare: The UEP-HSUS Agreement and H.R. 3798 2* (Cong. Research Serv. May 14, 2012) (available at <http://www.fas.org/sgp/crs/misc/R42534.pdf> (accessed Apr. 13, 2013)).

<sup>83</sup> Green & Cowan, *supra* n. 82, at 6. At the beginning of Oregon's 2011 legislative session, HSUS was advocating for the passage of Sen. 805, a committee bill that would "phase out the use of battery cages" and "require producers to give each hen enough room to spread her wings." Press Release, Humane Socy. of the U.S., *Citizen Advocates Converge on Oregon's Capitol, Urge Lawmakers to Protect Animals* (Mar. 7, 2011) (available at [http://www.humanesociety.org/news/press\\_releases/2011/02/oregon\\_2011\\_humane\\_lobby\\_day\\_030711.html](http://www.humanesociety.org/news/press_releases/2011/02/oregon_2011_humane_lobby_day_030711.html) (accessed Apr. 13, 2013)). HSUS had withdrawn support by the end of the session, stating that the bill was "hijacked by the egg industry," and "essentially gutted so that it only provides nominally more space." Press Release, Humane Socy. of the U.S., *Oregon Legislature Adjourns with Important Gains for Animal Welfare* (July 1, 2011) (available at [http://www.humanesociety.org/news/press\\_releases/2011/07/oregon\\_legislature\\_adjourns\\_070111.html](http://www.humanesociety.org/news/press_releases/2011/07/oregon_legislature_adjourns_070111.html) (accessed Apr. 13, 2013)) [hereinafter HSUS Press Release, *Oregon Legislature Adjourns*]. As passed, the Oregon law authorizes the State Department of Agriculture to adopt rules designed to ensure humane confinement for egg-laying hens, and mandates that enclosures constructed or acquired after January 1, 2012, meet (or be capable of conversion to meet) the American Humane Association's standards for enriched-colony systems. Or. Sen. 805, 76th Legis. Assembly, 2011 Reg. Sess. § 4 (May 25, 2011) (as passed legislature) (available at <http://www.leg.state.or.us/11reg/measpdf/sb0800.dir/sb0805.en.pdf> (accessed Apr. 13, 2013)). HSUS criticized Sen. 805 for delaying implementation of the minimum-space standards until 2026. HSUS Press Release, *Oregon Legislature Adjourns, supra*. While the Oregon law does delay full implementation and enforcement of the conversion until 2026—containing benchmarks that are only aspirational—some facility operators have pledged to adopt the standards earlier. Press Release, Willamette Egg Farms, *Willamette Egg Farms Praises Passage of SB 805, Pledges Early Adoption of Standards* (June 14, 2011) (available at <http://www.willametteegg.com/willamette-egg-farms-praises-passage-of-sb-805-pledges-early-adoption-of-standards-2/> (accessed Apr. 13, 2013)).

<sup>84</sup> Green & Cowan, *supra* n. 82, at 6. See also Wash. S. 5487, 62d Wash. Legis., 2011 Reg. Sess. (Apr. 21, 2011) (as passed legislature) (available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Passed%20Legislature/5487-S.PL.pdf>

ment with UEP.<sup>85</sup> In part, UEP agreed to work with HSUS because the alliance would mean the end of HSUS state-by-state advocacy efforts.<sup>86</sup>

If passed, the EPIAA would be the first federal law to set welfare standards for animals while on the farm by addressing the care and treatment of egg-laying hens.<sup>87</sup> The EPIAA was sponsored by Representative Kurt Schrader (D-OR) on January 23, 2012, as H.R. 3798<sup>88</sup> and by Senator Dianne Feinstein (D-CA) on May 24, 2012, as Sen. 3239.<sup>89</sup> The EPIAA amends the Eggs Products Inspection Act<sup>90</sup> by setting standards for the housing and treatment of egg-laying hens,<sup>91</sup> setting air-quality standards,<sup>92</sup> and creating uniform labeling standards.<sup>93</sup>

Significantly, the EPIAA addresses the living conditions of millions of laying hens in the U.S.<sup>94</sup> that currently spend their entire lives

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(accessed Apr. 13, 2013)) (establishing a certification program for commercial egg-laying hen operations). Like the Oregon law, HSUS criticized the Washington legislation for “not going far enough” to improve welfare. Andrew Garber, Seattle-Times, *Sponsors Drop Hens Initiative after Accord with Egg Producers*, [http://seattletimes.com/html/localnews/2015540939\\_chickens08m.html](http://seattletimes.com/html/localnews/2015540939_chickens08m.html) (July 7, 2011) (accessed Apr. 13, 2013).

<sup>85</sup> Green & Cowan, *supra* n. 82, at 6.

<sup>86</sup> See Gene Gregory, PowerPoint, *UEP-HSUS Initiative for Federal Legislation—What it Means to the Industry* slides 3–9 (United Egg Producers) (U.S. Poultry & Egg Assn. Future of Am. Egg Indus. Conf.) (available at <http://egg-cite.com/documents/GeneGregoryPresentation.pdf>) (accessed Apr. 13, 2013)) (noting UEP’s concern with the availability of state ballot initiatives and their impact upon the free flow of eggs).

<sup>87</sup> Jonathan R. Lovvorn & Nancy Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *Animal L.* 149, 151–52 (2009); David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House—Animals, Agribusiness, and the Law: A Modern American Fable*, in *Animal Rights: Current Debates and New Directions* 205–07 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (discussing how the scope of federal law does not include protections for farm animals on the farm).

<sup>88</sup> H.R. 3798, 112th Cong. (Jan. 23, 2012) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3798ih/pdf/BILLS-112hr3798ih.pdf>) (accessed Apr. 13, 2013)). The House bill was co-sponsored by Representative Elton Gallegly (R-CA), Representative Sam Farr (D-CA), and Representative Jeff Denham (R-CA). *Id.*

<sup>89</sup> Sen. 3239, 112th Cong. (May 24, 2012) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3239is/pdf/BILLS-112s3239is.pdf>) (accessed Apr. 13, 2013)); see also Govtrack.us, *Sen. 3239 (112th): Egg Products Inspection Act Amendments of 2012*, <http://www.govtrack.us/congress/bills/112/s3239> (accessed Apr. 13, 2013) (showing co-sponsorship of Sen. 3239 by nineteen senators).

<sup>90</sup> Egg Products Inspection Act, 21 U.S.C. §§ 1031–1056 (2006).

<sup>91</sup> H.R. 3798, 112th Cong. at § 2(b)(7A)(a)–(b); Sen. 3239, 112th Cong. at § 2(b)(7A)(a)–(b) (providing for environmental enrichments and specified amounts of floor space).

<sup>92</sup> H.R. 3798, 112th Cong. at § 2(b)(7A)(c); Sen. 3239, 112th Cong. at § 2(b)(7A)(c) (requiring that, two years after the enactment of the law, an egg handler must provide egg-laying hens with “acceptable air quality,” defined as no more than 25 parts per 4 million of ammonia during “normal operations”).

<sup>93</sup> H.R. 3798, 112th Cong. at § 2(b); Sen. 3239, 112th Cong. at § 2(b) (requiring “adequate housing-related labeling”).

<sup>94</sup> There are approximately 338 million egg-laying hens in the U.S. U.S. Dept. of Agric., Natl. Agric. Statistics Serv., *Chicken and Eggs 2011 Summary* 6 (Feb. 2012) (available at <http://usda01.library.cornell.edu/usda/nass/ChickEgg/2010s/2012/Chick->

caged in 67 square inches of space per bird,<sup>95</sup> a space equivalent to two-thirds the size of a sheet of standard letter-size paper.<sup>96</sup> The EPIAA provides for three phase-in conversion requirements for individual floor space,<sup>97</sup> with the third and final stage—effective December 31, 2029—mandating a national cage size of 144 square inches of individual floor space per brown hen and 124 square inches of individual floor space per white hen.<sup>98</sup> There are two provisions that apply to floor space: first, a heightened standard that only a specified proportion of the hen population must meet by a given date;<sup>99</sup> and, second, a

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Egg-02-28-2012.pdf (accessed Apr. 13, 2013)) (showing that, in 2011, there were an average of 338,424,000 egg-laying hens in the U.S. during a given month). However, HSUS refers to the federal legislation as improving the lives of approximately 280 million egg-laying hens. Press Release, Humane Socy. of the U.S., *Senate Bill Introduced to Improve Housing for Egg-Laying Hens and Provide Stable Future for Egg Farmers: Egg Industry and Animal Welfare Groups Enthusiastically Support Legislation* (May 24, 2012) (available at [http://www.humanesociety.org/news/press\\_releases/2012/05/hen\\_bill\\_052412.html](http://www.humanesociety.org/news/press_releases/2012/05/hen_bill_052412.html) (accessed Apr. 13, 2013)) [hereinafter HSUS Press Release]. While only 280 million of the 338 million egg-laying hens are so-called table layers—hens producing market-type eggs—the 280 million figure could also refer to the number of egg-laying hens still confined to battery cages. See Press Release, U.S. Dept. of Agric., *Egg Production* (Aug. 23, 2010) (available at [http://www.nass.usda.gov/Statistics\\_by\\_State/Iowa/Publications/Livestock\\_Report/reports/2010/Chicken&Egg/Chick08\\_10.pdf](http://www.nass.usda.gov/Statistics_by_State/Iowa/Publications/Livestock_Report/reports/2010/Chicken&Egg/Chick08_10.pdf) (accessed Apr. 13, 2013)) (reflecting that there are 280 million “table layers” in the U.S.).

<sup>95</sup> HSUS Press Release, *supra* n. 94 (observing that the majority of hens receive 67 square inches of space but noting that up to 40 million are confined to only 48 inches); David Fraser, Joy Mench, & Suzanne Millman, *Farm Animals and Their Welfare in 2000* in *State of the Animals 2001* 87, 93 (Deborah J. Salem & Andrew N. Rowan eds., Humane Socy. Press 2001).

<sup>96</sup> An 8.5 inch by 11 inch standard sheet of paper represents 93.5 square inches of space ( $8.5 \times 11 = 93.5$ ); two-thirds of 93.5 square inches is approximately 62 square inches.

<sup>97</sup> H.R. 3798, 112th Cong. at § 2(b)(7B)(a)–(c); Sen. 3239, 112th Cong. at § 2(b)(7B)(a)–(c). The bills define “individual floor space” as “the amount of total floor space in a caging device available to each egg-laying hen in the device, which is calculated by measuring the total floor space of the caging device and dividing by the total number of egg-laying hens in the device.” H.R. 3798, 112th Cong. at § 2(a)(9)(q); Sen. 3239, 112th Cong. at § 2(a)(9)(q).

<sup>98</sup> H.R. 3798, 112th Cong. at § 2(b)(7B)(c); Sen. 3239, 112th Cong. at § 2(b)(7B)(c). See also Green & Cowan, *supra* n. 82, at 8 n. 19 (noting that brown hens tend to be larger than white hens).

<sup>99</sup> H.R. 3798, 112th Cong. at § 2(b)(7B)(a)–(c); Sen. 3239, 112th Cong. at § 2(b)(7B)(a)–(c). Both the floor-space standard and the proportion of the population subject to the requirement gradually increase over time, culminating with the full phase-in by 2029. During the first conversion phase, slated to commence six years after the date of enactment, at least 25% of commercial egg-laying hens shall be housed either in new cage devices or in existing cage devices with 102 square inches of floor space (brown hens) or 90 square inches of space (white hens). H.R. 3798, 112th Cong. at § 2(b)(7B)(a); Sen. 3239, 112th Cong. at § 2(b)(7B)(a). During the second conversion phase, beginning twelve years after the date of enactment, at least 55% of hens shall be provided with 130 square inches of floor space (brown hens) or 113 inches of floor space (white hens). H.R. 3798, 112th Cong. at § 2(b)(7B)(b); Sen. 3239, 112th Cong. at § 2(b)(7B)(b). An “existing caging device” is any caging device “continuously in use for the production of eggs in commerce up through and including December 31, 2011.” H.R. 3798, 112th Cong. at § 2(a)(8)(m); Sen. 3239, 112th Cong. at § 2(a)(8)(m). A “new caging



more relaxed standard that will apply to *all* egg-laying hens by the deadline, with different standards for new and existing caging devices.<sup>100</sup>

Producers are also obligated to provide hens with “adequate environmental enrichments,”<sup>101</sup> which are defined as adequate “perch space, dust bathing or scratching areas, and nest space.”<sup>102</sup> Again, however, the requirement is phased in over time and features differing standards for new and existing devices.<sup>103</sup> All existing caging devices must provide such enrichments within fifteen years of enactment, but for new caging devices, the deadline is nine years.<sup>104</sup>

The EPIAA also establishes uniform federal standards for labeling on all egg cartons, which must specify the type of housing used to produce the eggs.<sup>105</sup> This is important because it would standardize defi-

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device” is one that was not in such use prior to December 31, 2011. H.R. 3798, 112th Cong. at § 2(a)(10)(u); Sen. 3239, 112th Cong. at § 2(a)(10)(u).

