NOTE

Amending the Endangered Species Act: Wildlife Protection in a Post-*Tiger King* Society

Jonathan Peloquin[*]

ABSTRACT

Roadside zoos—such as the one in Netflix's Tiger King *documentary—present pressing issues concerning mistreatment of animals and the lack of meaningful federal regulation or oversight for captive animal care. These problems largely stem from the fact that the only federal statute designed to protect captive animals, the Animal Welfare Act ("AWA"), is underenforced by the government and provides only minimal protection for captive animals. Citizen suits not only allow those concerned with the welfare of captive wildlife to punish those who mistreat animals but can also serve to draw more public and government scrutiny to certain facilities. Although citizens are empowered under the Endangered Species Act ("ESA") to complement government enforcement by allowing them to also bring suit, the current mechanisms fall short. Finally, this Note argues that the ESA should be amended to remove any reference to the AWA so that citizens can bring a greater number of successful actions against facilities that slip through the government's net, and thereby support the purposes of both the ESA and AWA.*

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[*] J.D., expected May 2022, The George Washington University Law School.

INTRODUCTION

"You know why animals die in cages? Their soul dies."[1]

This exemplary quote ironically comes from the so-called "Tiger King," Joe "Exotic" Maldonado-Passage, who continues to serve over twenty years in prison for charges including violations of wildlife protection laws and causing some of his tigers to die in captivity.[2] Notably, the tigers suffered less from the death of their souls than from the bullets he fired into their bodies.[3] Despite what Joe Exotic's quote may indicate, mistreatment of the animals in cages poses a far greater threat than the cages themselves. Joe Exotic owned nearly two hundred tigers, a number that astoundingly equals over five percent of the estimated population of 3,900 tigers still living in the wild.[4]

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1 Eric Goode, *Tiger King: Murder, Mayhem, and Madness*, NETFLIX (Mar. 20, 2020), https://www.netflix.com/watch/81130220?trackId=200257859 [https://perma.cc/2NGB-9XWL].

2 Colleen Slevin, Court Orders Shorter Sentence for 'Tiger King' Joe Exotic, AP News (July 14, 2021), https://apnews.com/article/tiger-king-joe-exotic-shorter-sentence-a3d9b098a24af4792c742cf0cc578c9a [https://perma.cc/5PDH-63MJ].

3 *See* Press Release, U.S. Dep't of Justice, "Joe Exotic" Sentenced to 22 Years for Murder-For-Hire and for Violating the Lacey Act and Endangered Species Act (Jan. 22, 2020), https://www.justice.gov/usao-wdok/pr/joe-exotic-sentenced-22-years-murder-hire-and-violating-lacey-act-and-endangered [https://perma.cc/EG89-J7TX].

4 Labanya Maitra, *From the Eye of the Tiger*, OUTLOOK TRAVELER (May 16, 2020), https://www.outlookindia.com/outlooktraveller/explore/story/70459/the-us-has-nearly-

The survival of many endangered species, like the tiger, depends in part on the efforts of captive conservation programs.[5] Only as few as six or seven percent of the roughly 5,000 tigers in the U.S. are cared for by accredited and monitored zoos and research facilities.[6] The remainder are in private collections or—more often—in facilities like Joe Exotic's, purporting to be refuges or sanctuaries with limited oversight.[7]

To understand the problem, consider the following situation: An uncredited facility houses large and iconic endangered creatures, with a license from the government to do so. Instead of keeping a handful for research or wildlife release programs, this facility houses hundreds of these animals in small enclosures with insufficient food, water, medical care, and environmental conditions. An animal rights organization obtains video footage of animal abuse, but the facility remains open. The Humane Society of the United States ("HSUS") releases a report of the animals dying due to insufficient veterinary care, but the facility remains open. The United States Department of Agriculture ("USDA") issues a citation and small fine for insufficient care, but the facility remains open. Multiple visitors are distressed at the condition of the animals in the facility, but they see no way to personally fix the issue, so they do nothing, and the facility remains open. Finally, the owner of the facility is charged with violating wildlife protection laws, but only because the owner drew attention to himself—being arrested for attempting to hire a hitman to kill the owner of a rival facility—and still the facility remains open. If this sounds familiar, that is because this is exactly what happened with Joe Exotic's Greater Wynnewood Exotic Animal Park as seen on Netflix's *Tiger King* documentary.[8]

The wildlife protection laws of the United States require substantive change. More specifically, the way wildlife protection laws deal with captive wildlife, especially in the context of the proliferation of roadside zoos,

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twice-the-number-of-privately-owned-tigers-than-there-are-tigers-in-the-wild [https://perma.cc/JT3F-9TKA].

5 Leigh Henry, *5 Things* Tiger King *Doesn't Explain About Captive Tigers*, WWF (Mar. 31, 2020), https://www.worldwildlife.org/stories/5-things-tiger-king-doesn-t-explain-about-captive-tigers#:~:text=1.,problem%20in%20the%20United%20States.&text=It%20is%20estimated%20that%20there,3%2C900%20remaining%20in%20the%20wild [https://perma.cc/A7AW-UQC7].

6 DOUGLAS WILLIAMSON & LEIGH HENRY, PAPER TIGERS? THE ROLE OF THE U.S. CAPTIVE TIGER POPULATION IN THE TRADE IN TIGER PARTS 2 (July 2008) https://www.traffic.org/site/assets/files/5400/paper-tigers.pdf [https://perma.cc/HVM6-DULY].

7 *Id.*

8 *See* Robert Moor, *Tiger King Joe Exotic and His American Animals*, INTELLIGENCER (Sept. 3, 2019), https://nymag.com/intelligencer/2019/09/joe-exotic-and-his-american-animals.html [https://perma.cc/X7S2-GTAD].

desperately requires said changes. The term "roadside zoos" applies to facilities that claim to be zoos or wildlife sanctuaries, but are not accredited as such and are instead motivated by commercial gain rather than conservation.[9] Today, there are over 3,000 such facilities in the United States that lack accreditation from any zoological association, meaning these facilities only maintain the standards that wildlife protection laws require at best.[10] The welfare of animals in these facilities therefore depends entirely on the proper enforcement of statutory wildlife protection laws. Unfortunately, as the story of Joe Exotic highlights, most of these wildlife protection laws are either too lax or too poorly enforced to prevent mistreatment of the animals in these facilities.[11]

This Note addresses three major laws dealing with regulation of captive animals: (1) The Lacey Act, (2) The Animal Welfare Act ("AWA"), and (3) The Endangered Species Act ("ESA"). The Lacey Act has a broad exemption for captive animals and primarily deals with importation concerns.[12] The AWA is the only statute that caters to protecting captive animals, but many consider it too weak and criticize its lack of a citizen-suit provision.[13] While the ESA does have a citizen-suit provision, it has limited application to captive animals.[14] Neither the ESA nor the AWA are properly enforced by their relevant agencies, largely due to a lack of resources that spreads their enforcement agents too thin.[15]

Given the popularity of Netflix's *Tiger King* and the spotlight it cast on the plight of captive wildlife in zoos like Joe Exotic's, legal advocates can likely find more support for improving wildlife protections now than they have in the past.[16] Prominent animal protection attorney Carney Anne Nasser

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9 *See* TIGERS IN AMERICA, *Roadside Zoos*, http://www.tigersinamerica.org/roadside.htm#:~:text=Today%20there%20are%20more%20than,and%20therefore%20have%20no%20standards [https://perma.cc/A5WK-ZFK6].

10 *See id.*

11 See *infra* Section II.A.

12 *See* Kali S. Grech, *Detailed Discussion of the Laws Affecting Zoos*, ANIMAL LEGAL & HIST. CTR. (2004), https://www.animallaw.info/article/detailed-discussion-laws-affecting-zoos#id-3 [https://perma.cc/26JV-B6D6].

13 *See id.*

14 *Id.*

15 *Id.*

16 *See* Todd Spangler, *'Tiger King' Nabbed Over 34 Million U.S. Viewers in First 10 Days, Nielsen Says*, VARIETY (Apr. 8, 2020, 5:00 AM), https://variety.com/2020/digital/news/tiger-king-nielsen-viewership-data-stranger-things-1234573602/ [https://perma.cc/EZ7U-GJWM] (article detailing extreme popularity of Tiger King documentary when it debuted); *see also* Todd Spangler, *'Tiger King' Ranks as TV's Most Popular Show Right Now, According to Rotten Tomatoes*, VARIETY (Mar. 28 2020), https://variety.com/2020/digital/news/tiger-king-most-popular-tv-show-netflix-1203548202/ [https://perma.cc/L8QQ-XVKP].

argues that the AWA requires better enforcement to protect animals from roadside zoos, or that it should include a citizen-suit provision to let individuals take action where the enforcement agencies fall short.[17] Both of these measures have failed to become law in the past, and there is little indication that this will change soon.[18]

Yet, far fewer advocates have focused on the ESA's captive animal exceptions as a potential path for legal protections. One exception in particular protects facilities from liability if they comply with AWA standards—"[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act."[19] This exception needlessly incorporates AWA analysis into ESA suits and hampers private citizens and government agencies from enforcing the ESA while holding facilities to the lax standards espoused by the AWA.