<sup>100</sup> H.R. 3798, 112th Cong. at § 2(b)(7A)(b); Sen. 3239, 112th Cong. at § 2(b)(7A)(b). Within four years of enactment of the law, all egg-laying hens housed in existing caging devices must have 76 square inches of floor space (brown hens) or 67 square inches (white hens). H.R. 3798, 112th Cong. at § 2(b)(7A)(b)(1)(A); Sen. 3239, 112th Cong. at § 2(a)(7A)(b)(1)(A). Within fifteen years after enactment, the benchmark jumps to 144 square inches and 124 square inches, respectively. H.R. 3798, 112th Cong. at § 2(b)(7A)(b)(1)(B); Sen. 3239, 112th Cong. at § 2(b)(7A)(b)(1)(B). For new caging devices, the standard is slightly higher. Within three years of enactment, all egg-laying hens housed in new caging devices must have 90 square inches (brown hens) or 78 square inches (white hens). H.R. 3798, 112th Cong. at § 2(b)(7A)(b)(2)(A); Sen. 3239, 112th Cong. at § 2(b)(7A)(b)(2)(A). The benchmark increases at the six year mark (to 102 square inches and 90 square inches, respectively), the nine year mark (to 116 and 101 square inches), the twelve year mark (to 130 and 113 square inches), and the fifteen year mark (to 144 and 124 square inches). H.R. 3798, 112th Cong. at § 2(b)(7A)(b)(2)(B)–(E); Sen. 3239, 112th Cong. at § 2(b)(7A)(b)(2)(B)–(E). Caging devices in the state of California are also subject to their own standard. H.R. 3798, 112th Cong. at § 2(b)(7A)(b)(3); Sen. 3239, 112th Cong. at § 2(b)(7A)(b)(3).

<sup>101</sup> H.R. 3798, 112th Cong. at § 2(b)(7A)(a); Sen. 3239, 112th Cong. at § 2(b)(7A)(a).

<sup>102</sup> H.R. 3798, 112th Cong. at § 2(a)(6)(a); Sen. 3239, 112th Cong. at § 2(a)(6)(a). This provision continues by stating that enrichments will be “defined by the Secretary of Agriculture, based on the best available science, including the most recent studies available at the time that the Secretary defines the term. The Secretary shall issue regulations defining this term not later than January 1, 2017, and the final regulations shall go into effect on December 31, 2018.” H.R. 3798, 112th Cong. at § 2(a)(6)(a); Sen. 3239, 112th Cong. at § 2(a)(6)(a).

<sup>103</sup> See H.R., 112th Cong. 3798 at § 2(b)(7A)(a)(1)–(2); Sen. 3239, 112th Cong. at § 2(b)(7A)(a)(1)–(2) (requiring that “new” caging devices provide adequate enrichments within nine years after enactment; “existing” caging devices must comply within fifteen years). Again, California is subject to a separate standard; California cages must offer adequate enrichments no later than December 31, 2018. H.R. 3798, 112th Cong. at § 2(b)(7A)(a)(3); Sen. 3239, 112th Cong. at § 2(b)(7A)(a)(3).

<sup>104</sup> H.R. 3798, 112th Cong. at § 2(b)(7A)(a)(3); Sen. 3239, 112th Cong. at § 2(b)(7A)(a)(3).

<sup>105</sup> H.R. 3798, 112th Cong. at § 2(d) (requiring “adequate housing-related labeling”); Sen. 3239, 112th Cong. at § 2(d) (same). “Adequate housing-related labeling” is defined as “a conspicuous, legible marking on the front or top of a package of eggs accurately indicating the type of housing that the egg-laying hens were provided during egg production.” H.R. 3798, 112th Cong. at § 2(a)(6)(b); Sen. 3239, 112th Cong. at § 2(a)(6)(b).

nitions of “eggs from free-range hens,” “eggs from cage-free hens,” “eggs from enriched cages,” and “eggs from caged hens.”<sup>106</sup> Further, the transport and sale of eggs or egg products that fail to meet these requirements are prohibited.<sup>107</sup>

There has been substantial criticism of the EPIAA from a segment of the animal-welfare community and from members of the meat industry, albeit for very different reasons. Criticism from the animal-welfare community, led by the Humane Farming Association (HFA), focuses on the fact that the EPIAA would preempt state initiatives to establish stricter floor-space or enrichment regulations on egg producers because it contains a provision expressly forbidding the enactment of state or local laws with alternate restrictions.<sup>108</sup> Since federal law will trump state laws regulating egg production, even if they are more stringent than the EPIAA, state laws currently in force will be rendered inoperative.<sup>109</sup> Bradley Miller, national director of HFA, also criticized HSUS for inconsistency in its support of state initiatives in Oregon and Washington prior to aligning with UEP and backing the

<sup>106</sup> H.R. 3798, 112th Cong. at § 2(a)(6)(b)(1)–(4); Sen. 3239, 112th Cong. at § 2(a)(6)(b)(1)–(4). The first designation, “eggs from free-range hens,” would indicate that the hens were, during egg production, “not housed in caging devices” and “provided with outdoor access.” H.R. 3798, 112th Cong. at § 2(a)(6)(b)(1); Sen. 3239, 112th Cong. at § 2(a)(6)(b)(1). The second designation, “eggs from cage-free hens,” would indicate that the hens were, during egg production, “not housed in caging devices.” H.R. 3798, 112th Cong. at § 2(a)(6)(b)(2); Sen. 3239, 112th Cong. § 2(a)(6)(b)(2). The third designation, “eggs from enriched cages,” would indicate that the hens were, during egg production, housed in caging devices with “adequate environmental enrichments” and allocated a minimum of either 116 square inches of floor space (brown hen) or 101 square inches (white hen.) H.R. 3798, 112th Cong. at § 2(a)(6)(b)(3); Sen. 3239, 112th Cong. at § 2(a)(6)(b)(3). Finally, the fourth designation, “eggs from caged hens” indicates that the hens were confined in caging devices that do not meet the enriched colony standard. H.R. 3798, 112th Cong. at § 2(a)(6)(b)(4); Sen. 3239, 112th Cong. at § 2(a)(6)(b)(4).

<sup>107</sup> H.R. 3798, 112th Cong. at § 3(a)(2)(c); Sen. 3239, 112th Cong. at § 3(a)(2)(c).

<sup>108</sup> The bill expressly provides that “[r]equirements within the scope of this chapter with respect to minimum floor space allotments or enrichments for egg-laying hens housed in commercial egg production which are in addition to or different than those made under this chapter may not be imposed by any State or local jurisdiction . . . .” H.R. 3798, 112th Cong. at § 4(c); Sen. 3239, 112th Cong. at § 4(c); Press Release, Humane Farming Assn., *Animal Organizations Intensify Opposition to Egg Bill (H.R. 3798) in Anticipation of Senate Version* (Apr. 18, 2012) (available at <http://www.hfa.org/pr012412.html> (accessed Apr. 13, 2013)) [hereinafter HFA Press Release].

<sup>109</sup> Currently, five U.S. states (California, Michigan, Ohio, Oregon, and Washington) have laws prescribing floor space standards for laying hens in some regard. *Supra* nn. 80–84 and accompanying text. While the standards set by the EPIAA match or exceed the state standards in Oregon, Washington, and Ohio, they would replace the standards established in California by Proposition 2: California has stricter requirements mandating that hens have enough room to spread their wings (believed to be 1.5 square feet or 216 square inches) which is significantly more space than the standard in the EPIAA (124 or 144 square inches). Laura Allen, Animal Law Coalition, *Senate Version of Egg Products Bill Is Introduced*, <http://www.animallawcoalition.com/farm-animals/article/1679> (May 25, 2012) (accessed Apr. 13, 2013).

EPIAA.<sup>110</sup> Opponents of the bill also complain that it is a way of prohibiting local groups from tailoring legislation to reflect animal-welfare values in the future.<sup>111</sup>

On the other hand, some members of the egg industry have balked at the presumed high costs of compliance; estimates for full implementation of the EPIAA range from \$4 billion (from HSUS and UEP) to \$10 billion (from opponents of the bill).<sup>112</sup> In response, Gene Gregory, President of UEP through 2012, argues:

Egg farmers believe a single national standard is the only way to shape their own future as sustainable, family-owned businesses. It is the only way to have some control over their own destiny and avoid a bleak future of overlapping, inconsistent, unworkable, state-based animal welfare standards that will result from ballot initiatives our industry cannot win even if we raise millions of dollars to try to educate the public, as we did in California in 2008.<sup>113</sup>

The EPIAA was also opposed by the American Farm Bureau Federation, the National Pork Producers Council, and the National Cattlemen's Beef Association, which object to the precedent of establishing expensive federal animal-housing standards.<sup>114</sup> Although the proposed federal legislation would only apply to the egg industry, other industry players—such as those who employ sow gestation crates—are concerned that other meat- and dairy-production sectors could be next.<sup>115</sup> Chad Gregory, who succeeded his father as the UEP president in 2013, attempted to negate these concerns by enumerating examples of federal restrictions that are narrowly tailored to avoid impacting related

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<sup>110</sup> HFA Press Release, *supra* n. 108; Dan Wheat, Capital Press, *Egg Bill Union Silent*, <http://www.capitalpress.com/content/djw-eggbills-112712> (Dec. 27, 2012) (accessed Apr. 13, 2013). Others in Oregon were also critical of the HSUS decision to endorse enriched colony cages, including state lawmakers and the Oregon Humane Society, who backed the passage of Oregon's proposed legislation, Sen. 805. See Press Release, Or. Humane Socy., *Oregon's Hen Legislation Becomes National Model* (July 7, 2011) (available at [http://www.oregonhumane.org/news/stories/Hen\\_Legislation\\_Goes\\_National.asp](http://www.oregonhumane.org/news/stories/Hen_Legislation_Goes_National.asp) (accessed Apr. 13, 2013)) (describing HSUS's support of the federal legislation as a "stunning reversal"); Press Release, Off. of the Or. Sen. Pres., *Statement by Senate President Peter Courtney on National Agreement to Improve Standards for Egg-Laying Hens* (July 7, 2011) (available at [http://www.leg.state.or.us/press\\_releases/courtney\\_070711.html](http://www.leg.state.or.us/press_releases/courtney_070711.html) (accessed Apr. 13, 2013)) (crediting Sen. 805 and the Washington legislation with the development of a new national standard).

<sup>111</sup> Helena Bottemiller, Food Safety News, *Animal Rights Groups Argue against Egg Bill*, <http://www.foodsafetynews.com/2012/06/animal-rights-groups-organize-against-egg-bill> (June 14, 2012) (accessed Apr. 13, 2013) (discussing the opposition of HFA, Friends of Animals, United Poultry Concerns, Action for Animals, and Last Chance for Animals); Humane Farming Assn., *Stop the Rotten Egg Bill*, <http://stoptherotteneggbill.org> (accessed Apr. 13, 2013).

<sup>112</sup> Green & Cowan, *supra* n. 82, at 13.

<sup>113</sup> *Id.* at 11–12.

<sup>114</sup> Dan Charles, Pub. Broad. Serv., *U.S. Pig and Cattle Producers Trying to Crush Egg Bill*, <http://www.npr.org/blogs/thesalt/2012/07/10/156551903/pig-and-cattle-producers-trying-to-crush-egg-bill> (July 11, 2012) (accessed Apr. 13, 2013); Wheat, *supra* n. 110.

<sup>115</sup> Green & Cowan, *supra* n. 82, at 13.

industries, such as price supports for dairy, but not beef, even though both products come from cattle.<sup>116</sup>

H.R. 3798 was referred to the Subcommittee on Livestock, Dairy, and Poultry, where it remained at the end of the 112th Congress; the Senate version did not advance beyond the Agriculture, Nutrition, and Forestry Committee.<sup>117</sup> A similar bill was reintroduced in the 113th Congress on April 25, 2013, as H.R. 1731 and Sen. 820.<sup>118</sup>

#### V. LIVESTOCK GRAZING ON PUBLIC LANDS: THE GRAZING IMPROVEMENT ACT OF 2012 AND THE RURAL ECONOMIC VITALIZATION ACT OF 2011

Livestock grazing on public lands is a hotly contested issue. In Congress, the national conflict over grazing became evident in the introduction of two bills that both addressed the practice of public-lands grazing, but in vastly different ways. One bill focused on facilitating and streamlining the current permit system; the other focused on phasing it out. The Grazing Improvement Act of 2012 sought to streamline the existing permit system by eliminating the need for environmental review and doubling the duration of public-lands-grazing permits.<sup>119</sup> The other bill, the Rural Economic Vitalization Act of 2011 (REVA), proposed an incentive program to entice ranchers to stop grazing on public lands over time.<sup>120</sup>

<sup>116</sup> Chad Gregory, PowerPoint, *Egg Bill Update*, slide 24 (2012 Pa. Poultry Sales & Serv. Conf. & 84th N.E. Conf. on Avian Diseases Sept. 26, 2012) (available at <http://extension.psu.edu/animals/poultry/conferences/pssc-necad/presentations/2012/general-session/egg-bill-update/> (accessed Apr. 13, 2013)) (describing different packing restrictions for red meat and poultry, regulations unique to the pork industry, different civil authority exercised by the USDA over the egg and pork industries, and environmental restrictions limited to the pork industry).

<sup>117</sup> See Lib. Cong., THOMAS, *Bill Summary & Status: 112th Cong. (2011–2012): H.R. 3798 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03798:@@X> (accessed Apr. 13, 2013) (reflecting that the last action was the subcommittee referral); See Lib. Cong., THOMAS, *Bill Summary & Status: 112th Cong. (2011–2012): S. 3239 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN03239:@@X> (accessed Apr. 13, 2013) (reflecting that the last action was committee hearings).

<sup>118</sup> H.R. 1731, 113th Cong. (Apr. 25, 2013) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr1731ih/pdf/BILLS-113hr1731ih.pdf> (accessed May 27, 2013)); Sen. 820, 113th Cong. (Apr. 25, 2013) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s820is/pdf/BILLS-113s820is.pdf> (accessed May 27, 2013)); see also Press Release, Humane Socy. of the U.S., *Federal Bill Introduced to Improve Housing for Egg-laying Hens and Provide Stable Future for Egg Farmers* (Apr. 25, 2013) (available at [http://www.humanesociety.org/news/press\\_releases/2013/04/egg-products-inspection-act-2013-042513.html](http://www.humanesociety.org/news/press_releases/2013/04/egg-products-inspection-act-2013-042513.html) (accessed May 27, 2013)) (describing the new legislation as “similar to S. 3239 and H.R. 3798 from the 112th Congress”).

<sup>119</sup> Grazing Improvement Act of 2012, H.R. 4234, 112th Cong. (Mar. 21, 2012) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4234ih/pdf/BILLS-112hr4234ih.pdf> (accessed Apr. 13, 2013)).

<sup>120</sup> Rural Economic Vitalization Act, H.R. 3432, 112th Cong. (Nov. 15, 2011) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3432ih/pdf/BILLS-112hr3432ih.pdf> (accessed Apr. 13, 2013)).

Those who favor continued public-lands grazing introduced legislation designed to promote and facilitate the existing federal permit system. On March 21, 2012, Representative Raúl Labrador (R-ID) introduced the Grazing Improvement Act of 2012, H.R. 4234,<sup>121</sup> the companion bill to Sen. 1129, which was initially introduced on May 26, 2011, by Senator John Barrasso (R-WY).<sup>122</sup> Both bills introduced measures to expand grazing of domestic livestock on public lands under the current federal permit system.<sup>123</sup> H.R. 4234 and Sen. 1129 would extend the term of grazing permits from ten to twenty years, and encourage the use of categorical exclusions to avoid triggering the environmental review requirements of the National Environmental Policy Act (NEPA) when new permits are issued or existing permits are transferred.<sup>124</sup> When first introduced, H.R. 4234 only excluded grazing transfers or renewals that were identical to prior grazing or contained only “minor modifications” from NEPA oversight.<sup>125</sup> However, the final version of the bill, as reported to the House Committee on Natural Resources on June 15, 2012, would exempt a much broader class of activities from the requirement to prepare an environmental analysis under NEPA.<sup>126</sup>

Because the Grazing Improvement Act would extend the term of grazing permits and exempt many grazing allotments from environmental review, conservation groups were critical of its potential effects on wildlife and natural resources.<sup>127</sup> In addition, environmental

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<sup>121</sup> H.R. 4234, 112th Cong.

<sup>122</sup> Grazing Improvement Act of 2011, Sen. 1129, 112th Cong. (May 26, 2011) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1129is/pdf/BILLS-112s1129is.pdf> (accessed Apr. 13, 2013)).

<sup>123</sup> Press Release, Off. of Congressman Raúl Labrador, *Labrador's Grazing Improvement Act Passes House* (June 19, 2012) (available at <http://labrador.house.gov/index.cfm?sectionid=49&itemid=663> (accessed Apr. 13, 2013)) [hereinafter Congressman Labrador Press Release].

<sup>124</sup> *Id.*

<sup>125</sup> H.R. 4234, 112th Cong. at § 405(e) (Mar. 21, 2012) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4234ih/pdf/BILLS-112hr4234ih.pdf> (accessed Apr. 13, 2013)) (“The renewal, reissuance, or transfer of a grazing permit or lease by the Secretary concerned shall be categorically excluded from the requirement to prepare an environmental analysis if the decision continues the current grazing management of the allotment. . . . If the renewal, reissuance, or transfer of a grazing permit or lease by the Secretary concerned contains only minor modifications from the grazing permit or lease that is the subject of the renewal, reissuance, or transfer, the grazing permit or lease shall be categorically excluded from the requirement to prepare an environmental analysis if [certain conditions are met].”).

<sup>126</sup> H.R. 4234, 112th Cong. § 405(h)(1)–(2) (June 15, 2012) (as amended) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr4234rh/pdf/BILLS-112hr4234rh.pdf> (accessed Apr. 13, 2013)) (“The National Environmental Policy Act of 1969 shall not apply to the following: (1) Crossing and trailing authorizations of domestic livestock; (2) Transfer of grazing preference.” (internal quotation marks and citation omitted)).

<sup>127</sup> See e.g. Sierra Club, *Oppose the Grazing Improvement Act!*, <https://secure.sierraclub.org/site/Advocacy?cmd=display&page=UserAction&id=8443> (accessed Apr. 13, 2013); Mark Salvo, Wild Earth Guardians, *Oppose Grazing Reform Bill, Support Grazing Permit Retirement*, [http://www.wildearthguardians.org/site/MessageViewer?em\\_id=](http://www.wildearthguardians.org/site/MessageViewer?em_id=)

groups were concerned that, while the Grazing Improvement Act would provide livestock producers with a special process to appeal adverse grazing decisions, it would deny members of the public the opportunity to challenge grazing decisions by the Bureau of Land Management and the Forest Service that may have been detrimental to the environment.<sup>128</sup>

The Grazing Improvement Act of 2012 was included in H.R. 2578, the Conservation and Economic Growth Act.<sup>129</sup> The Conservation and Economic Growth Act passed the House on June 19, 2012, by a vote of 232–188.<sup>130</sup> Upon passing the House, it was received in the Senate and referred to the Committee on Energy and Natural Resources, where no further action was taken.<sup>131</sup>

Across the aisle, Representative Adam Smith (D-WA) introduced REVA, H.R. 3432, to begin the process of phasing out public-lands grazing.<sup>132</sup> By allowing third parties to compensate livestock producers for the return and retirement of existing grazing allotments, REVA would establish a financial incentive for ranchers to voluntarily end livestock grazing on public lands.<sup>133</sup> When introduced, REVA was lauded for offering an economically sound resolution to the current permit system of livestock grazing on federal public lands,<sup>134</sup> which costs taxpayers \$115 million annually.<sup>135</sup> The bill would gradually phase out grazing on public lands by allowing groups or individuals

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7721.0 (accessed Apr. 13, 2013) (encouraging members to oppose the bill because it “would extend the term of grazing permits and leases from ten to twenty years; exempt many grazing allotments from environmental review; and provide grazers a special process to appeal adverse grazing decisions, while denying the public the same process to challenge decisions that may harm the environment”).

<sup>128</sup> Sierra Club, *supra* n. 127; Salvo, *supra* n. 127.

<sup>129</sup> Congressman Labrador Press Release, *supra* n. 123.

<sup>130</sup> Lib. Cong., THOMAS, *Bill Summary & Status, 112th Cong. (2011–2012), H.R. 2578, All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR02578:@@X> (accessed Apr. 13, 2013).

<sup>131</sup> *Id.*

<sup>132</sup> H.R. 3432, 112th Cong. at preamble (stating that the purpose of the bill is “[t]o authorize voluntary grazing permit retirement on Federal lands managed by the Department of Agriculture or the Department of the Interior where livestock grazing is impractical, and for other purposes”).

<sup>133</sup> *Id.* at § 2; Press Release, Off. of Congressman Adam Smith, *Smith Introduces the Rural Economic Vitalization Act of 2011 (REVA)* (Nov. 16, 2011) (available at <http://adamsmith.house.gov/news/documentsingle.aspx?DocumentID=269150> (accessed Apr. 13, 2013)) [hereinafter Congressman Smith Press Release].

<sup>134</sup> See Congressman Smith Press Release, *supra* n. 133 (stating that the “legislation opens the door for private solutions to a long-standing problem that costs taxpayers millions and has prevented public land ranchers from efficiently utilizing resources available to them.”); see e.g. Natl. Wolfwatcher Coalition, *National Wolfwatcher Coalition Supports H.R. 3432: REVA*, [https://www.popvox.com/orgs/wolfwatcher/\\_action/4028](https://www.popvox.com/orgs/wolfwatcher/_action/4028) (accessed Apr. 13, 2013); Salvo, *supra* n. 127 (showing examples of conservation and wildlife groups lending positive support to REVA).

<sup>135</sup> Govt. Accountability Off. Rpt. to Cong. Requesters, *Livestock Grazing: Federal Expenditures and Receipts Vary, Depending on the Agency and the Purpose of the Fee Charged*, GAO-05-869 at 7 (Sept. 2005) (available at <http://www.gao.gov/new.items/d05869.pdf> (accessed Apr. 13, 2013)).

who purchase permits to retire the purchased allotment. Additionally, it would prohibit the federal government from authorizing new grazing on the retired allotment.<sup>136</sup> In the past, the federal government has authorized buy-out provisions for third parties within the 25-million acre California Desert Conservation Area, and for allotments where domestic sheep graze in the presence of bighorn sheep in the West.<sup>137</sup> Like these past buy-outs, REVA would allow ranchers to recoup their investments in federal grazing permits<sup>138</sup> and would limit the number of permits retired each year to 100.<sup>139</sup>

REVA was unique because the impact of public-lands grazing on wildlife and the natural landscape is often underevaluated. Although cattle and sheep grazing have been a fixture of the American West since the mid-1800s,<sup>140</sup> domestic livestock can and do cause significant damage to public lands.<sup>141</sup> Grazing causes damage to soil and native vegetation, the spread of invasive plant species, water contamination, accelerated desertification, and harm to native wildlife through habitat loss and lethal predator-control.<sup>142</sup> Notwithstanding the potential benefits to wildlife that might have resulted from a nationalized system of grazing-permit retirement, REVA remained in subcommittees of the House Committee on Agriculture and the House Committee on Natural Resources at the close of the 112th Congress.<sup>143</sup>

## VI. INCREASING ACCESS TO VETERINARY MEDICINES: THE FAIRNESS TO PET OWNERS ACT

The Fairness to Pet Owners Act, H.R. 1406, would require veterinarians to provide a copy of prescriptions to clients<sup>144</sup> and forbid a

<sup>136</sup> H.R. 3432, 112th Cong. at § 4(a).

<sup>137</sup> Jodi Peterson, High County News, *Détente in the Rancher v. Environmentalist Grazing Wars?*, [http://www.hcn.org/issues/44.1/detente-in-the-rancher-v.-environmentalist-grazing-wars/print\\_view](http://www.hcn.org/issues/44.1/detente-in-the-rancher-v.-environmentalist-grazing-wars/print_view) (accessed Apr. 13, 2013).

<sup>138</sup> See H.R. 3432, 112th Cong. at § 2(2)–(6) (detailing the findings of Congress that grazing permits have become “stranded investments,” and that “[m]any permittees and lessees have indicated their willingness to end their commercial livestock grazing on Federal lands in exchange for compensation to reasonably compensate them for the effort and investment that they have made in a grazing allotment”).

<sup>139</sup> *Id.* at § 4(c).

<sup>140</sup> U.S. Dept. of the Int., Bureau of Land Mgt., *History of Public Land Livestock Grazing*, [http://www.blm.gov/nv/st/en/prog/grazing/history\\_of\\_public.html](http://www.blm.gov/nv/st/en/prog/grazing/history_of_public.html) (accessed Apr. 13, 2013).