This Note argues that amending the definition of "harass" under the ESA to modify the animal husbandry exception under 50 C.F.R. § 17.3 would provide a workable and timely solution that could pass Congress. This Note proposes that the exception in 50 C.F.R. § 17.3 instead be amended as "animal husbandry practices that are generally accepted as reasonable."[20] The simple change would show the most promise by giving citizens a better chance of succeeding in litigation under the ESA. This Note further argues that if citizen suits have a higher chance of success, more private citizens and interested groups could bring claims, and in the process fill the voids in captive animal protections created by weak agency enforcement and deficient resources.

Part I examines major wildlife statutes, the ways in which roadside zoos avoid enforcement, and describes the obstacles faced by citizen suits under the ESA. Part II explores different interpretations of the current ESA "harass" definition, the conflict among the courts in applying the AWA standards to the ESA, and some of the arguments scholars of wildlife law make for excluding the AWA from ESA analysis. Part III analyzes how this Note's proposed solution would positively impact the current legal

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17 Matt Reynolds, *Animal Law Attorney Discusses Netflix's 'Tiger King,' Legal Issue Related to Wildlife Trafficking*, ABA J. (May 14, 2020), https://www.abajournal.com/web/article/animal-law-attorney-talks-tiger-king [https://perma.cc/6UD7-LVWD] (interview with Animal Law expert detailing issues with protections); *see also* Carney Anne Nasser, *Welcome to the Jungle: How Loopholes in the Endangered Species Act and Animal Welfare Act are Feeding a Tiger Crisis in America*, 9 ALB. GOV'T L. REV. 194, 234–35 (2016).

18 *Id*. *But see* Big Cat Public Safety Act, H.R. 263, 117th Cong. (2021) (proposed Act, which happened to coincide with the release of Netflix's Tiger King, aimed at improving captive animal conditions, but not targeting roadside zoos).

19 50 C.F.R. § 17.3 (2006).

20 *Id.*

framework and explains how it remains the best, most manageable solution even notwithstanding some potential obstacles.

I. THE WEB OF WILDLIFE PROTECTION ENFORCEMENT AND INTERPRETATION

Roadside zoos are not a new concept in America, and laws already exist that would address them. This Part provides background on current applicable laws and why roadside zoos need correcting. It explains the potential loopholes and avoidance methods roadside zoo owners utilize and highlights key examples of citizen suits brought in attempts to force compliance with captive wildlife laws.

A. Roadside Zoos and Joe Exotic the Tiger King

Roadside zoos have been spreading throughout the United States since the exotic animal trade boomed in the 1940s,[21] yet what constitutes a roadside zoo still lacks clear definition.[22] At a basic level, the term "roadside zoo" usually refers to facilities housing animals that do not meet any agency's requirements for accreditation.[23] Unlike accredited facilities, which are subject to exhibit size and standard of care restrictions, roadside zoos can virtually be any size and employ widely divergent personal standards of care.[24] The term "roadside" can also be misleading, with many of these so-called zoos being located nowhere near a major road.[25] This Note uses the term in the same way as most animal welfare organizations and agencies have: to describe those facilities where animal's basic needs are not met, or at least where the animals are not receiving skilled care.[26]

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21 *See A Brief History of the Global Exotic Pet Trade*, WORLD ANIMAL PROTECTION (Oct. 31, 2018), https://www.worldanimalprotection.us/news/brief-history-global-exotic-pet-trade [https://perma.cc/D8X8-YLX7]; *see also* TIGERS IN AMERICA, *supra* note 9.

22 *See generally* Lilly Burba, Student Research, *A Home for Hope: Examining the History, Role and Purpose of the Modern American Zoo*, DEPAUW UNIV. 81 (2018), https://scholarship.depauw.edu/cgi/viewcontent.cgi?article=1081&context=studentresearch [https://perma.cc/JH55-NEKT] (student research article describing the history of zoos in America, including roadside zoos).

23 *See* TIGERS IN AMERICA, *supra* note 9.

24 *See* Burba, *supra* note 22, at 8.

25 *See id.*

26 *See Roadside Zoos and Other Captive-Animal Displays*, PETA, https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/ [https://perma.cc/6S55-EB66]; *see also* THE HUMANE SOCIETY OF THE UNITED STATES, CLOSE-UP REPORT 28 (1980), https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1027&context=cu_reps [https://perma.cc/2S3H-BRY4] (describing the poor conditions of roadside zoos and the problems they posed even 40 years ago).

The Animal Legal Defense Fund offers a clear summary of the problems inherent in unaccredited roadside zoos:

> The animals frequently live in small, dirty cages. They are fed inadequate food, and are denied medical care. They have little in the way of mental stimulation—often, not even the company of other animals, since many roadside zoos keep animals confined alone in their cages. Sometimes roadside zoos also encourage dangerous interactions between animals and visitors, such as bottle feeding tiger cubs.[27]

No federal law requires that facilities displaying animals receive accreditation from any zoological organization, and even if there were such a requirement, the leading organizations have differing standards.[28] A recent assessment found state wildlife protections are generally weaker—when they exist at all—than federal protections.[29] Unfortunately, only a handful of regulations govern roadside zoos, each with a different standard of applicability.

The Greater Wynnewood Exotic Animal Park ("GW Zoo"), the infamous facility run by Joe Exotic, serves as a prime example of the roadside zoo problem. Unlike the roadside zoo image some may conjure of a run-down stop, just off the highway with a few scattered cages, GW in fact housed hundreds of animals, including lions, tigers, and bears, in multiple enclosures.[30] Yet GW still fell into the definition of a roadside zoo.[31] A 2011 report by the Humane Society of the United States found that tiger cubs were punched and whipped during training, that animals were bred excessively to get babies for photo ops, that cubs were passed around to visitors despite cries of distress, and that five endangered tigers died during the course of the investigation alone.[32] Despite the report's findings that the facility violated

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27 *Roadside Zoos*, ANIMAL LEGAL DEF. FUND (2021), https://aldf.org/issue/roadside-zoos/ [https://perma.cc/V9EA-BEQL].

28 *See generally* Accreditation Basics, ASS'N OF ZOOS AND AQUARIUMS, https://www.aza.org/becoming-accredited [https://perma.cc/3FTQ-GB5G]; ZAA Accreditation Standards, ZOOLOGICAL ASS'N OF AMERICA, https://zaa.org/standards [https://perma.cc/8TLY-E6U2].

29 *See generally* Alejandro E. Camacho et al., *Assessing State Laws and Resources for Endangered Species Protection*, 47 ENV'T. L. REP. 10837 (2017) (analyzing the weaknesses of state laws protecting endangered species).

30 *Reckless Tiger Cub Petting Zoo: The Humane Society of the United Stated Investigates GW Exotic Animal Park*, HUMANE SOC'Y OF THE U.S. (2012), https://www.humanesociety.org/sites/default/files/docs/investigative-report-gw-exotic-animal-park.pdf [https://perma.cc/7YL4-52ZT] [hereinafter HSUS Investigation].

31 *E.g.*, David Lee, *'Tiger King' Zoo Shut Down After Inspection by Feds*, COURTHOUSE NEWS SERVICE, https://www.courthousenews.com/tiger-king-zoo-shut-down-after-inspection-by-feds/ [https://perma.cc/AGQ6-VSTA].

32 *See* HSUS Investigation, *supra* note 30.

numerous USDA regulations, GW continued to operate in this manner for years after.[33] GW only faced severe repercussions after the public outcry prompted by Netflix's documentary.[34]

B. The Current State of Wildlife Protection Laws

The Lacey Act, the first major federal animal protection act, deals mainly with the acquisition of wildlife and related trade and commerce issues and less with the subsequent treatment of captive wildlife.[35] Although the Captive Wildlife Safety Act[36] amended the Lacey Act in 2003 to limit interstate trafficking of wildlife, it still did not touch on animal cruelty or standards of care for animals in captivity.[37] Thus, the Lacey Act has little applicability to the treatment of animals in roadside zoos.

The Animal Welfare Act ("AWA") is the primary federal statute relevant to roadside zoos because the AWA specifically focuses on captive animals, regulating standards for "transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes . . . ."[38] However, the efficacy of the AWA is consistently undermined by the low standards it sets and underenforcement by its governing agency, the Animal and Plant Health Inspection Service, with oversight by the USDA.[39] The AWA is not an animal cruelty law—the minimum standards of the statute are based mainly on commerce—and so some argue that the penalties for violating the act are too small to offset the huge monetary gains that can be made from exhibiting exotic animals.[40]

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33 *See id.*; *see also* Kitty Block, *Netflix's 'Tiger King' is a Wake-Up Call for Ending Private Possession of Big Cats*, HUMANE SOC'Y OF THE U.S. BLOG (Mar. 27, 2020), https://blog.humanesociety.org/2020/03/netflixs-tiger-king-is-a-wake-up-call-for-ending-private-ownership-of-big-cats.html [https://perma.cc/4VCR-6H3Y] (showing that despite the results and reporting of the previous HSUS investigation, Joe Exotic continued to run his zoo with the same problems outlined in the report).