<sup>141</sup> Ctr. for Biological Diversity, *Grazing*, [http://www.biologicaldiversity.org/programs/public\\_land/grazing/](http://www.biologicaldiversity.org/programs/public_land/grazing/) (accessed Apr. 13, 2013) (“By destroying vegetation, damaging wildlife habitats and disrupting natural processes, livestock grazing wreaks ecological havoc on riparian areas, rivers, deserts, grasslands and forests alike—causing significant harm to species and the ecosystems on which they depend.”).

<sup>142</sup> *Id.*

<sup>143</sup> Lib. Cong., *THOMAS, Bill Summary & Status, 112th Cong. (2011–2012), H.R. 3432, All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03432:@@X> (accessed Apr. 13, 2013).

<sup>144</sup> Fairness to Pet Owners Act, H.R. 1406, 112th Cong. § 2(1)(A) (Apr. 6, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1406ih/pdf/BILLS-112hr1406ih.pdf>

charge for the service.<sup>145</sup> If passed, the law would bring consistency to the existing regulatory scheme: currently, most states do not regulate veterinary prescription releases, but others require written prescriptions automatically or upon request.<sup>146</sup> Given that Americans spend \$7 billion annually on pet medications, inconsistent prescribing practices are an important issue affecting companion-animal owners.<sup>147</sup>

Veterinarians and veterinary associations vehemently opposed the bill. Veterinary associations argued that since professional ethics already require that veterinarians provide prescriptions to clients upon request, this bill represented a federally mandated “redundancy” which would be unnecessarily cumbersome to practitioners and confusing to clients.<sup>148</sup> Additionally, since the prescriptions issued by veterinarians could be filled at human pharmacies, veterinarians raised concerns that pharmacists trained in human medicine would not be qualified to dispense medications to animal patients.<sup>149</sup> At the center

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(accessed Apr. 13, 2013)) (The prescriber of an animal drug shall, “whether or not requested by the pet owner, provide to the pet owner a copy of the veterinary prescription and a written disclosure that the pet owner may fill the prescription through the prescriber (if available), or through another pharmacy determined by the pet owner.”).

<sup>145</sup> *Id.* at § 2(2)(A)(ii) (The prescriber of an animal drug may not “require payment in addition to, or as part of, the fee for an examination and evaluation as a condition of providing a copy of the veterinary prescription or verifying such prescription.”).

<sup>146</sup> Ltr. from Deborah Dubow Press, Reg. Affairs Manager, Am. Socy. for the Prevention of Cruelty to Animals, to Stephanie A. Wilkinson, Fed. Trade Commn. (Sept. 21, 2012) (available at <http://ftc.gov/os/comments/petmedsworkshop/560891-00532-84185.pdf> (accessed Apr. 13, 2013)); *see e.g.* Susan Koeppen, CBS Pittsburgh, *Shopping Around Could Save Owners Money on Pet Medications*, <http://pittsburgh.cbslocal.com/2012/11/05/shopping-around-could-save-owners-money-on-pet-medications> (Nov. 5, 2012) (accessed Apr. 13, 2013) (discussing availability of pet medication in stores and noting that veterinarians in Pennsylvania are not legally required to give patients a copy of prescriptions).

<sup>147</sup> Fed. Trade Commn., *Pet Medications Workshop*, <http://www.ftc.gov/opp/workshops/petmeds/index.shtml> (accessed Apr. 13, 2013).

<sup>148</sup> Am. Veterinary Med. Assn., YouTube, *Fairness to Pet Owners Act* (posted Apr. 24, 2012) (available at <http://youtu.be/UmNp4mJXS9Q> (accessed Apr. 13, 2013)); Am. Veterinary Med. Assn., *AVMA Continues Opposition to Fairness to Pet Owners Act*, <http://atwork.avma.org/2012/06/27/avma-continues-opposition-to-fairness-to-pet-owners-act/> (June 27, 2012) (accessed Apr. 13, 2013). These concerns raised by the AVMA ignore the practical reality that most pet owners have no knowledge of internal veterinary standards or the fact that they can ask for the prescription and take it to be filled elsewhere. For a more detailed look at this debate, *compare* Nate Smith, Vice Pres. Bus. Dev., NuSkin Enterprises, Panel Remarks, *Competition & Consumer Protection Issues in the Pet Medications Industry* 152–53 (D.C., FTC Workshop Oct. 2, 2012) (transcript available at <http://www.ftc.gov/opp/workshops/petmeds/petmedtranscript.pdf> (accessed Apr. 13, 2013)) (arguing “automatic prescription release is essential to let consumers know they have a choice”) with Dr. Wendy Hauser & Dr. Doug Aspros, Panel Remarks, *Competition & Consumer Protection Issues in the Pet Medications Industry* 209–10 (D.C., FTC Workshop Oct. 2, 2012) (transcript available at <http://www.ftc.gov/opp/workshops/petmeds/petmedtranscript.pdf> (accessed Apr. 13, 2013)) (asserting that many consumers are already aware of portability).

<sup>149</sup> *See* Dr. Paul D. Pion, Presentation, *Competition & Consumer Protection Issues in the Pet Medications Industry* 29–30, 35–36 (D.C., FTC Workshop Oct. 2, 2012) (transcript available at <http://www.ftc.gov/opp/workshops/petmeds/petmedtranscript.pdf> (ac-



of the fight, however, were financial concerns—specifically, whether or not the veterinary medicine industry should be opened to facilitate competitive pricing.<sup>150</sup>

The American Society for the Prevention of Cruelty to Animals (ASPCA) supported the Fairness to Pet Owners Act on the grounds that it would make pet care more affordable and would bring price transparency to the industry.<sup>151</sup> The ASPCA stated that cost reduction of pet medications encourages pet ownership; the correlation of human poverty to shelter-related animal euthanasia has been demonstrably impacted by the availability of low-cost veterinary care.<sup>152</sup>

Although the bill was referred to the House Energy and Commerce Committee on April 6, 2011, and no further action was taken,<sup>153</sup> the Federal Trade Commission (FTC) took an interest in the topic and held an investigative workshop entitled “Competition and Consumer Protection Issues in the Pet Medications Industry” on October 2, 2012.<sup>154</sup> FTC attention to the issue is an important development and

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cessed Apr. 13, 2013)) (“A dog is not a little person, and a cat is not a little dog.”). Specific concerns include: pharmacists with no knowledge veterinary medicine may apply familiar human standards of knowledge when making dose adjustments or drug substitutions, which can be fatal to animal patients; pharmacists may not have regular protocols for informing veterinarians when prescriptions have been altered; and lastly, pharmacists may not be liable for malpractice in the act of dispensing veterinary medicines. *Id.*; see also James F. Wilson, *Risks Associated with Prescriptions and Purchases of Pet Medications from Sources Other Than Veterinarians* ¶ 2 (Sept. 5, 2012) (available at <http://ftc.gov/os/comments/petmedsworkshop/560891-00258-83627.pdf> (accessed Apr. 13, 2013)) (public comment to the FTC Pet Medication Workshop on problems of pharmacist and veterinarian liability, and the lack of communication between the professions).

<sup>150</sup> Rene Letourneau, *Billions of Dollars at Stake as Pet Medication Controversy Reaches FTC*, <http://www.healthcarefinancenews.com/news/billions-dollars-stake-pet-medication-controversy-reaches-ftc> (Oct. 23, 2012) (accessed Apr. 13, 2013). For example, one concern raised by veterinarians is that encouraging price competition will be detrimental to the small-business aspect of a practice if they are required to carry obscure and expensive pet medicines, which are likely to expire before they are purchased, while less expensive items that might otherwise balance out those losses are allowed to be sold elsewhere. See e.g. Elizabeth Baird, *Re: Request for Comments for the Workshop on Pet Medications Issues* (available at <http://www.ftc.gov/os/comments/petmedsworkshop/560891-00289-83677.pdf> (accessed Apr. 13, 2013)) (detailing the negative impacts the Fairness to Pet Owners Act would have on veterinarians).

<sup>151</sup> Deborah Press, Reg. Affairs Manager, Am. Socy. for the Prevention of Cruelty to Animals, Panel Remarks, *Competition & Consumer Protection Issues in the Pet Medications Industry* 163 (D.C., FTC Workshop Oct. 2, 2012) (transcript available at <http://www.ftc.gov/opp/workshops/petmeds/petmedtranscript.pdf> (accessed Apr. 13, 2013)) (“The ASPCA supports the concept of prescription portability, because it will make pet care more affordable. More choice encourages competitive pricing, and competitive pricing makes it more affordable to be a pet owner.”).

<sup>152</sup> *Id.* at 165 (“30 percent of previous dog owners, and 25 percent of previous cat owners, cited vet care cost as the reason they don’t currently have pets.”).

<sup>153</sup> Lib. Cong., THOMAS, *Bill Summary & Status, 112th Congress (2011–2012), H.R. 1406, All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01406:@@X> (accessed Apr. 13, 2013).

<sup>154</sup> Fed. Trade Commn., *Pet Medications Workshop, Agenda* (Oct. 2, 2012) (available at <http://www.ftc.gov/opp/workshops/petmeds/agenda.pdf> (accessed Apr. 13, 2013)). The

may provide an avenue to address the issue even in the absence of congressional action.

#### VII. THE INTERSECTION OF ANIMAL WELFARE AND HUMAN HEALTH: THE DOWNED ANIMAL AND FOOD SAFETY PROTECTION ACT

In January 2012, the U.S. Supreme Court held unanimously in *National Meat Association v. Harris*<sup>155</sup> that the Federal Meat Inspection Act (FMIA) preempts state laws mandating humane treatment of animals at slaughterhouses when those standards exceed the standards prescribed in the federal law.<sup>156</sup> The Court specifically struck down a California law mandating that nonambulatory animals<sup>157</sup> be immediately euthanized if injured prior to arrival at the slaughterhouse,<sup>158</sup> and prohibiting the sale of meat or meat products from downer animals for human consumption.<sup>159</sup> The Court emphasized that the FMIA preemption clause “sweeps widely,” and clarified that any state law that tries to prescribe standards for the humane treatment of downer animals will be preempted.<sup>160</sup>

The implication of the Court’s holding in *Harris* is significant: the decision leaves animal-welfare activists with federal legislation as the

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workshop consisted of three panel discussions: the first panel focused on the distribution of pet medications, the second panel focused on the portability of prescription pet medications, and the third panel was focused on parallels between the contact lens industry and the pet medication industry. *Id.* at 1–3.

<sup>155</sup> 132 S. Ct. 965, 969–70 (2012) (holding that the FMIA preempts a California statute prohibiting the sale of meat from nonambulatory animals and requiring immediate euthanasia).

<sup>156</sup> 21 U.S.C. §§ 601–695 (2011) (available at [http://www.fsis.usda.gov/regulations/federal\\_meat\\_inspection\\_act/](http://www.fsis.usda.gov/regulations/federal_meat_inspection_act/) (accessed Apr. 13, 2013)). The FMIA’s preemption clause states: “Requirements within the scope of this [Act] with respect to premises, facilities and operations of any establishment at which inspection is provided under . . . this [Act] which are in addition to, or different than those made under this [Act] may not be imposed by any State.” *Id.* at § 678. A full analysis of the rationale of the Court and the preemption analysis are beyond the scope of this Article. For more information, see William W. Buzbee, *Preemption and the Price of One Voice*, 48 *Trial* 54 (May 2012) (discussing the preemption issue in *National Meat Association v. Harris*).

<sup>157</sup> See 9 C.F.R. § 309.2(b) (2012) (defining “non-ambulatory disabled livestock” as “livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons, or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions”).

<sup>158</sup> Cal. Penal Code Ann. § 599f(c) (West 2010); *Harris*, 132 S. Ct. at 970–71. While recognizing that animals become injured and nonambulatory, which occurs “not infrequently” during transport to the slaughterhouse, the Court focused on the differing obligations the California law and the FMIA impose on the slaughterhouse. The FMIA and its regulations allow slaughterhouses to hold any downer pig that has not been condemned. *Id.*

<sup>159</sup> Cal. Penal Code Ann. § 599f(b) (West 2010); see *Harris*, 132 S. Ct. at 972–74 (discussing why the Court struck this portion of the California law).

<sup>160</sup> *Harris*, 132 S. Ct. at 970, 973 (rejecting the Ninth Circuit’s conclusion that § 599(f) is analogous to various state laws banning the sale of horse meat for human consumption).

only mechanism for change. Wayne Pacelle, President of the Humane Society of the United States, in recognition of this new constraint, stated: “This ruling places the matter squarely in the Congress and the [U.S. Department of Agriculture] to take meaningful action to protect animals unable to walk.”<sup>161</sup> As such, the decision reinvigorated efforts to pass a federal law to ensure the humane slaughter of nonambulatory animals.