34 *See* Block, *supra* note 33.

35 *See* 16 U.S.C. §§ 3371–3378 (2012); *see also* Grech, *supra* note 12 (characterizing the Lacey Act as mainly dealing with importation).

36 Captive Wildlife Safety Act, 108 Pub. L. No. 191 (2003).

37 *See* 16 U.S.C. §§ 1531–1544; Captive Wildlife Safety Act, 108 Pub. L. No. 191 (2003).

38 7 U.S.C. § 2131 (1985).

39 *See, e.g.*, Nasser, *supra* note 17, at 199 (pointing out that USDA interprets AWA handling regulations to allow for public handling of tiger cubs with little oversight, which in turn leads to forced breeding programs to produce more cubs).

40 *See* U.S.D.A. OFFICE OF THE INSPECTOR GEN. AUDIT REPORT 33002-3-SF, APHIS ANIMAL CARE PROGRAM INSPECTION AND ENFORCEMENT ACTIVITIES at i (U.S.D.A. 2005), https://www.animallaw.info/sites/default/files/awa_enforcement_2005.pdf [https://perma.cc/R25J-FTTF] (finding that the USDA was "not aggressively pursuing

Likewise, the AWA regulations are generally not species-specific, but instead provide a small number of catch-all categories.[41] Thus, the statute frequently does not account for differences in diet, natural environment, enrichment, or veterinary needs between the many species of animals kept in captivity.[42] For example, minimum standards of care in these facilities could be the same for a tiger as for a wolf. This poses an obvious problem when considering the differences in what a pack animal that enjoys large family groups requires when compared to a much more solitary apex predator like a tiger. For example, six wolves in a group would not be an oddity in the wild, but six tigers living in a small area will likely lead to conflict—especially if there are multiple males present—given the more territorial nature of tigers.[43] Tigers lives primarily alone in vast swaths of jungle territory and require personal space and a significantly different habitat to feel comfortable.[44]

The main agency responsible for enforcing the AWA is the Animal and Plant Health Inspection Service ("APHIS"), a subbranch of the USDA.[45] Enforcement of minimum standards for captive animals was originally within the USDA's mandate, but they have since delegated this authority to APHIS.[46] Per the AWA, APHIS is only required to inspect facilities housing captive animals once per year; yet, APHIS has frequently been criticized for not properly enforcing the AWA, even when these inspections do occur.[47]

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enforcement actions against violators of the AWA" and that when the agency imposed monetary penalties, such penalties were so low as to be considered a mere "cost of conducting business" for the licensees) [hereinafter OIG Inspection Report].

41 *See* Nasser, *supra* note 17, at 221–24.

42 *See id.*

43 *See* TIGERS-WORLD, https://www.tigers-world.com/tiger-social-structure/ [https://perma.cc/7UUH-MNJ4].

44 *Id.* at 221.

45 U.S.D.A. Animal and Plant Health Inspection Service, *Animal Welfare Act Enforcement* (June 2, 2020), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/ct_awa_enforcements [https://perma.cc/RQD8-UUJM].

46 *See* U.S.D.A. OFFICE OF THE INSPECTOR GEN. AUDIT REPORT 33601-10-CH, CONTROLS OVER APHIS LICENSING OF ANIMAL EXHIBITORS (U.S.D.A. 2010), https://www.usda.gov/sites/default/files/33601-10-CH.pdf [https://perma.cc/W6HC-RHNC]; *see also* U.S.D.A. Animal and Plant Health Inspection Service, *Animal Welfare Act* (Jan. 11, 2022), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa#:~:text=USDA%20Animal%20Care%2C%20a%20unit,Animal%20Welfare%20Act%20(AWA) [https://perma.cc/D82D-ZKYB].

47 *See, e.g.*, Nasser, *supra* note 17; *see also* OIG Inspection Report, *supra* note 40 at i (finding that the USDA was "not aggressively pursuing enforcement actions against violators of the AWA").

While the AWA is the most specific federal statute for *captive* wildlife, the ESA is relevant any time captive endangered animals are at issue. The ESA is a broad act that deals with multiple aspects of wildlife protection: Section Four of the ESA provides a process by which the Secretary of the Interior may designate species as endangered or threatened;[48] Section Seven requires federal agencies to ensure that their actions comply with all aspects of the law and do not jeopardize the existence of any species protected by the act.[49] Most issues involving captive animals would fall under Section Nine, however, which holds the title of "perhaps the most powerful regulatory provision in all of environmental law," [50] and prohibits the "taking" of a member of a species protected under the act.[51] The ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[52] Unlike the AWA, the ESA also includes an important citizen-suit provision, under which any interested private party with standing may bring a civil action in federal court to enforce compliance with the ESA.[53]

C. Tiger King*: Highlighting the Issues*

Two recent cases highlight the problem of agency underenforcement of the AWA and ESA, and are further analyzed in Part II of this Note.[54] The criminal indictment of the Tiger King himself, Joe Exotic, initially only included charges related to murder-for-hire. [55] During the trial, the prosecution found evidence of numerous complaints and investigations against Joe Exotic's GW Zoo, including disturbing video footage of animal abuse from an animal rights organization,[56] a HSUS report on insufficient

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48 16 U.S.C. § 1533.

49 16 U.S.C. §§ 1536.

50 SONIA S. WAISMAN, PAMELA D. FRASCH & BRUCE A. WAGMAN, ANIMAL LAW: CASES AND MATERIALS 605 (Carolina Academic Press, 5th ed. 2014).

51 16 U.S.C. § 1538 (ESA prohibitions).

52 16 U.S.C. § 1532(19) (definition of "take").

53 16 U.S.C. § 1540(g) (citizen-suit provision allowing for private civil suits).

54 *See infra* Part II.

55 *See* Superseding Indictment, United States v. Maldonado-Passage, No. CR-18-227-SLP (W.D. Okla. 2018), https://www.courtlistener.com/recap/gov.uscourts.okwd.104490/gov.uscourts.okwd.104490.24.0.pdf [https://perma.cc/A5GX-G56X] [hereinafter Superseding Indictment]; *see also Grand Jury Adds Wildlife Charges to Murder-For-Hire Allegations Against Joe Exotic*, DEP'T OF JUST. W. D. OKLA. (Nov. 7, 2018), https://www.justice.gov/usao-wdok/pr/grand-jury-adds-wildlife-charges-murder-hire-allegations-against-joe-exotic [https://perma.cc/9GKN-2ZMM].

56 *What "Tiger King" Didn't Reveal: Animal Abuse and an Extensive Network of Breeding and Selling Tigers*, HSUS (April 7, 2020),

care in the facility,[57] and several USDA citations and small fines for insufficient care.[58] A superseding indictment was filed that included charges for violating the ESA and the Lacey Act.[59] The Lacey charges alleged falsification of labels for the shipment of endangered species, whereas four of the ESA charges were for violating prohibitions on selling endangered species in interstate commerce.[60] The final five counts were for shooting and killing five tigers in order to make room for other big cats Joe Exotic was shipping in to be boarded for a fee at the park.[61] These final five counts against Joe Exotic were all based on actions that occurred in a single year of the park's twenty-year existence.

In October of 2020, following Joe Exotic's conviction, the state of Virginia filed a similar indictment against Bhagavan "Doc" Antle, the owner of another roadside zoo that was the inspiration for Joe Exotic's own park and was also featured in Netflix's *Tiger King*.[62] PETA reported that from 1986 to 1991, Antle's facility received numerous citations and several small fines under the AWA.[63] In 1991, the federal government charged Antle with repeated violations of the AWA, including substandard housing, but Antle was able to settle with a $3,500 fine—merely a slap on the wrist.[64] Despite being open since 1983 and, like Joe Exotic's GW Zoo, receiving numerous complaints and investigations by agencies, the only ESA charges Antle faced were for conspiracy to violate the Act.[65]

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https://www.humanesociety.org/news/what-tiger-king-didnt-reveal-animal-abuse-and-extensive-network-breeding-and-selling-tigers.

57 HSUS Investigation, *supra* note 30.

58 Joe Schreibvogel, AWA Docket No. 05-0014 (2006), https://oalj.oha.usda.gov/sites/default/files/AWA_05-0014_012606.pdf [https://perma.cc/YLU9-5GVT].

59 Superseding Indictment, *supra* note 55 at 2–4.

60 *Id*. at 8–10.

61 *Id*. at 7–8.

62 Press Release, Commonwealth of Virginia Office of the Attorney General, *Owner of Myrtle Beach Safari and Owner of Virginia "Roadside Zoo" Indicted on Wildlife Trafficking Charges* (Oct. 9, 2020), https://www.oag.state.va.us/media-center/news-releases/1848-october-9-2020-owner-of-myrtle-beach-safari-and-owner-of-virginia-roadside-zoo-indicted-on-wildlife-trafficking-charges [https://perma.cc/36NF-FH9T].

63 *T.I.G.E.R.S. (Bhagavan Antle)*, PETA, https://www.mediapeta.com/peta/PDF/TIGERS-bhagavan-antle-fs.pdf [https://perma.cc/P4KK-9HWM].

64 *See id.* (describing that in 1991 Antle was able to settle multiple USDA violations for only a $3,500 fine).

65 *See id.*

D. Avoidance and Loopholes in Wildlife Protection Laws

Because the AWA suffers the dual problems of practically inconsequential standards of care and weak enforcement, [66] many of those concerned for captive animals' welfare may feel the need to turn to other laws to stop continued mistreatment. Unfortunately, the AWA itself creates roadblocks in enforcing other related statutes by providing enforcement loopholes. One example is in animal trafficking, specifically mass breeding mills that sell baby endangered animals bred in inhumane conditions, similar to the puppy mills that exist throughout the United States.[67] These mills would typically be subject to both state law regulations and provisions of the Lacey Act and ESA dealing with animal transport.[68] However, breeders can often avoid or at least dissuade enforcement actions by getting a license under the AWA as an exhibitor for as little as $10 with a $30–$310 annual fee.[69] This license allows for the breeding of animals with little to no oversight on the number of animals being bred or care the animals receive.

Many state laws also contain exemptions for AWA-compliant exhibitors,[70] and while the Lacey Act and ESA do not have the same exemptions, the limited resources enforcement agencies have has tended to divert focus from licensed facilities. Counterintuitively, this allows larger operations like GW Zoo to avoid the heaviest scrutiny.[71] Additionally, roadside zoo operators can further avoid federal action by using a trade loophole to label the transactions "free" or "donations" when they are cash purchases or sales.[72]

The conditions in which captive animals are kept also falls outside of the Lacey Act, although the AWA and ESA do provide some limited

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66 In the past, the Office of the Inspector General (OIG) has repeatedly criticized APHIS for poor enforcement of the AWA. *See* OIG Inspection Report, *supra* note 40; *see, e.g.*, U.S.D.A. OFFICE OF THE INSPECTOR GEN. AUDIT REPORT 33601-001-41, APHIS OVERSIGHT OF RESEARCH FACILITIES, 14 (U.S.D.A. 2014), https://www.usda.gov/sites/default/files/33026-0001-41.pdf [https://perma.cc/9JMK-KKBL] (identifying multiple "grave" or repeat violators of the AWA, some even involving animal deaths, which the USDA took no enforcement action against). *See generally* U.S.D.A. OFFICE OF THE INSPECTOR GEN. AUDIT REPORT 33002-4-SF: APHIS ANIMAL CARE PROGRAM INSPECTIONS OF PROBLEMATIC DEALERS 1, 6 (U.S.D.A. 2010), https://www.usda.gov/sites/default/files/33002-4-SF.pdf [https://perma.cc/75Z6-6PJ3] (pointing out multiple deficiencies in the USDA's administration of the AWA).

67 Reynolds, *supra* note 17.

68 *Id.*; *see also* 9 C.F.R. § 2.6 (a)–(c) (2020).

69 9 C.F.R. § 2.6 (a)–(c).

70 *See* 720 ILL. COMP. STAT. 5/48-10(a)-(b) (2015); N.Y. ENVTL. CONSERV. LAW § 11-0512 (LexisNexis 2015).

71 Reynolds, *supra* note 17.

72 *E.g.*, Superseding Indictment, *supra* note 55.

protection. The lack of a citizen-suit provision in the AWA limits enforcement of the statute to APHIS. Meanwhile, the ESA was not designed with captive animals in mind and, as a result, one of its most effective provisions—the prohibition against "harassing" animals as a form of taking—is explicitly tied to the standards of the AWA.[73]

E. Citizen Suits Under the ESA

When these wildlife protection statutes are left solely to agencies to manage, loopholes and poor enforcement have the potential to hamstring their effectiveness. Conversely, citizen actions have the potential to support agencies in holding violators responsible. Yet, among wildlife protection statutes, only the ESA has a citizen-suit provision.[74]

The ESA was unfortunately not designed with captive animals in mind,[75] and suits against roadside zoos are relegated almost solely to violations of Section Nine's "take" prohibitions.[76] The statute defines "take" as actions that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[77] "Harass" and "harm" arguably apply best to roadside zoos. Such facilities are not pursuing, hunting, trapping, capturing, or collecting animals from the wild directly, and it is rare that a facility will intentionally shoot, wound, or kill an animal that they are trying to profit from. Furthermore, of these terms, "harass" covers far more types of mistreatment than the direct physical injury that "harm" is mostly limited to.[78]

The undefined scope of "harass," as well as the inclusion of an exception for facilities meeting minimum AWA standards, unnecessarily burdens citizen plaintiffs when they allege a violation of the AWA.[79] In *Graham v. San Antonio Zoological Society*,[80] the citizen plaintiffs argued that compliance with the AWA standards was insufficient to exempt the operators from ESA action.[81] The district court judge rejected this argument

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73 50 C.F.R § 17.3 (2006).

74 *See supra* note 53 (citizen-suit provision in ESA).

75 *See*, *e.g.*, Greer Gaddie, Note, *Protecting Captive Endangered Animals: The Importance of Interpreting the Endangered Species Act Broadly*, 49 TEX. ENVTL. L. J. 295, 303 (2019) (noting that the ESA protects only a certain subset of captive animals).

76 Benjamin Rubin, *Does the Federal Endangered Species Act Protect Zoo Animals?*, NOSSAMAN LLP, https://www.endangeredspecieslawandpolicy.com/does-the-federal-endangered-species-act-protect-zoo-animals [https://perma.cc/E34R-ZTXV].

77 16 U.S.C. § 1532 (definitions section of ESA).

78 *Id.*

79 *See, e.g.*, *infra* notes 60, 69, 73 and accompanying text.

80 261 F. Supp. 3d 711 (W.D. Texas 2017).

81 *Id.* at 716–17.

and granted summary judgment in favor of a zoo defendant on multiple harassment claims because the operators had complied with the AWA's minimum standards.[82] Citizen plaintiffs also brought suit under the ESA's Section Nine take prohibition, claiming that the zoo's treatment of Lucky, an Asian elephant, constituted harassment and harm in the form of Lucky's arthritis, foot, and mental health problems.[83] Plaintiffs raised four primary claims under the ESA:

> (1) keeping her alone without any Asian elephant companions; (2) keeping her in a small enclosure which fails to meet minimum size standards set by the Association of Zoos and Aquariums ("AZA"); (3) depriving her of adequate shelter from the sun; and (4) forcing her to live on a hard, unnatural, species-inappropriate substrate.[84]

In determining whether the zoo's actions amounted to "harassment" under the ESA, the court stated that the minimum compliance standards of the AWA become the substantive standard to determine whether an ESA violation occurred. [85] The court declined to use previous APHIS determinations that the zoo was compliant with the AWA as a determinative factor, instead making them merely part of the analysis.[86] Although APHIS never found the zoo to be in violation of the AWA, the operators still added two more elephants to Lucky's enclosure to remedy her social isolation, so the court granted summary judgment to the zoo on that claim for mootness.[87] Although keeping Lucky alone without any Asian elephant companions was problematic, the citizen plaintiffs offered expert testimony from multiple sources that the enclosure was not large enough for one elephant, let alone three.[88] Despite this evidence, the court still granted summary judgment for the zoo on the claim that the enclosure was too small because there was not sufficient evidence that the ailments Lucky suffered were due to the enclosure's size, and the size seemed to conform to AWA minimum standards.[89] The court denied summary judgment on the other two counts for genuine dispute of material facts.[90]

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82 *Id.*

83 *Id.* at 717–21.

84 *Id.* at 716.

85 *See id.* at 744–45.

86 *See id.* at 745.

87 *See id.* at 749.

88 *See id.* at 750.

89 *Id.* (discussing only briefly the minimum AWA standards and finding that the enclosure complied with them, despite not rejecting expert testimony that Lucky did not have enough space in their opinion).

90 *Id.* at 750–51.