The issue of nonambulatory animal slaughter extends beyond animal welfare to human welfare as well. For over a decade, Representative Gary Ackerman (D-NY) zealously advocated removing animals too ill to stand from the human-food supply. Representative Ackerman first introduced the Downed Animal and Food Safety Protection Act in 2007,<sup>162</sup> and again in 2009.<sup>163</sup> H.R. 3704, introduced on December 16, 2011, represented the eleventh and most recent attempt by Representative Ackerman, joined by twenty-nine co-sponsors,<sup>164</sup> to protect downed animals and the public safety. The bill would amend the Humane Methods of Livestock Slaughter Act of 1958.<sup>165</sup> However, the bill was referred to the Subcommittee on Livestock, Dairy, and Poultry on February 8, 2012, where no further action was taken.<sup>166</sup>

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<sup>161</sup> David G. Savage & Matt Stevens, *State Law on Pig Slaughter Struck Down; As the Supreme Court Rejects the California Rule, Animal Activists Push for a Federal One*, L.A. Times B2 (Jan. 24, 2012).

<sup>162</sup> H.R. 661, 110th Cong. (Jan. 24, 2007) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-110hr661ih/pdf/BILLS-110hr661ih.pdf> (accessed Apr. 13, 2013)); see Lib. Cong., THOMAS, *Search Bill Text from Multiple Congresses*, <http://thomas.loc.gov/home/multicongress/multicongress.html>; search “downed animal” select Exact Match Only select Check All (accessed May 7, 2013). Prior to 2007, Rep. Ackerman introduced the Downed Animal Protection Act to the 102nd Congress in 1992 and to each successive congress until the introduction of the Downed Animal and Food Safety Protection Act in 2007. In the Senate, his efforts were matched by Senator Daniel Akaka (D-AK), who also retired in 2013. *Id.*

<sup>163</sup> H.R. 4356, 111th Cong. (Dec. 16, 2009) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr4356ih/pdf/BILLS-111hr4356ih.pdf> (accessed Apr. 13, 2013)).

<sup>164</sup> H.R. 3704, 112th Cong. (Dec. 16, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr3704ih/pdf/BILLS-112hr3704ih.pdf> (accessed Apr. 13, 2013)); Lib. Cong., THOMAS, *Bill Summary & Status, 112th Congress (2011–2012), H.R. 3704, Cosponsors*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03704:@@P> (accessed Apr. 13, 2013).

<sup>165</sup> Pub. L. No. 85-765, 72 Stat. 862 (1958) (codified at 7 U.S.C. §§ 1901–1907). The FMIA incorporates the standards set out in the Humane Methods of Livestock Slaughter Act of 1958 and requires that all slaughterhouses comply with them. *Id.*; 21 U.S.C. §§ 601–695; see also David N. Cassuto, *Meat Animals, Humane Standards and Other Legal Fictions*, Law, Culture & the Humanities (July 18, 2012) (available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2111455](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111455) (accessed Apr. 13, 2013)) (discussing the law’s indifference to animal welfare and failure to prescribe standards for humane treatment).

<sup>166</sup> Lib. Cong., THOMAS, *Bill Summary & Status, 112th Congress (2011–2012), H.R. 3704, All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03704:@@X> (accessed Apr. 13, 2013).

The bill required the humane treatment and handling of downed animals<sup>167</sup> by prescribing, among other things, that an animal be “immediately humanely euthanize[d]” upon becoming nonambulatory.<sup>168</sup> The bill revised inspection procedure and prohibited any meat from a downed animal from entering the food supply.<sup>169</sup> A provision of the bill explicitly stated that it would not preempt state law with stricter requirements or penalties.<sup>170</sup>

Representative Ackerman’s continued support of the bill was based on the belief that the public needs to be protected from food contaminated with mad cow disease—bovine spongiform encephalopathy (BSE).<sup>171</sup> According to Representative Ackerman, downed cattle are fifty times more likely to be afflicted with BSE.<sup>172</sup> Twenty-three cases of BSE have been recorded in North America,<sup>173</sup> with the most recent case recorded in April 2012 in California.<sup>174</sup> Representative Ackerman retired in 2013.<sup>175</sup> Despite the support of twenty-nine cosponsors, H.R. 3704 failed to pass out of the House Agriculture Committee.<sup>176</sup>

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<sup>167</sup> H.R. 3704, 112th Cong. at § 3(a)(4) (“The term ‘nonambulatory livestock’ means any cattle (including calves), sheep, swine, goats, or horses, mules, or other equines, that will not stand and walk unassisted.”).

<sup>168</sup> *Id.* at § 3(a)(3), (c)(1).

<sup>169</sup> *Id.* at § 3(e).

<sup>170</sup> *Id.* at § 3(g) (“This section shall not be construed to preempt any law or regulation of a State or a political subdivision of a State containing requirements that are greater than the requirements of this section, or which create penalties for conduct regulated by this section.”).

<sup>171</sup> Food Safety News, *Bill Seeks Permanent Ban on Downer Slaughter at Meat Plants*, <http://www.foodsafetynews.com/2012/01/bill-seeks-permanent-ban-on-downer-slaughter-at-meat-plants/> (Jan. 13, 2012) (accessed Apr. 13, 2013); *see also* U.S. Dept. of Agric., *About BSE*, [http://www.aphis.usda.gov/newsroom/hot\\_issues/bse/index.shtml](http://www.aphis.usda.gov/newsroom/hot_issues/bse/index.shtml) (last updated Aug. 3, 2012) (accessed Apr. 13, 2013) (Eating animal products derived from animals afflicted with BSE is linked to a variant of the Creutzfeldt-Jakob disease in humans. BSE is thought to be caused by an abnormal prion protein, generally transmitted through contaminated meat-and-bone meal in feed. The disease usually takes three to six years from the time of infection to manifest clinical symptoms.).

<sup>172</sup> Food Safety News, *supra* n. 171.

<sup>173</sup> Ctrs. for Disease Control & Prevention, *BSE (Bovine Spongiform Encephalopathy, or Mad Cow Disease)*, <http://www.cdc.gov/ncidod/dvrd/bse/> (Feb. 21, 2013) (accessed Apr. 13, 2013) (reflecting that there have been four cases of BSE in the U.S.).

<sup>174</sup> *Id.*; Charles Abbott, Reuters, *Analysis: U.S. Mad Cow Find: Lucky Break or Triumph of Science?*, <http://www.reuters.com/article/2012/04/25/us-usa-madcow-testing-idUSBRE83O1LE20120425> (Apr. 25, 2012) (accessed Apr. 13, 2013); Dan Flynn, Food Safety News, *USDA Reveals More Details About Latest ‘Mad Cow’*, <http://www.foodsafetynews.com/2012/04/usda-gets-more-details-out-about-latest-mad-cow/> (Apr. 28, 2012) (accessed Apr. 13, 2013).

<sup>175</sup> Gary Ackerman, N.Y. Times, *My Last Day in Congress*, <http://www.nytimes.com/2013/01/02/opinion/my-last-day-in-congress.html> (Jan. 2, 2013) (accessed Apr. 13, 2013) (reflecting on his career in Congress and public service).

<sup>176</sup> Lib. Cong., *THOMAS, Bill Summary & Status, 112th Congress (2011–2012), H.R. 3704 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR03704:@@X> (accessed Apr. 13, 2013).

## VIII. FEDERAL ACTIONS IMPACTING HORSES

A. *The Horse Protection Act Amendments*

Tennessee Walking Horses<sup>177</sup> have been specifically identified for statutory protection because harsh methods are often used in competitive showmanship of the breed.<sup>178</sup> Introduced on September 13, 2012, by Representatives Ed Whitfield (R-KY) and Steve Cohen (D-TN), H.R. 6388, the Horse Protection Act Amendments, would amend the Horse Protection Act (HPA), which was enacted in 1970.<sup>179</sup> The Amendments strengthen regulations and penalties related to inflicting pain on Tennessee Walking Horses in order to improve their performance in competitions, a practice known as “soring.”<sup>180</sup> “Soring” is used to create the signature high-stepping show walk associated with Tennessee Walking Horses.<sup>181</sup> This is the first legislation introduced to address the problem of soring since the passage of the HPA forty-two years ago.<sup>182</sup>

Although proper training can produce the exaggerated show gait, it takes time.<sup>183</sup> As an alternative to patience and humane training, some trainers use the practice of soring to achieve the desired result.<sup>184</sup> Soring can involve the application of pain-causing chemicals, cuts, or foreign objects to the legs or hoof pads of the horse, which

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<sup>177</sup> Tennessee Walking Horses are a unique breed of horses from the Middle Basin area of Tennessee. The horses are known for three gaits, the most famous being the “running walk,” which cannot be taught to horses who have not inherited the innate ability unique to the breed. In competitions, an exaggeration of this natural gait is desirable. Okla. St. U. Bd. of Regents, *Tennessee Walking Horse*, <http://www.ansi.okstate.edu/breeds/horses/tennesseewalking/> (Aug. 3, 1999) (accessed Apr. 13, 2013).

<sup>178</sup> H.R. 6388, 112th Cong. (Sept. 13, 2012) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr6388ih/pdf/BILLS-112hr6388ih.pdf> (accessed Apr. 13, 2013)).

<sup>179</sup> *Id.*; 77 Fed. Reg. 33607, 33607 (June 7, 2012).

<sup>180</sup> 77 Fed. Reg. 33607. The term “sore” is used to describe when a horse suffers pain, distress, inflammation, or lameness when moving as a result of an “irritating or blistering agent,” a “burn, cut or laceration,” any “tack, nail, screw, or chemical agent,” or other such substances or devices inflicted by persons on the limb of a horse. *Id.* The amendments would disqualify sore horses from shows and exhibitions for specified periods of time, prohibit the use of “action devices” that encircle the lower extremity of the leg, and increase penalties for soring. H.R. 6388, 112th Cong. at § 1(c)–(e). Under the amendments, the maximum penalty for initial violations would increase from \$3,000 and one year of imprisonment to \$5,000 and two years of imprisonment. *Id.* at § 1(e).

<sup>181</sup> Press Release, Am. Socy. for the Prevention of Cruelty to Animals, *ASPCA Endorses New Legislation to Prohibit Cruel Practice of Horse Soring* (Sept. 13, 2012) (available at <http://www.aspca.org/Pressroom/press-releases/091312> (accessed Apr. 13, 2013)) [hereinafter ASPCA Press Release].

<sup>182</sup> Email from Carolyn Schnurr, Fed. Legis. Manager of Govt. Relations, Humane Socy. of the U.S., to Carolyn Greenshields, co-author (Dec. 21, 2012, 3:25 PM PST) (on file with *Animal Law*).

<sup>183</sup> Eve Alexander, Examiner, *Mr. Biggs: Tennessee Walking Horse’s Life Ruined by Abusive Training*, <http://www.examiner.com/article/mr-biggs-tennessee-walking-horse-s-life-ruined-by-abusive-training> (June 30, 2009) (accessed Apr. 13, 2013).

<sup>184</sup> *Id.*

cause the horse to pick its feet up as high as possible.<sup>185</sup> Soring can result in chronic pain, permanent injury, and crippling.<sup>186</sup>

Currently, soring is prohibited by the HPA, but the practice persists.<sup>187</sup> In September 2012, following an undercover investigation by the Humane Society of the United States (HSUS), a nationally known horse trainer was convicted in federal court for his abusive training methods, including the use of caustic chemicals and an electric cattle prod.<sup>188</sup> Random testing at competitions conducted by U.S. Department of Agriculture (USDA) Animal and Plant Health Inspection Service (APHIS), the agency charged with enforcing the HPA, found that 97.6% of samples tested positive for prohibited substances in 2011.<sup>189</sup> Inspection by APHIS at fifty-nine horse shows in 2010 recorded 627 violations of the HPA, further demonstrating the pervasiveness of soring.<sup>190</sup>

Under the proposed legislation, self-policing practices would be eliminated and replaced with licensed inspectors assigned by the USDA.<sup>191</sup> Under the current HPA, horse-show organizers are not obligated to hire a licensed inspector;<sup>192</sup> rather, organizers may voluntarily hire inspectors to ensure the integrity of the show and to protect

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<sup>185</sup> Humane Socy. of the U.S., *What is Soring? Important Facts About This Cruel Abuse*, [http://www.humanesociety.org/issues/tenn\\_walking\\_horses/facts/what\\_is\\_soring.html](http://www.humanesociety.org/issues/tenn_walking_horses/facts/what_is_soring.html) (Jan. 29, 2013) (accessed Apr. 13, 2013).

<sup>186</sup> See e.g. Alexander, *supra* n. 183 (discussing a Tennessee Walking Horse injured by soring that may no longer be able to carry a rider).

<sup>187</sup> ASPCA Press Release, *supra* n. 181.

<sup>188</sup> NBC News, *Horse Trainer Jackie McConnell Fined for Caustic Chemical Cruelty*, [http://usnews.nbcnews.com/\\_news/2012/09/19/13955200-horse-trainer-jackie-mcconnell-fined-for-caustic-chemical-cruelty](http://usnews.nbcnews.com/_news/2012/09/19/13955200-horse-trainer-jackie-mcconnell-fined-for-caustic-chemical-cruelty) (Mar. 18, 2013) (accessed Apr. 13, 2013); see also Humane Socy. of the U.S., YouTube, *Tennessee Walking Horse Investigation Exposes Cruelty* (Humane Socy. of the U.S. posted May 16, 2012) (available at [http://youtu.be/gxVlxT\\_x-f0](http://youtu.be/gxVlxT_x-f0) (accessed Apr. 13, 2013)) (showing undercover footage of horse trainer Jackie McConnell brutally soring horses, which provided the basis for his prosecution).

<sup>189</sup> Press Release, Humane Socy. of the U.S., *The HSUS Commends United States Equestrian Federation for New Rule Protecting Walking Horses* (Jan. 24, 2013) (available at [http://www.humanesociety.org/news/press\\_releases/2013/01/usef-new-rule-walking-horses-012413.html](http://www.humanesociety.org/news/press_releases/2013/01/usef-new-rule-walking-horses-012413.html) (accessed Apr. 13, 2013)) [hereinafter HSUS Press Release] (noting that the prohibited substances include numbing agents and drugs which are used to hide evidence of soring)

<sup>190</sup> U.S. Dept. of Agric., PowerPoint, *Animal Welfare: Horse Protection Act Inspection and Enforcement: Veterinary Medical Officer (VMO) Annual Show Report 2010* slide 1 (Horse Protec. Program Rpts. Nov. 9, 2010) (available at [http://www.aphis.usda.gov/animal\\_welfare/hp/hp\\_pubs\\_reports.shtml](http://www.aphis.usda.gov/animal_welfare/hp/hp_pubs_reports.shtml) (accessed Apr. 13, 2013)) (Data for 2010 was available through November 9, 2010.).

<sup>191</sup> H.R. 6388, 112th Cong. at § 1(c) (amending 15 U.S.C. § 1823(c) and providing that “[t]he Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter”).

<sup>192</sup> Press Release, Off. of Congressman Steve Cohen, *Whitfield, Cohen Discuss Bill That Strengthens the Horse Protection Act* (Sept. 13, 2012) (available at <https://cohen.house.gov/press-release/whitfield-cohen-discuss-bill-strenghtens-horse-protection-act> (accessed Apr. 13, 2013)).

themselves from liability if violations are discovered in a USDA spot inspection.<sup>193</sup> This shift reflects the incorporation of suggestions made by the USDA following an audit of the HPA Program.<sup>194</sup> Aside from these recommendations, on June 7, 2012, the USDA issued a final rule requiring the horse industry to impose uniform minimum penalties for violations of the HPA.<sup>195</sup>

Although many organizations support humane treatment and training of Tennessee Walking Horses,<sup>196</sup> the sentiment is not universal. The Tennessee Walking Horse Breeders' and Exhibitors' Association conducted a survey to assess member opinions on H.R. 6388 and found that no clear consensus exists.<sup>197</sup> Recently, however, the U.S. Equine Federation demonstrated support for ending inhumane practices by passing a new rule that prohibits participants in licensed competitions from using certain action devices.<sup>198</sup> Moreover, a December 2012 study indicates that voters in Tennessee and Kentucky support the Amendments, by a five-to-one and three-to-one margin, respectively.<sup>199</sup> The Amendments also have received unequivocal support from the American Veterinary Medical Association and from animal-

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<sup>193</sup> *Id.*

<sup>194</sup> ASPCA Press Release, *supra* n. 181 (noting that the USDA Office of Inspector General specifically suggested eliminating the self-policing policy and strengthening penalties).

<sup>195</sup> 77 Fed. Reg. at 33607 (amending 9 C.F.R. pt. 11); Press Release, Humane Socy. of the U.S., *The HSUS Asks Federal Court to Uphold Vital Regulations to Protect Tennessee Walking Horses* (Oct. 26, 2012) (available at [http://www.humanesociety.org/news/press\\_releases/2012/10/federal-court-tn-walking-horses-102612.html](http://www.humanesociety.org/news/press_releases/2012/10/federal-court-tn-walking-horses-102612.html) (accessed Apr. 13, 2013)).

<sup>196</sup> Alexander, *supra* n. 183; *see also* Natl. Walking Horse Assn., *NWHA Bylaws* (Feb. 22, 2000) (available at [http://www.humanesociety.org/news/press\\_releases/2012/10/federal-court-tn-walking-horses-102612.html](http://www.humanesociety.org/news/press_releases/2012/10/federal-court-tn-walking-horses-102612.html) (accessed Apr. 13, 2013)) (providing an example of an organization supporting the humane treatment and training of walking horses).

<sup>197</sup> Press Release, Tenn. Walking Horses Breeders' & Exhibitors' Assn., *TWHBEA Releases Results of H.R. 6388 Survey* (Jan. 2, 2013) (available at <http://www.twhbea.com/News%202012/13HRsurveyResults.php> (accessed Apr. 13, 2013)). Only 3.5% of TWHBEA members participated in the survey. *Id.* Of the 347 responses, 196 responded that they did not completely oppose the bill as written, while 136 responded that they did. When asked whether they support the increase of criminal penalties to felony level, 186 responded in support and 156 responded in opposition. *Id.*

<sup>198</sup> HSUS Press Release, *supra* n. 189; *see also* Sally Baker, U.S. Equine Fed. Network, *American Association of Equine Practitioners Issues White Paper on Ending Soring of Tennessee Walking Horses*, [http://www.usefnetwork.com/news/3499/2008/8/20/american\\_association\\_of\\_equine\\_prac.aspx](http://www.usefnetwork.com/news/3499/2008/8/20/american_association_of_equine_prac.aspx) (Aug. 20, 2008) (accessed Apr. 13, 2013) (providing a description of the American Association of Equine Practitioners' recommendations for ending the practice of soring and calling it "one of the most significant welfare issues affecting any equine breed or discipline").

<sup>199</sup> Press Release, Humane Socy. of the U.S., *New Poll Shows Voters in Tennessee and Kentucky Overwhelmingly Support Bill to Strengthen the Horse Protection Act* (Dec. 12, 2012) (available at [http://www.humanesociety.org/news/press\\_releases/2012/12/horse-protection-act-poll-support-121212.html](http://www.humanesociety.org/news/press_releases/2012/12/horse-protection-act-poll-support-121212.html) (accessed Apr. 13, 2013)) (discussing the poll, and providing the questions posed to voters along with the voting percentages divided by gender and political affiliation).

welfare organizations such as HSUS and the American Society for the Prevention of Cruelty to Animals (ASPCA).<sup>200</sup>

The bill was referred to the House Energy and Commerce Committee on September 13, 2012, and to the Subcommittee on Commerce, Manufacturing, and Trade the following day.<sup>201</sup> Despite the support of fifty-six co-sponsors, the legislation did not advance beyond the committee.<sup>202</sup>

### B. Horse Transportation Safety Act

The Horse Transportation Safety Act (Sen. 1281) was introduced by Senator Mark Kirk (R-IL) and Senator Frank Lautenberg (D-NJ) on June 27, 2011, and was referred to committee the same day.<sup>203</sup> Formerly, Senator Kirk introduced the bill twice in the House when he was a congressman.<sup>204</sup> The Horse Transportation Safety Act prohibits interstate transportation of horses in trailers with two or more stacked layers.<sup>205</sup> Current federal law regulates the maximum time animals in

<sup>200</sup> Press Release, Am. Veterinary Med. Assn., AVMA, AAEP Call for Passage of Horse Protection Act Amendments to Curb Soring (Nov. 21, 2012) (available at <https://www.avma.org/News/PressRoom/Pages/HR6388.aspx> (accessed Apr. 13, 2013)); ASPCA Press Release, *supra* n. 181.

<sup>201</sup> Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) H.R.6388 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR06388:@@X> (accessed Apr. 13, 2013).

<sup>202</sup> *Id.*

<sup>203</sup> Sen. 1281, 112th Cong. (June 27, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1281is/pdf/BILLS-112s1281is.pdf> (accessed Apr. 13, 2013)).

<sup>204</sup> H.R. 6278, 110th Cong. (June 17, 2008) (available at <http://thomas.loc.gov/cgi-bin/t2GPO/http://www.gpo.gov/fdsys/pkg/BILLS-110hr6278ih/pdf/BILLS-110hr6278ih.pdf> (accessed Apr. 13, 2013)); H.R. 305, 111th Cong. (Jan. 8, 2009) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr305ih/pdf/BILLS-111hr305ih.pdf> (accessed Apr. 13, 2013)). Senator Kirk began introducing horse-transportation legislation in response to an Illinois accident in 2007, which involved an overturned double-deck cattle truck. Am. Horse Council, *Horse Transportation Safety Act of 2011*, <http://www.horsecouncil.org/legislation/horse-transportation-safety-act-2011> (Feb. 2, 2012) (accessed Apr. 13, 2013). The truck contained fifty-nine Belgian draft horses, eighteen of which died or had to be euthanized as a result of the accident. *Id.* Other examples of accidents resulting in a high death toll include an accident in 1991 on US-281 in North Dakota involving seventy-eight horses, thirty-four of which were killed. In Ohio in 1993, forty horses were involved in a similar accident, and twenty-six died. An accident in 2004 on SR-1 in Indiana involved fifty horses, twenty-one of which died. Equine Protec. Network, *Double Deck Possum Belly Trailers*, <http://equineprotectionnetwork.com/transport/transportindex.htm> (accessed Apr. 13, 2013). Most recently, in 2006, an accident on I-44 in Missouri involved a trailer carrying forty-two horses, sixteen of which died or were euthanized at the scene of the crash. KSDK, *Horse Trailer Accident Shuts Down I-44*, <http://www.ksdk.com/news/story.aspx?storyid=104394> (Sept. 27, 2006) (accessed Apr. 13, 2013). Accidents occur when the weight of horses overloaded on trailers cause floor collapses. Equine Protec. Network, *supra* (noting that six states prohibit horse transportation in double-deck trailers, but that federal regulation is limited to commercial transportation of horses to slaughter).

<sup>205</sup> Sen. 1281, 112th Cong. at § 2(d)(1). Stacked layers are defined as “two or more layers stacked on top of each other.” *Id.*



transit can be without access to food and water, but is silent on the quality of transport.<sup>206</sup>

Sen. 1281 was referred to the Senate Commerce, Science, and Transportation Committee, where it remained at the close of the 112th Congress.<sup>207</sup> Senator Frank Lautenberg (D-NJ), a cosponsor of Sen. 1281, also introduced the Commercial Motor Vehicle Safety Enhancement Act of 2011, Sen. 1950, which incorporated the same prohibition on multi-level horse trailers, but that legislation similarly did not advance from the Senate Commerce, Science, and Transportation Committee.<sup>208</sup> Substantively identical language was also included in H.R. 7, the American Energy and Infrastructure Jobs Act of 2012, which has currently stalled before the House Transportation and Infrastructure Committee.<sup>209</sup>

While the legislation is aimed at protecting horse (and human) safety by prohibiting double-deck trailers, it does not differentiate between use of unsuitable livestock trailers and specially modified trailers designed for horses used by rodeos, which are arguably much safer.<sup>210</sup> Although the Horse Transportation Safety Act has the sup-

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<sup>206</sup> 49 U.S.C. § 80502 (2006).

<sup>207</sup> Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) Sen. 1281 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01281:@@X> (accessed Apr. 13, 2013).

<sup>208</sup> Sen. 1950, 112th Cong. § 905 (Dec. 7, 2011) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s1950is/pdf/BILLS-112s1950is.pdf> (accessed Apr. 13, 2013)).

<sup>209</sup> H.R. 7, 112th Cong. § 6606 (Jan. 31, 2012) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr7ih/pdf/BILLS-112hr7ih.pdf> (accessed Apr. 13, 2013)). See generally H.R. Rpt. 112-397 (Feb. 13, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt397/pdf/CRPT-112hrpt397.pdf> (accessed Apr. 13, 2013)) (reporting a “do pass” recommendation as amended); but see Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) H.R. 7 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00007:@@X> (accessed Apr. 13, 2013) (reflecting that H.R. 7 stalled following the House Rules Committee print of H.R. 7); Ex. Off. of the Pres., Off. of Mgt. & Budget, *Statement of Administration Policy: H.R. 7—American Energy and Infrastructure Jobs Act of 2012* (Feb. 14, 2012) (available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr7r\\_20120214.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saphr7r_20120214.pdf) (accessed Apr. 13, 2013)) (outlining the changes made to H.R. 7 by the Rules Committee and declaring the Obama Administration’s opposition to the amended version).