In *Kuehl v. Sellner*,[91] citizen plaintiffs brought suit against a facility with multiple AWA violation-free inspections, alleging, among other claims, that lemurs were harassed by their lack of sufficient enrichment, and tigers were harassed by the buildup of feces in their exhibits.[92] Unlike in *Graham*, the district court found in favor of the citizen plaintiffs, but this was only due to the evidence they produced of extreme conditions that exemplified "pervasive, long-standing, and ongoing"[93] violations. The very social lemurs lived in isolation, without enrichment or an AWA compliant plan for enrichment, while the tigers lived in enclosures with an excessive amount of excrement and did not receive veterinary care for illnesses, leading to the deaths of some animals.[94] The Eighth Circuit affirmed the district court's decision, but still denied the citizen plaintiffs' choice in what facility to send the animals to and instead chose a USDA-licensed zoo the plaintiffs disapproved of given the zoo had a longer history of AWA-"compliant" inspections.[95] Judge Goldberg wrote a concurring opinion expressing his belief that the court erred in weighing AWA compliance so heavily when deciding where to send the animals, given the evidence the court had just seen indicating that a violation-free inspection does not always indicate actual AWA compliance.[96]

The Fourth Circuit chose to give closer scrutiny to the language of the AWA compliance exclusion in *Hill v. Coggins*,[97] vacating in part a lower court's ruling in favor of Cherokee Bear Zoo.[98] Citizen plaintiffs had brought suit under the ESA against the owners of the zoo for keeping four bears in undersized concrete pits in the ground.[99] In ruling for the defendants, the court dismissed plaintiff's argument that the language of 50 C.F.R. § 17.3 requires facilities to maintain both (1) generally accepted standards of care and (2) AWA compliance in order to be exempted from the ESA's harassment prohibition.[100] Instead, the court found that the generally accepted practices of other zookeepers or zoological organizations are not relevant and that compliance with the minimum AWA standards was

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91 161 F. Supp. 3d 678 (N.D. Iowa 2016).

92 *See generally id.*

93 *Id.* at 718.

94 *See id.* at 710–16.

95 Kuehl v. Sellner, 887 F.3d 845, 854–55 (8th Cir. 2018).

96 *Id.* at 856–57 (Goldberg, J., concurring).

97 867 F.3d 488 (4th Cir. 2017).

98 *Id.* at 499.

99 Hill v. Coggins, No. 2:13-cv-00047-MR-DLH, 2016 WL 1251190, at *1 (W.D.N.C. 2016).

100 *See id.* at *13.

sufficient.[101] The Fourth Circuit disagreed, siding with citizen plaintiffs' interpretation that the exclusion is "comprised of both a 'generally accepted' requirement and an AWA compliance requirement."[102] The court went on to add that requiring only AWA compliance would narrow the protections of the ESA, which directly conflicted with the Supreme Court's interpretation of congressional intent in passing the ESA, and remanded for further proceedings.[103]

The Eleventh Circuit later established a more stringent standard for finding "harassment" under the ESA in *PETA v. Miami Seaquarium*,[104] by requiring a showing of a "threat of serious harm" to the orca Lolita resulting from the facility's treatment of her.[105] In doing so, the court cited a desire to avoid creating conflict between the ESA and the AWA as their reason for creating a heightened standard for "harassment."[106] In deciding so, the court ignored evidence of real injuries to Lolita, who suffered—among other injuries alleged by PETA—rakes inflicted when the dolphins in her tank scraped past her, a UV radiation condition in her eye that required twice-daily eyedrops, blisters and wrinkles from sun exposure in the shallow tank, and past treatments for respiratory infections.[107] Many of these issues are those shown in the documentary *Blackfish*, where researchers explained a captive orca named Tilikum developed aggressive behavior that led to him killing a trainer because the operators were confining a creature accustomed to living in thousands of miles of ocean to a small shallow enclosure shared with other sea creatures.[108] The Eleventh Circuit concluded Lolita was not "harmed or harassed" because her enclosure satisfied the AWA's minimum standards and the USDA (through APHIS) had not taken action, which in their opinion indicated a lack of serious risk of harm to Lolita.[109]

The Eleventh Circuit's ruling, as well as the holdings of the cases in this section, highlight the potential flaws of including the AWA in determining ESA violations. Lolita's tank is supposedly sixty feet wide and twenty feet deep, but arguably closer to thirty-five feet wide and eight feet deep in some

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101 *See id.*

102 Hill v. Coggins, 867 F.3d 499, 509 (4th Cir. 2017).

103 *See id.* at 509–10 (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Oregon*, 515 U.S. 687 (1995)).

104 879 F.3d 1142 (11th Cir. 2018).

105 *Id.* (headnote describing the rationale behind the holding).

106 *See id.* at 1150.

107 *See id.* at 1145 n.4.

108 *See* Jeanette Catsoulis, *Do Six-Ton Captives Dream of Freedom?*, N.Y. TIMES (July 18, 2013), https://www.nytimes.com/2013/07/19/movies/blackfish-a-documentary-looks-critically-at-seaworld.html [https://perma.cc/VSH2-DDT9].

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

parts due to the trainer's island.[110] The tank also housed multiple dolphins.[111] For comparison, the Seaworld tank housing Tilikum was about eighty-six by fifty-one feet in area and thirty-five feet deep housing multiple orcas, and still caused a trained orca who had been performing for years so much stress that he attacked multiple trainers.[112]

II. ANALYZING THE THREAT OF CONTINUED AWA SUPREMACY

This Note has discussed the different points of contact among the AWA, the ESA, and various parties working to regulate roadside zoos. This Part analyzes how the AWA negatively impacts each stage of the ESA enforcement process, from inspections to civil citizen suits. It provides insight on how in each instance the minimum standards of the AWA limit not just the power of the AWA itself, but also attempted enforcement under the ESA. This Part closes with a thorough review of how circuits courts have attempted to address the AWA and ESA crossover and the efficacy of their individual approaches.

A. Shortcomings of Agency Enforcement Contrasted with Public Interest in Captive Wildlife Treatment

The notorious cases of Joe Exotic and Doc Antle highlight agency failures in enforcing the ESA and AWA, as well as the growing number of public citizens now concerned with captive wildlife treatment.

In the case of Joe Exotic, despite frequent complaints reported on the GW Zoo over its two decades of operation, the federal government never took any enforcement action to close the facility.[113] Criminal prosecution of Joe Exotic only occurred in 2016 and was for murder-for-hire, not the mistreatment of the captive animals.[114] Only in 2018 were additional charges for violating the ESA tacked on, and no action was ever taken under the AWA.[115]

Of the nine ESA counts against Joe Exotic, only five dealt with animal mistreatment—specifically for killing tigers without a veterinarian present.[116] All five incidents occurred in the same year and were done for the

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110 SAVE LOLITA, https://www.savelolita.org/ [https://perma.cc/9TJ2-C9VG].

111 *Id.*

112 *See Orca Captivity Report*, PETA (June 2021), https://www.peta.org/wp-content/uploads/2021/06/SeaWorldCruelty.pdf [https://perma.cc/3LU5-UWN6].

113 *See supra* notes 55–65 and accompanying text.

114 Indictment, United States v. Maldonado-Passage, No. CR-18-227-SLP (W.D. Okla. 2018), https://s3.documentcloud.org/documents/4844380/Joe-Exotic-Indictment.pdf [https://perma.cc/8VLD-DRCL].

115 *Id.*

116 *Id.* at 7–8.

purpose of making room for more exotic cats that Joe Exotic would be paid to house.[117] It does not require a stretch of the imagination to assume that more killings likely took place at other points in the park's twenty-year history that were never caught nor prosecuted. Further, if the agencies responsible for enforcing the ESA and AWA failed to detect the callous murdering of animals at the facility despite numerous warnings, it is also highly likely that they were not investigating the facility sufficiently and likely missed many issues that could have met the lower standard of "harassing" animals.

Doc Antle, who Joe Exotic describes as a mentor, had his own encounters with the enforcement agencies.[118] His recent October 2021 indictment in Virginia is one of the first serious penalties that could be levied against Antle since the 1983 opening of his facility.[119] Antle faces charges of felony trafficking under the Lacey Act and misdemeanor ESA violations, both stronger than the weak penalties the AWA can impose on its own.[120]

Thanks in part to the interest generated by *Tiger King*, these new charges made national news, serving as further support that the public can have an important impact on enforcement of wildlife protection laws if given the chance.[121] Moreover, *Tiger King* highlighted reports from and by visitors and disenfranchised former employers, which indicate that there were many more citizens willing to take at least some action, legal or otherwise, that agencies were not.[122]

Even where individual citizens are not able or willing to ring a personal suit, animal rights and advocacy groups could step in as a group of citizens to take the necessary legal actions or encourage the agencies to act themselves. The issue is that the current state of the ESA makes it difficult to determine how successful a citizen suit might be. Uneven court application discourages private citizens and even the better-funded animal rights groups from risking potentially expensive litigation.[123] Despite these obstacles, citizen suits remain critical to exposing such injustices and subjecting the perpetrators to the type of spotlight that makes it harder for them to continue to skirt the relevant statues.

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117 *Id.*

118 Goode, *supra* note 1, at Episode 2.

119 *See T.I.G.E.R.S. (Bhagavan Antle)*, *supra* note 63.

120 *Id.*; *see generally* Nasser, *supra* note 17.

121 *See, e.g.*, Christina Morales, *Doc Antle of 'Tiger King' Is Charged With Wildlife Trafficking*, N.Y. TIMES (Oct. 9, 2020), https://www.nytimes.com/2020/10/09/us/tiger-king-doc-antle-charged.html [https://perma.cc/SL7M-XBX8].

122 *See generally* Goode, *supra* note 1.

123 *See infra* Section II.C.