<sup>210</sup> Sen. 1281, 112th Cong. at § 2(3) (including a prohibition on trailers with more than one level, but not including any exception for specially modified vehicles); Press Release, Am. Socy. for the Prevention of Cruelty to Animals, *ASPCA Declares Victory for Horses* (Feb. 3, 2012) (available at <https://donate.aspc.org/Pressroom/press-releases/020312> (accessed Apr. 13, 2013)). Using double-deck cattle trailers to transport horses is not only a safety hazard, but since these trailers are designed for cattle, the ceilings are not tall enough for horses to stand normally. *Id.* The horses’ unnaturally lowered head position, caused by the low ceiling, contributes to additional injuries because the horses are prone to losing their balance. Press Release, Prof. Rodeo Cowboys Assn., *Transporting Rodeo Horses by Modified Double Deck Trailers* (available at [prorodeo.com/community/pdfs/2010\\_double\\_deck\\_truck.pdf](http://prorodeo.com/community/pdfs/2010_double_deck_truck.pdf) (accessed Apr. 13, 2013)) (The rodeo community regularly transports horses in specially modified multi-level trailers that ensure not only that the horses are safe, but also that they arrive in condition to perform competitively).

port of the Animal Welfare Institute,<sup>211</sup> HSUS,<sup>212</sup> the Animal Law Coalition,<sup>213</sup> and the ASPCA,<sup>214</sup> the rodeo community and their representatives in Congress, such as Senator Max Baucus (D-MT), remain opposed to broad prohibitions on double-deck trailer transportation.<sup>215</sup>

### C. *Corolla Wild Horses Protection Act*

The Corolla Wild Horse Protection Act (Corolla Horse Act) provides for the management of free-roaming wild horses in and around the Currituck National Wildlife Refuge in the Outer Banks of North Carolina.<sup>216</sup> The bill was introduced as H.R. 306 by Representative Walter B. Jones (R-NC) on January 18, 2011, and as Sen. 3448 by Senators Kay Hagan (D-NC) and Richard Burr (R-NC) on July 26, 2012.<sup>217</sup>

<sup>211</sup> Press Release, Animal Welfare Inst., *Senator Kirk Introduces Bill to End Inhumane Transport of Horses Via Double Deck Trailers* (June 28, 2011) (available at <http://www.awionline.org/content/senator-kirk-introduces-bill-end-inhumane-transport-horses-double-deck-trailers> (accessed Apr. 13, 2013)).

<sup>212</sup> Press Release, Humane Socy. of the U.S., *The HSUS Praises Introduction of Bill to Improve Horse Welfare During Transport in U.S.* (June 28, 2011) (available at [http://www.humanesociety.org/news/press\\_releases/2011/06/federal\\_horse\\_transport\\_bill\\_introduced\\_062811.html](http://www.humanesociety.org/news/press_releases/2011/06/federal_horse_transport_bill_introduced_062811.html) (accessed Apr. 13, 2013)).

<sup>213</sup> Press Release, Animal L. Coalition, *House to Vote on Ban on Use of Double Deckers to Transport Horses* (Feb. 15, 2012) (available at <http://www.animallawcoalition.com/horse-slaughter/article/652> (accessed Apr. 13, 2013)).

<sup>214</sup> Press Release, Am. Socy. for the Prevention of Cruelty to Animals, *ASPCA Welcomes Legislation to Protect Horses During Transport* (June 29, 2011) (available at <http://www.aspc.org/Pressroom/press-releases/062911.aspx> (accessed Apr. 13, 2013)).

<sup>215</sup> Press Release, Off. of Senator Max Baucus, *Baucus: Proposed Trailer Ban Hurts Rodeo* (Jan. 19, 2012) (available at [http://www.baucus.senate.gov/?p=press\\_release&id=814](http://www.baucus.senate.gov/?p=press_release&id=814) (accessed Apr. 13, 2013)) (noting that the Senator drafted an outspoken letter dated January 13, 2012, to Senate Majority Leader Harry Reid in opposition to language in Sen. 1950 prohibiting multi-level transportation of horses); *see also* Open Ltr. to John L. Mica and Nick J. Rahall, II, Chairman and Ranking Member of the House Comm. on Trans. & Infrastructure, *Oppose Including Language in the Highway Bill That Prohibits Transporting Horses or Any Livestock in Double Deck Trailers* (Jan. 24, 2012) (on file with *Animal Law*) (expressing opposition to a broad prohibition on double-deck livestock transport, the open letter has the following signatories: the National Cattlemen's Beef Association; Professional Rodeo Cowboys Association; Professional Rodeo Stock Contractors Association; Agricultural & Food Transporters Conference, American Trucking Associations, Inc.; Agricultural Retailers Association; National Chicken Council; National Turkey Federation; National Pork Producers Council; and the Livestock Marketing Association).

<sup>216</sup> U.S. Fish & Wildlife Serv., *Currituck National Wildlife Refuge*, <http://www.fws.gov/currituck/> (accessed Apr. 13, 2013) [hereinafter *Currituck National Wildlife Refuge*].

<sup>217</sup> Corolla Wild Horses Protection Act, H.R. 306, 112th Cong. (Feb. 6, 2012) (as passed by the House) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr306eh/pdf/BILLS-112hr306eh.pdf> (accessed Apr. 13, 2013)); Corolla Wild Horses Protection Act, Sen. 3448, 112th Cong. (July 26, 2012) (as referred to the Committee on Environment and Public Works) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s3448is/pdf/BILLS-112s3448is.pdf> (accessed Apr. 13, 2013)); *see also* Corolla Wild Horses Protection Act, H.R. 5482, 111th Cong. (June 8, 2010) (as referred to the Committee on Natural Resources) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-111hr5482ih/pdf/>

Corolla wild horses are one of three remaining groups of wild horses in North Carolina.<sup>218</sup> The wild horses on the Outer Banks have adapted to harsh environmental conditions including exposure and a diet of coarse salt-marsh grasses, which would not sustain other types of horses.<sup>219</sup> Unlike other wild horse populations in North Carolina, the Corolla wild horses suffer from living close to developed human communities. Although local ordinances protect the horses from interference by humans,<sup>220</sup> they are not always effective.<sup>221</sup> Development limits land available to the horses for grazing, and their proximity to traffic is often fatal.<sup>222</sup>

The Corolla Horse Act provides that the herd would have free access to the Currituck National Wildlife Refuge.<sup>223</sup> As human development intensifies, the lands available to the herd decrease, and the animals increasingly depend on the lands within the Refuge for graz-

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BILLS-111hr5482ih.pdf (accessed Apr. 13, 2013)) (reflecting that the bill was previously introduced by Representative Walter B. Jones, Jr. (R-NC)).

<sup>218</sup> NCWildHorses, *North Carolina's Wild Horses*, <http://www.ncwildhorses.com/index.htm> (accessed Apr. 13, 2013); see also NCWildHorses, *The Wild Horses of Shackleford Banks*, <http://www.ncwildhorses.com/shackleford.htm> (accessed Apr. 13, 2013)) (noting that the wild horses of Shackleford Banks inhabit a nine-mile long barrier island free of regular human occupation and accessible only by boat); Wild Horses of Shackleford Banks, *Shackleford Horses Timeline*, <http://www.shacklefordhorses.org/timeline.htm> (accessed Apr. 13, 2013) [hereinafter *Shackleford Horses Timeline*] (noting that the Shackleford Banks Wild Horses Protection Act, which is very similar to the proposed legislation for the protection of the Corolla wild horses, became law as Public Law 105-229 on August 13, 1998, and has stabilized the population); NCWildHorses, *Beaufort's Wild Horses of the Rachel Carson Estuarine Reserve*, <http://www.ncwildhorses.com/beaufort.htm> (accessed Apr. 13, 2013) [hereinafter *Beaufort's Wild Horses*] (noting that the Beaufort wild horses live within the Rachel Carson Estuarine Reserve and are also only accessible by boat); Sheridan Alexander, *Ocracoke Island Horses – Descendants of the Wild Horses of the Past*, [http://gosoutheast.about.com/od/beacheslakes\\_rivers/a/ocracoke\\_ponies.htm](http://gosoutheast.about.com/od/beacheslakes_rivers/a/ocracoke_ponies.htm) (accessed Apr. 13, 2013) (noting that the Ocracoke horse population has not been wild since 1957, when the population was penned to protect them from highway NC12. Since the 1960s, the National Park Service has overseen the herd. The population is currently reduced to seventeen animals from a herd of over 300.).

<sup>219</sup> *Beaufort's Wild Horses*, *supra* n. 218; U.S. Fish & Wildlife Serv., *Currituck National Wildlife Refuge: Division of Planning: Comprehensive Conservation Plan 1*, 37 (Nov. 2008) (available at <http://www.fws.gov/southeast/planning/PDFdocuments/Currituck%20Final%20CCP/Final%20Edited%20Currituck%20CCP.pdf> (accessed Apr. 13, 2013)) [hereinafter *Comprehensive Conservation Plan*].

<sup>220</sup> Currituck Co. Code Ordin. (NC) §§ 3-26 to 3-38 (2012) (available at <http://library.municode.com/index.aspx?clientId=12419> (accessed Apr. 13, 2013)) (stipulating prohibited behavior with regard to wild horses including luring, touching, feeding, and harassment).

<sup>221</sup> Laura Beil, N.Y. Times, *Herd's Fate Lies in Preservation Clash*, <http://www.nytimes.com/2012/05/08/science/wild-horses-fate-in-outer-banks-lies-in-preservation-clash.html> (May 7, 2012) (accessed Apr. 13, 2013) (a version of this article appeared in the New York print edition on May 8, 2012, at D1) (noting that a two-week-old colt died after intestinal blockage due to tourists feeding it a bit of watermelon rind).

<sup>222</sup> *Id.*

<sup>223</sup> H.R. 306, 112th Cong. at § 2(a)(2)(A); Sen. 3448, 112th Cong. at § 2(a)(2)(A).

ing.<sup>224</sup> The Corolla Horse Act also seeks to address the danger to the Corolla population posed by its lack of genetic diversity.<sup>225</sup> The bill does so by increasing and maintaining the target population from approximately sixty to approximately 110 to 130 animals,<sup>226</sup> and by introducing Shackleford horses to the Corolla population to broaden the genetic diversity of the herd.<sup>227</sup>

The cost of herd management would be covered by the Corolla Wild Horse Fund, a non-profit organization dedicated to the protection and management of the wild Colonial Spanish Mustangs, which have been designated by North Carolina as a cultural treasure and the official state horse.<sup>228</sup> The Corolla Horse Act proposes management for the Corolla population that would resemble the management of the Shackleford population under the Shackleford Banks Wild Horse Protection Act.<sup>229</sup>

Despite the success and popularity of the Shackleford conservation, there was significant opposition to the Corolla Wild Horse Protection Act. Conservation organizations such as the Wildlife Society and the National Wildlife Refuge Association appreciate the plight of the wild horses, but place a higher priority on maintaining the integrity of the Currituck National Wildlife Refuge.<sup>230</sup> From the perspective of

<sup>224</sup> Beil, *supra* n. 221.

<sup>225</sup> *Id.*

<sup>226</sup> H.R. 306, 112th Cong. at § 2(a)(2)(A); Sen. 3448, 112th Cong. at § 2(a)(2)(A); Sam Walker, The Outer Banks Voice, *Corolla Wild Horse Bill Introduced in U.S. Senate*, <http://outerbanksvoice.com/2012/07/27/corolla-wild-horse-bill-introduced-in-us-senate/> (July 27, 2012) (accessed Apr. 13, 2013).

<sup>227</sup> H.R. 306, 112th Cong. at § 2(c); *See also* Dale Burrus, Corolla Wild Horses, *Facts and History*, <http://www.corollawildhorses.com/facts-and-history/> (accessed Apr. 13, 2013) (Another serious threat to the Corolla wild horses is a “genetic bottleneck.” This was revealed by a 1992 DNA study conducted by Dr. E. Gus Cothran, an international expert on genetics in wild horses, which showed that the Corolla herd had less genetic diversity than any other group of horses. A follow-up study in 2008 on the existing herd of 90 animals showed high levels of inbreeding with low levels of genetic diversity. A genetically healthy herd of wild horses generally requires 120–150 individual animals.).

<sup>228</sup> Corolla Wild Horse Fund, *Corolla Wild Horse Fund*, <http://www.corollawildhorses.com/> (accessed Apr. 13, 2013); Corolla Wild Horse Fund, *Legislation*, <http://www.corollawildhorses.com/legislation/> (accessed Apr. 13, 2013); *Shackleford Horses Timeline*, *supra* n. 218 (noting that the wild horses of the Outer Banks represent a living reminder of the history of North Carolina and are a popular tourist attraction). In support of the Shackleford Banks Wild Horse Protection Act, the North Carolina Secretary of Cultural Resources stated that the Shackleford horses were “part of what makes North Carolina one of the most interesting and best places to live,” citing the “great excitement and enjoyment” they bring to tourists and residents).