B. Problems Under the Endangered Species Act: "Harassment" of Wildlife

The current state of major wildlife protection statutes and the consistent way they are underenforced falls short of meeting the statutes' goals. The AWA, the only act specifically intended to protect captive animals, limps along, hamstrung by inadequate enforcement due to agency inaction, insufficient resources to deal with the legions of roadside zoos in the United States, and judicial deference to agency nonenforcement.[124] Citizen suits could provide a solution to many of these problems, providing a basis for injunctive relief against roadside zoos and bringing the most problematic facilities to the attention of agencies and the public, even when the suit is unsuccessful. The AWA currently lacks a citizen-suit provision, however, leaving the ESA as the best option for concerned citizens and animal welfare groups to take legal action.[125]

Problems with ESA citizen suits arise because actions can only be brought in three circumstances: (1) to compel the Secretary to apply the prohibitions set forth in the ESA, (2) against the Secretary for alleged failure to act, or (3) to enjoin any person who is allegedly in violation of the statute.[126] It is only this third category, however, that allows citizens to bring suit directly against a private facility.[127] These suits typically fall under the Section Nine "take" provision, specifically the terms "harm" or "harass".[128] Both the U.S. Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") agencies of the Department of the Interior narrowly define "harm" to mean acts "which actually kill or injure wildlife."[129] This definition is difficult to apply to anything outside of obvious physical injury to the animals, limiting its usefulness in citizen suits. Therefore, "harass" provides a more encompassing definition of "take" for

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124 *See generally* Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 467 (1999) ("The USDA and the federal courts are empowered to enforce the AWA, yet both have failed . . . ."); Katharine M. Swanson, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. MICH. J. L. REFORM 937, 950, 955 (2002).

125 *See supra* note 53 (citizen-suit provision in ESA). *See generally* Gaddie, *supra* note 75, *Protecting Captive Endangered Animals: The Importance of Interpreting the Endangered Species Act Broadly*(note describing lack of citizen suit options in wildlife laws (including AWA)).

126 Patrick Parenteau, *Citizen Suits Under the Endangered Species Act: Survival of the Fittest*, 10 WIDENER L. REV. 321, 322–28 (2003).

127 *Id.*

128 *See generally*, Federico Cheever & Michael Balster, *The Take Prohibition in Section 9 of the Endangered Species Act: Contradictions, Ugly Ducklings, and the Conservation of Species*, 34 ENVTL. L. REV. 363.

129 50 C.F.R. § 222.102; 50 C.F.R. § 17.3.

captive animal protection and has the most potential for successful citizen suits, but the promulgated definition of "harass" brings a host of other issues to courts.[130]

"Harass," as defined under the ESA, specifically provides that, when applied to *captive* wildlife, the definition will not include "generally accepted"

> (1) [a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act,
>
> (2) [b]reeding procedures, or
>
> (3) [p]rovisions of veterinary care for confining, tranquilizing, or anesthetizing, when such practices, procedures, or provisions are not likely to result in injury to the wildlife.[131]

The phrase "generally accepted" has no clear universally accepted definition, though. Courts must consider circumstances and expert opinions when determining whether to apply the second and third prongs, which are both clearer than the general phrase "animal husbandry practices." Only the first prong then refers to the AWA, and when the rule was promulgated, the FWS made it clear that the exception was only meant to exempt "humane and healthful care," and that "inadequate, unsafe or unsanitary conditions, physical mistreatment and the like constitute harassment."[132]

Yet there are almost no instances of federal prosecution for harassment of captive wildlife under the ESA for improper captivity conditions.[133] Instead, most challenges involving harassment of protected animals come from citizen suits, forcing courts to consider the overlap of the statutes.[134] Without any guiding Supreme Court precedent, varying approaches have been taken, imposing different levels of difficulty for citizens bringing suit.[135]

C. Substandard: Interpreting "Harassment" of Captive Animals Under the AWA

Despite a lack of expert consensus regarding whether the AWA's standards provide any meaningful protection, the court in *Graham v. San*

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130 50 C.F.R. § 17.3.

131 *Id.*

132 Ani B. Satz & Delcianna Winders, *Animal Welfare Act: Interaction with Other Laws*, 25 ANIMAL L. *185, *196 (2019) (annotated transcript from panel presentation on Animal Welfare Act for Harvard Law School).

133 *See generally id.*

134 *See id.* at *197–202 (referencing the growing number of citizen suits under the AWA and the different obstacles they face in a presentation on the efficacy of the AWA).

135 *See id.*

Antonio Zoological Society followed the common interpretation of 50 C.F.R. § 17.3 in holding that the AWA sets the standard for "harass" under which the ESA is judged.[136] This case serves as a prime example of both the weakness of AWA enforcement and the reasons why the AWA should not provide the standard for determining harassment under the ESA. Previous APHIS inspections found the zoo at issue to be compliant with the AWA's minimum standards, but the court found a genuine dispute of material facts as to whether the facility complied with the statue.[137] If courts disagree with the agency responsible for enforcing AWA standards as to whether the AWA standards are met, then the standards do not provide the clarity necessary under the statute. Worse, the repeated failures of APHIS and the AWA to address whether there is a genuine dispute of material facts in complying with the AWA standard—as the court in *Graham* found—means that private citizen action is necessary to get any relief for captive animals like Lucky the elephant. Holding the citizen plaintiffs to a standard that allows APHIS's poor determinations of compliance to be used as evidence against them only makes their task more difficult.

The *Graham* court itself was not blind to the evidentiary burden facing plaintiffs under the "AWA compliance" standard, and they chose not to consider the many passed APHIS inspections as dispositive of the zoo's compliance.[138] Disregarding past compliance determinations is a step in the right direction, but this must become the universal rule if citizen suits are to be effective, as it would under this Note's proposed solution. Without such, it is likely that roadside zoos will simply continue to move to new locations that still use the AWA as the standard facilities must meet.[139] *Graham* highlights just how important these citizen suits are, and how effective they can be in protecting captive animals: the only relief Lucky received was the addition of extra elephants to her enclosure to provide social enrichment, although it did raise additional valid concerns regarding the elephants' enclosure size.[140] Even though plaintiffs did not succeed outright in this case, the mere act of citizens bringing suit accomplished more than years of APHIS inspections did.

Citizen suits received a setback in *PETA v. Miami Seaquarium*,[141] where the Eleventh Circuit added further hardships for citizen plaintiffs by holding

136 *See Graham*, 261 F. Supp. 3d. at 750.

137 *See id.* at 726.

138 *Id.* at 716.

139 *See, e.g.*, Natasha Daly, *Court Orders 'Tiger King' Zoo to be Surrendered*, NAT'L GEOGRAPHIC (June 2, 2020), https://www.nationalgeographic.com/animals/article/joe-exotic-former-zoo-ordered-to-big-cat-rescue [https://perma.cc/34VX-6ZSW].

140 *Graham*, 261 F. Supp. 3d at 749–50.

141 879 F.3d 1142 (11th Cir. 2018).

that "harm" and "harassment" under the ESA "[are] only actionable if [they] pose[] a threat of serious harm."[142] Including harm in the definition of harassment do little to assist with interpreting the term, and the opinion makes it clear that the court only chose this potentially confusing standard to avoid conflict with the provisions of the AWA incorporated into the ESA.[143] Considering that the court applied the same definition to "harm" and "harass," the case demonstrates that the inclusion of the AWA exception can affect more than just suits that deal with harassment of wildlife. In reality, the AWA exception can also impose further roadblocks on citizens or organizations trying to prevent mistreatment of captive animals.[144]

That is not to say that the court would have sided with the plaintiffs if the AWA provisions were removed from the ESA. In fact, it is possible the majority objected to PETA's standard—that "harm" and "harass" should include any conduct that falls within those terms' dictionary definitions—as unworkable on other grounds.[145] For example, the dictionary definition of "harass" is broad and would include almost any kind of continual annoyance.[146] According to the court, such a broad definition would effectively nullify the deference granted from AWA compliance.[147] This last point, however, indicates that PETA may have had a good reason for proposing the definition they chose—the result of the case shows that this definition, despite not mentioning the AWA explicitly, is still beholden to it. The court applied the low minimum standards of the AWA, and the Seaquarium's compliance with them, to determine that Lolita the killer whale had not been harassed or harmed—even though the facts indicated otherwise. The numerous painful injuries Lolita displayed from a variety of sources invite an unpleasant reminder of the case of Tilikum in the widely acclaimed *Blackfish* documentary. No one could reasonably argue that when Tilikum, a well-trained orca, killed one of his trainers, he had been driven to a state of aggression from being harassed in a way that violated the ESA. In not taking a determinative note from such an obvious analogy, the court failed Lolita.

In reviewing the case, the Eleventh Circuit again relied on the fact that Lolita's enclosure was nominally compliant with the AWA's minimum

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142 *Id.* at 1149–50.

143 *See id.* at 1150.

144 The court ends its opinion with the same definition applied to both harm and harass, implying that at least this circuit would consider the AWA exception in a "harm" case as well. *See generally id.*

145 *See* Miami Seaquarium, 879 F.3d, at 1149 (Court stating that this interpretation of "harm" or "harass" would be out of step with ESA's purpose).