<sup>229</sup> *Compare* H.R. 306, 112th Cong. with 16 U.S.C. § 459g-4 (2006) (revealing that conservation goals and protective measures in the House bill, including the Secretary entering into an agreement with a local horse-conservation society, mirror the provisions of the Corolla Wild Horses Protection Act).

<sup>230</sup> Ltr. from Natl. Wildlife Refuge Assn. to Chairwoman Barbara Boxer and Ranking Member James Inhofe, Env. & Pub. Works Comm. (May 1, 2012) (available at <http://refugeassociation.org/2012/05/at-currituck-nwr-no-horsing-around/> (accessed Apr. 13, 2013)) (noting that the wildlife activists focus on the fragile nature of indigenous ecosystems, which rely on the special protection of the FWS within the refuge to prevent irrep-

these groups, the main issue with giving the Corolla population unimpeded access to the Currituck National Wildlife Refuge hinges on the critical fact that wild horses are not indigenous to the area, having been imported from Spain over 500 years ago.<sup>231</sup> This is significant because the U.S. Fish & Wildlife Service (FWS) does not consider the horses an indigenous species, which excludes them from being a conservation priority of the refuge.<sup>232</sup> FWS's concerns center on the destabilizing impact of horse grazing on the fragile ecosystem of marshes and dunes.<sup>233</sup> However, whether or not horse grazing is the main cause of this ecosystem destruction has not yet been scientifically established.<sup>234</sup> While a promising study is currently being conducted jointly by North Carolina State University and FWS to measure the impact of wild horses, deer, and hogs on the Refuge, it was not available to senators when considering the bill.<sup>235</sup> The study was released in April of 2013.<sup>236</sup>

The Corolla Wild Horses Protection Act passed the House in a voice vote held February 6, 2012.<sup>237</sup> The bill passed despite dissent concerning the costs of evaluating the impact of the herd on the Refuge and of forcing the FWS to manage competing conservation goals.<sup>238</sup>

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arable destruction from invasive species, such as wild horses); Wildlife Socy., *Opposition Expressed on Corolla Wild Horses Protection Act*, *The Wildlifer* (newsltr. of the Wildlife Socy.) 386 (May 2012) (available at <http://wildlife.org/publications/the-wildlifer/2012/may#corolla> (accessed Apr. 13, 2013)).

<sup>231</sup> Press Release, Wildlife Socy., *Final Position Statement: Feral Horses and Burros* (July 2011) (available at <http://joomla.wildlife.org/documents/positionstatements/FeralHorses.July.2011.pdf> (accessed Apr. 13, 2013)); Beil, *supra* n. 221.

<sup>232</sup> *Comprehensive Conservation Plan*, *supra* n. 219, at 37; see *Currituck National Wildlife Refuge*, *supra* n. 216 (the Conservation Plan refers to the horses as feral and of unknown origin, which excludes them from the "Refuge Objectives" stated on the website to "[p]rotect and improve the last remaining habitat of the endangered or threatened piping plover, loggerhead sea turtle and seabeach amaranth"); see also Beil, *supra* n. 221 (clearly outlining the local conflict between protecting native species and protecting the Corolla horses).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*; Beil, *supra* n. 221.

<sup>235</sup> Beil, *supra* n. 221.

<sup>236</sup> Email from Dr. Christopher S. DePerno, Assoc. Prof., N.C. St. U., to Carolyn Greenshields, co-author (Apr. 24, 2013, 3:37 AM PST) (on file with *Animal Law*); see Kimberly Marie Porter, *Vegetative Impact of Feral Horses, Feral Pigs, and White-tailed Deer in the Currituck National Wildlife Refuge* 10, 13–14 (unpublished M.S. thesis, N.C. St. U., Apr. 24, 2013) (on file with *Animal Law*) (concluding that horses have a negative impact on the ecosystem).

<sup>237</sup> 158 Cong. Rec. H480–481 (daily ed. Feb. 6, 2012) (available at <http://www.gpo.gov/fdsys/pkg/CREC-2012-02-06/pdf/CREC-2012-02-06-pt1-PgH480-4.pdf> (accessed Apr. 13, 2013)).

<sup>238</sup> H.R. Rpt. 112–310 at 7 (Dec. 1, 2011) (available at <http://www.gpo.gov/fdsys/pkg/CRPT-112hrpt310/pdf/CRPT-112hrpt310.pdf> (accessed Apr. 13, 2013)). Concerns raised by dissenters included the expense to FWS—estimated at \$285,800 initially and \$265,030 annually—of managing the wildlife refuge in conjunction with the wild horse population. *Id.* at 7 (these figures represent the cost of controlling the horses' impact on native wildlife, including the installation of corrals to protect critical habitat). Dissenters also criticized the legislation as unnecessary and redundant, noting that FWS al-

The bill passed by a two-thirds affirmative vote after a motion from Representative Doc Hastings (R-WA) to suspend the rules to expedite the vote.<sup>239</sup> Once H.R. 306 passed in the House, it was referred to the Senate Committee on Energy and Natural Resources, which discharged the bill with unanimous consent.<sup>240</sup> The bill was then referred to the Senate Environment and Public Works Committee, but no major action occurred before the end of the 112th Congress.<sup>241</sup>

On January 3, 2013, the bill was reintroduced as H.R. 126 by Representative Walter Jones, Jr. (R-NC) and was referred the same day to the House Natural Resources Committee.<sup>242</sup> The new version of the Corolla Wild Horses Protection Act is identical to the prior version that passed the House, with the exception of the removal of a subsection which forbade the Secretary of the Interior from excluding the Corolla herd from any part of the Currituck National Wildlife Refuge without a credible scientific finding that the horses threatened an endangered species.<sup>243</sup>

#### D. Update on the Status of Horse Slaughter

Horse slaughter and human consumption of horse meat was a major issue in 2012. Although never explicitly banned by Congress, the slaughter of horses for human consumption was effectively prohibited between 2007 and 2010 through the removal of funding for USDA inspections of horse slaughter facilities.<sup>244</sup> In 2011, however, Congress lifted the prohibition and reinstated funding for USDA inspections of

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ready participates in a local joint management program that provides for a maximum of sixty horses with flexibility to adapt to changing circumstances. *Id.* Finally, dissenters noted that the FWS and the National Wildlife Refuge System are already underfunded and currently overburdened with extra expenses brought by recent natural disasters. *Id.*

<sup>239</sup> Lib. Cong., THOMAS, *Bill Summary & Status 112th Congress (2011–2012) H.R. 306 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00306:@@X> (accessed Apr. 13, 2013).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> H.R. 126, 113th Cong. (Jan. 3, 2013) (as introduced) (available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr126ih/pdf/BILLS-113hr126ih.pdf> (accessed Apr. 13, 2013)); Lib. Cong., THOMAS, *Bill Summary & Status 113th Congress (2013–2014) H.R. 126 All Congressional Actions*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR00126:@@X> (accessed Apr. 13, 2013).

<sup>243</sup> Compare H.R. 306, 112th Cong. with H.R. 126, 113th Cong. (the former containing § 2(b), specifying the conditions under which the Secretary may exclude wild horses from the refuge, but the latter containing no analogous provision).

<sup>244</sup> Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 794, 119 Stat. 2120, 2164 (2005) (available at <http://www.gpo.gov/fdsys/pkg/STATUTE-119/pdf/STATUTE-119-Pg2120.pdf> (accessed Apr. 13, 2013)); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 741, 121 Stat. 1844, 1881 (2007) (available at <http://www.gpo.gov/fdsys/pkg/STATUTE-121/pdf/STATUTE-121-Pg1844.pdf> accessed Apr. 13, 2013)); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 739, 123 Stat. 524, 559 (2009) (available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ8/pdf/PLAW-111publ8.pdf> (accessed Apr. 13, 2013)).

horse-slaughter facilities in Appropriations Bill H.R. 2112.<sup>245</sup> Thus, it was unclear if and when horse slaughter would legally resume in the U.S.<sup>246</sup>

In the summer of 2012, the USDA stated its intention to recommence horse-slaughter inspections by the end of the year.<sup>247</sup> The USDA received applications requesting inspection so that the facilities could begin slaughter, but the USDA failed to approve the requests.<sup>248</sup> One of the applicants, Valley Meat Co., grew frustrated by USDA inaction and sued the agency.<sup>249</sup> The lawsuit is ongoing and informal statements from USDA indicate that the facility is likely to open in 2013.<sup>250</sup> Thus, absent congressional or administrative action on this issue, it appears that 2013 will mark the end to the short prohibition on horse slaughter in the U.S.<sup>251</sup>

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<sup>245</sup> Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552 (2011) (available at <http://www.gpo.gov/fdsys/pkg/PLAW-112publ55/pdf/PLAW-112publ55.pdf> (accessed Apr. 13, 2013)); Patrik Jonsson, Christian Science Monitor, *Way Cleared for Horse Slaughter to Resume in US after 5-Year Ban*, <http://www.csmonitor.com/USA/2011/1129/Way-cleared-for-horse-slaughter-to-resume-in-US-after-5-year-ban> (Nov. 29, 2011) (accessed Apr. 13, 2013).

<sup>246</sup> Graves et al., *supra* n. 63, at 380–83.

<sup>247</sup> Stephanie Strom, N.Y. Times, *U.S.D.A. May Approve Horse Slaughtering*, <http://www.nytimes.com/2013/03/01/business/usda-may-approve-horse-slaughter-plant.html> (Feb. 28, 2013) (accessed Apr. 13, 2013) (a version of this article appeared in the New York print edition on March 1, 2013, at B1 with the headline *U.S. May Approve Horse Meat Plant*); Dan Flynn, Food Safety News, *USDA Ready to Inspect Horse Slaughter by Year End*, <http://www.foodsafetynews.com/2012/07/usda-ready-to-inspect-horse-slaughter-by-year-end/> (July 30, 2012) (accessed Apr. 13, 2013).

<sup>248</sup> Heidi Rucki, Examiner, *Five Applications under Consideration for Horse Slaughter Facilities in US*, <http://www.examiner.com/article/five-applications-under-consideration-for-horse-slaughter-facilities-us> (Mar. 20, 2013) (accessed Apr. 13, 2013).

<sup>249</sup> Dan Flynn, Food Safety News, *Valley Meat Goes to Court to Get Equine Inspection Services*, <http://www.foodsafetynews.com/2012/12/valley-meat-goes-to-court-to-get-equine-inspection-services/> (Dec. 22, 2012) (accessed Apr. 13, 2013); Logan Hawkes, W. Farm Press, *Horse Slaughter Suit Hits USDA, Humane Society*, <http://westernfarm-press.com/government/horse-slaughter-suit-hits-usda-humane-society> (Jan. 9, 2013) (accessed Apr. 13, 2013).

<sup>250</sup> Alan Bjerga & Amanda J. Crawford, Bloomberg, *Horse-Slaughter Jobs Embraced in State Where Cowboys Roam*, <http://www.bloomberg.com/news/2013-03-19/horse-slaughter-jobs-embraced-in-state-where-cowboys-roam.html> (Mar. 19, 2013) (accessed Apr. 13, 2013) (quoting USDA Secretary Tom Vilsack who, while not committing to a hard timeframe, has stated that “We’re very close to getting the work done that’s needed to be done to allow them to operate”); Jeri Clausing, *New Mexico Horse Slaughterhouse To Open Soon*, [http://www.huffingtonpost.com/2013/05/02/new-mexico-horse-slaughterhouse-open-soon\\_n\\_3201395.html](http://www.huffingtonpost.com/2013/05/02/new-mexico-horse-slaughterhouse-open-soon_n_3201395.html) (Apr. 30, 2013) (accessed May 8, 2013) (reporting that the Valley Meat Co. plant was re-inspected by the USDA in April 2013 and will open soon).

<sup>251</sup> See Flynn, *supra* n. 247 (reporting that USDA’s Food Safety and Inspection Service will be ready to inspect horse-slaughter facilities by the end of 2012); see also Press Release, Off. of Congressman Jim Moran, *Moran Calls on USDA to Deny Horse Slaughter Facility Permits* (Mar. 25, 2013) (available at <http://moran.house.gov/press-release/moran-calls-usda-deny-horse-slaughter-facility-permits> (accessed Apr. 13, 2013)) (an-

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nouncing a letter from Congressman Moran to the USDA requesting denial of permit applications for horse-slaughter facilities, and requesting that the agency include the slaughter ban in its budget).