146 *See id.* at 1146, 1149.

147 *See id.* at 1150.

standards.[148] In doing so, the court overlooked the fact that Lolita's tank was drastically smaller than Tilikum's tank, and that while it did not house multiple orcas like Tilikum's, it did house multiple dolphins alongside Lolita in a much smaller space than the one that caused Tilikum enough stress to attack his trainers.[149] As demonstrated, the AWA minimum standards are insufficient, but as of February 2020 there were 104 inspectors for 12,851 facilities to enforce compliance with them.[150] The mere fact that a facility has not been found to violate the AWA's minimum standards is far from a sufficient reason to exempt the facility from ESA actions.[151]

The shortcomings in the AWA's standards and enforcement, and the effect these have on the ESA's Section Nine take provision, are addressed by other authors.[152] Some advocate for a broader reading of the provision in the context of captive animals, or for a significant overhaul of the AWA to give it the power to stand on its own.[153] These approaches skirt the possibility that the best solution is for Congress to override the agencies and separate the AWA from the ESA. Regardless of whether the statute is read broadly or if the AWA is revised, the conflict between the two statutes will remain and continue to have an impact on captive wildlife cases.

The Eighth Circuit case *Kuehl v. Sellner*[154] highlights this, as the court took a broader reading of ESA Section Nine than the court in *Miami Seaquarium*, thus allowing citizen plaintiffs to succeed in a suit alleging improper care for wildlife—but only due to the extreme conditions the animals were subjected to.[155] The facility in *Sellner* had regular APHIS inspections, several of which found no violations of the AWA.[156] In cases where the facility received a citation for violating the Act, however, the operators were able to settle for a nominal fee.[157] The combination of weak enforcement and nominal penalties thus allowed the facility to treat the

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

149 *See* SAVE LOLITA, *supra* note 110.

150 *See Aquariums and Marine Parks*, PETA, https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/aquariums-marine-parks/ [https://perma.cc/E38D-MSKE].

151 *See id.*

152 *See, e.g.*, Gaddie, *supra* note 75 (journal note highlighting the shortcomings of the AWA).

153 *See id.*

154 887 F.3d 845 (8th Cir. 2018).

155 *Compare id.* (allowing factors such as lack of enrichment and buildup of fecal matter to compound to improper harassment) *with PETA v. Miami Seaquarium*, 879 F.3d 1142 (11th Cir. 2018) (requiring a "grave threat" to animal wellbeing to constitute harassment under the ESA).

156 *Id.*

157 *See generally id.* at 854–55.

occasional fine as merely the "cost of business,"[158] meaning they were less inclined to make any changes to the squalid conditions their animals were kept in.[159]

Even though citizen plaintiffs were ultimately successful in *Sellner*, no clear evidence exists that they would have prevailed had if the conditions had not been so extreme. On the contrary, despite said conditions—huge piles of excrement lining the cages, nothing more than a log on the ground for enrichment, and isolation of a species that lives in large family groups—the court declined to grant citizen plaintiffs their choice in where the animals should be moved, even after the plaintiffs showed APHIS's judgment in accrediting facilities was less than adequate.[160]

Sellner highlights just how high a bar citizen plaintiffs must satisfy to show a facility has not met AWA standards, especially when comparing the case with *Miami Seaquarium*, which also had animals in notably poor conditions but dismissed the plaintiff's case. Moreover, *Sellner* points out the absurdity of continuing to rely on the AWA as a metric for the acceptability of a facility's treatment of captive endangered species. As Judge Goldberg expressed in his concurrence, the purpose of the ESA is conservation of species, which he defined as "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which [ESA protections] are no longer necessary."[161] Judge Goldberg argues persuasively that the court erred in affording deference to accreditation by the USDA as demonstrative of compliance with the AWA. He instead suggests that because the Act "provide[s] minimum requirements for humane treatment" but fails to address "whether captive uses of wildlife affirmatively serve the conservation purpose required by the ESA," USDA accreditation should not be given such deference.[162] It appears then that the only way to prevent the AWA from interfering with ESA enforcement would be to remove the language referring to the AWA in 50 C.F.R. § 17[163] and to replace it with something else—as this Note suggests in Part III.[164]

The Fourth Circuit made the most significant stride towards eliminating the harmful crossover of the AWA and ESA to date in *Hill v. Coggins*[165] by expanding the requirements for an exemption under 50 C.F.R. § 17.3. In a

158 *See* Nasser, *supra* note 17, at 194 n.171.

159 *See generally* Kuehl v. Sellner, 161 F. Supp. 3d 678 (N. D. Iowa 2016).

160 *See* Kuehl v. Sellner, 887 F.3d 845, 854–55 (8th Cir. 2018).

161 Kuehl v. Sellner, 887 F.3d 845 (8th Cir. 2018) (Goldberg, J., concurring) (citing 16 U.S.C. § 1532(3)).

162 *Id.* (citing Br. For the Humane Soc'y of the United States et al. as *Amici Curiae* 12).

163 50 C.F.R. § 17.

164 *See infra* Part III.

165 867 F.3d 499 (4th Cir. 2017).

similar vein to the previous three cases, the citizen plaintiffs' argument was largely based on the idea that the AWA provisions were insufficient to prevent mistreatment of captive animals.[166] Conversely, the operators of the roadside zoo argued that compliance with the AWA gave them a blanket exemption.[167] As this Note has mentioned before, however, the AWA is definitively *not* an animal cruelty law, and it only protects against the most severe cases of mistreatment.[168] The *Coggins* court recognized both this and the fact that the ESA was meant to extend further than the AWA. By taking the language of the ESA statute to impose a second requirement of "generally accepted standards" in addition to AWA compliance, the court tacitly acknowledged that meeting the AWA's minimum standards is insufficient to meet the protective goals of the ESA.[169]

The Supreme Court has long held that the ESA's protective goals supersede the determinations of other government agencies.[170] Unless or until the Supreme Court takes a definitive stance on the issue of AWA-ESA conflicts in cases like these, courts will remain free to weaken citizen suits under the ESA by using AWA standards. Meanwhile, captive animals cry out for a new solution to protect them.

III. GOODBYE TO THE AWA—PROPOSING A NEW STANDARD

This Note urges measures to keep the AWA separate from the ESA. Accomplishing this goal does not require the complete overhaul or repeal of the AWA. Instead, this Part outlines a relatively minor modification with both workable standards and evaluation methods, as well as the potential to significantly reduce the negative effects the AWA inflicts, at times, on the captive animals under its protection.

A. Following the Leader: The Coggins "Generally Accepted" Standard

The court in *Coggins* started on the right track by separating "generally accepted standards" into a second requirement, but they did not go far enough. Roadside zoos have used AWA compliance as an excuse to such a degree that courts have been forced to reinterpret the standards,[171] ignore APHIS determinations of compliance,[172] and create a separate requirement

166 *See id.* at 503–05.

167 *See id.*

168 *See infra* Part I.

169 *See generally Coggins*, 867 F.3d 499.

170 *See* Tenn. Valley Auth. v. Hill, 487 U.S. 153, 182–84 (1978).

171 *See, e.g.*, PETA v. Miami Seaquarium, 879 F.3d 1142 (11th Cir. 2018).

172 *See generally* Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711 (W.D. Texas 2017).

entirely [173] —demonstrating that the AWA standards should not be determinative of ESA harassment violations at all. It has become increasingly evident that legislative or administrative action must be taken so that the first prong of the *Coggins* test—that facilities maintain generally accepted standards of care—becomes the only factor in determining if an exemption under 50 C.F.R. § 17.3 applies.

The current definition of "harass" under 50 C.F.R. § 17.3 exempts "[a]nimal husbandry practices that meet or exceed the minimum standards for facilities and care under the Animal Welfare Act."[174] This Note would change that exemption to read "[a]nimal husbandry practices that are generally accepted as reasonable."[175] Because the current exemption draws foundation from a federal regulation, and the ESA statute itself does not actually define "harass,"[176] there are two ways in which the new exemption could be achieved: (1) Congress could take legislative action amending the ESA to include the proposed exemption and explicitly override the agency definition that currently references the AWA, or (2) the Secretary of FWS could issue a new regulation using the proposed language, thus replacing the old.[177]

B. Evaluating Claims Under the "Generally Accepted" Standard

The proposed standard of "animal husbandry practices that are generally accepted as reasonable" admittedly still requires interpretation by courts and agencies. As discussed below and in Section III.C of this Note, these actors are already well-equipped in interpreting statutory standards. Moreover, the purpose of this proposed change is not to definitively solve the challenge of interpreting "harass."[178] Rather, this change seeks to free government agents, judges, and citizen plaintiffs from the constraints of the AWA when dealing

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173 *See generally* Hill v. Coggins, 867 F.3d 499 (4th Cir. 2017).

174 50 C.F.R. § 17.3.

175 The exact language could be varied by the agency body that implements it and this Note's arguments would still apply, so long as the *only* standard mentioned is the requirement highlighted in *Coggins* that "generally accepted" practices be used, which can be assessed by experts in the field and zoological organizations. *See* Hill v. Coggins, No. 2:13-cv-00047-MR-DLH, 2016 WL 1251190, at *13 (W.D.N.C. 2016).

176 16 U.S.C. § 1532(19).

177 This Note merely acknowledges that either option exists to implement the proposed solution. This Note focuses on how courts and agencies would deal with this proposed change and does not comment on whether one option would be preferred over another, other than to acknowledge that an administrative solution would likely face fewer political obstacles than getting majority approval from Congress. The rationales outlined in this Note for meeting the purpose of the ESA, lack of agency resources, and support that could be gained from citizen suits apply equally to both legislative and agency actions.

178 *See infra* Section III.C.

with potential ESA violations. Evaluation under this new standard can be broken down into three components: (1) what constitutes animal husbandry practices, (2) how to interpret "generally accepted," and (3) how to deal with the modifier "reasonable." This Note argues that courts and agencies are already perfectly capable of managing these components.

Determining what constitutes "animal husbandry practices" within the exemption to "harass" is nothing new—the same language exists in the current exemption under 17 C.F.R. § 17.3[179]—and so courts and agencies may continue to use the same methods they have used in the past.[180] The term can encompass a wide range of techniques and can vary in definition based on location.[181] But agencies already have a definition of harass that both they and courts can turn to codified in regulations: "[p]rovision of health care, management of populations by culling, contraception, euthanasia, grouping or handling of wildlife to control survivorship and reproduction, and similar normal practices of animal husbandry needed to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible."[182] Courts have spent little time debating this portion of the current exemption, and that should not change with the proposed solution.[183]

Detractors of this solution may attempt to argue that "generally accepted" is too ambiguous a standard, and that courts and enforcement agencies will struggle to answer the question, "generally accepted by whom?" To the first argument, the AWA itself already occasionally uses the term "generally accepted" in its regulations, so this proposed solution adds no new ambiguity.[184] To the second, courts *already* have a stable of experts to call upon to determine what "generally accepted standards" should be in this context. The largest zoological organizations in the United States, the American Zoological Association ("AZA") and the Zoological Association of America ("ZAA"), prominently publish their accreditation standards, as

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179 50 C.F.R. § 17.3.

180 *See generally* Hill v. Coggins, 867 F.3d 499 (4th Cir. 2017); Kuehl v. Sellner, 887 F.3d 845, 854–55 (8th Cir. 2018); PETA v. Miami Seaquarium, 879 F.3d 1142 (11th Cir. 2018); Graham v. San Antonio Zoological Soc'y, 261 F. Supp. 3d 711 (W.D. Texas 2017).

181 *See* National Animal Interest Alliance, *NAIA Position Statement: Animal Husbandry Practices*, NAIAONLINE.ORG, https://www.naiaonline.org/about-us/position-statements/animal-husbandry#:~:text=Animal%20husbandry%20practices%20range%20from,that%20live%20in%20the%20household [https://perma.cc/CQ77-Y8DQ].

182 50 C.F.R. § 17.3.

183 *See generally Coggins*, 867 F.3d 499 (4th Cir. 2017); *Sellner*, 887 F.3d at 854–55; *Miami Seaquarium*, 879 F.3d at 1142; *Graham*, 261 F. Supp. 3d at 711.

184 9 C.F.R. A.W.R. § 3.76(b); 9 C.F.R. A.W.R. § 3.13(f).

does the Global Federation of Animal Sanctuaries ("GFAS").[185] These standards are developed by panels of experts in the field and can give color to the analysis that courts and enforcement agencies conduct by giving them access to multiple current expert opinions, without the need to hear from them all as expert witnesses.

Zoological organization standards are both easily accessible and preferable to those evinced in the AWA since they are *current* and *professional* opinions, rather than the result of legislative deliberation by nonexperts with political agendas. Additionally, plaintiffs are already bringing these kinds of experts to trial to argue their mistreatment cases.[186] Without the constraints of AWA analysis, courts will be free to evaluate expert opinions on their own merit without having to balance them against the nonprofessional, statute-based standards.

Lastly, courts are more than prepared to deal with the "reasonable" modifier. The standard of what a "reasonable person" would do or think has a long history in multiple fields of law.[187] There is no such thing as a wildlife judge, and so courts that would see ESA suits under this Note's proposed standard undoubtedly already have experience evaluating reasonableness from other fields of law. The tools used in these analyses are just as available in wildlife law as tort or criminal law.[188] The proposed new language does not introduce anything that the courts and executive agencies are not prepared to handle.

C. Addressing Limitations

For the reasons described above, this Note's proposed changes present a manageable new standard of analysis that is free of the problems associated with the AWA. The fact that it will likely require some judicial interpretation

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185 *See* ASS'N OF ZOOS AND AQUARIUMS, *supra* note 28; ZOOLOGICAL ASS'N OF AMERICA, *supra* note 28; GLOBAL FED'N OF ANIMAL SANCTUARIES, *Accreditation*, SANCTUARYFEDERATION.ORG, https://www.sanctuaryfederation.org/accreditation/ [https://perma.cc/4S37-LAZR].

186 *See, e.g.*, *Coggins*, 867 F.3d at 503.

187 *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (creating the reasonable expectation of privacy standard, asking whether a reasonable person would believe their conduct remained private in criminal procedure); Bethel v. New York City Transit Auth., 703 N.E.2d 1214 (N.Y. 1998) (asking what a reasonable person would have done in the circumstances for tort law analysis); MODEL PENAL CODE § 210.3 (establishing the standard for manslaughter as whether the conscious disregard for a risk was outside that which a reasonable person would have).

188 There is also precedent for establishing a modified reasonable standard, such as the "reasonable police officer" standard in some criminal procedure. *See generally* Whren v. United States, 517 U.S. 806 (1996). Courts would then be welcome to adopt some form of "reasonable animal handler" standard, but that is outside the scope of this Note.

is hardly a dealbreaker. One of the oldest pillars of the judicial system is the ability and duty of courts to interpret statutes and regulations,[189] and as Section III.B described, there are already existing methods by which the new standard can be interpreted.[190] Detractors could argue that courts may come to different results on what "practices generally accepted as reasonable" encompasses. However, this is exactly why our legal system allows for overriding opinions from higher courts when decisions are split. Moreover, as the cases discussed in Part II show, courts are already coming to different interpretations of the current standard—no extra ambiguity is added by following this Note's solution.[191]

The ESA protects only endangered species, and so animals not covered by the Act will still be limited to protection under the AWA with this proposed solution. One of the key benefits of this change, though, would be the much-needed support it provides to citizen suits.[192] Citizen suits can importantly impose penalties on facilities when successful, and even when not successful, may bring issues to the attention of enforcement agencies that lack the resources to find all violations on their own. Either of these results would have potentially positive effects on *all* animals within a facility, not just the endangered ones, by punishing the perpetrator and subjecting them to further scrutiny.[193]

As with any changes to the legal field that ease a plaintiff's burden, detractors may stoke the fears of a flood of litigation. However, because the ESA already has a citizen-suit provision that is exercised, even if it were to materialize, the flood of litigation is not likely to break any dams. Although the proposed solution would make suits more likely to succeed when brought, it does not create an entirely new avenue for suing and thus does not expand the scope of potential litigators. Additionally, the use of zoological association accreditation standards in the legal analysis should prevent this solution from being overly harmful to facilities that work to avoid abusing their animals and keep captive wildlife for genuine conservation or research purposes.

In any case, it is also a goal of this solution to increase litigation—as this Note has shown, the current system does not work sufficiently well to achieve the goals of the ESA. More lawsuits would, at the very least, bring

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189 *See generally* Marbury v. Madison, 1 Cranch 137 (1803) (the landmark case establishing the concept of "judicial review" as a role of the courts).

190 *See supra*, Section III.B.

191 *See generally supra*, Part II.

192 *Id.*

193 Additionally, it is better to have some protection that works well than none at all, and if others want to advocate for taking this solution further or revising the AWA entirely that is even better, but outside the scope of this Note.

more facilities that are potentially violating the statutes to light and cause citizens to demand action be taken. And so, it is the position of this Note that an increase in litigation is an acceptable price to pay.

CONCLUSION

In conclusion, there is a serious enforcement issue for the ESA when it comes to roadside zoos due to the forced inclusion of the AWA. As the *Tiger King* documentary stated, "we're going to have to change the laws to solve this problem" and protect these "cool cats and kittens" (along with all other captive wildlife).[194] This Note addresses the issue of captive animal care and proposes a solution that, with a slight change of language, creates a new, manageable standard that gives both citizens and enforcement agencies more power under the ESA, while simultaneously freeing courts from the constraints of the AWA. Captive animal abuse will not be solved with the stroke of a pen, but this solution pushes the law one step further in the right direction.

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194 Goode, *supra* note 1 (quoting animal rights activist Carole Baskin on how to fix wildlife issues, like those posed by Joe Exotic's facility, combined with a phrase she frequently uses).