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Should Animals Have Standing? A Review of Standing under the Animal Welfare Act

by

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SHOULD ANIMALS HAVE STANDING? A REVIEW OF STANDING UNDER THE ANIMAL WELFARE ACT

*Joseph Mendelson, III**

INTRODUCTION

Thirty years ago, Congress passed the Animal Welfare Act (AWA) to combat the growing problems of pets stolen for use in medical research and abusive animal research practices.[1] The AWA has been amended several times since its passage in 1966 which has resulted in considerable expansion of the statute's original purpose and scope.[2] Currently, the AWA governs not only federal animal research facilities but also numerous activities involving the treatment of animals. The Act also defines and regulates parties directly involved with handling animals including pet dealers, animal exhibitors, and federal medical research grant recipients.[3]

Despite the expanding reach of the AWA's regulatory regime, there is general consensus that the statute has failed to fulfill its potential in fostering the humane treatment of animals.[4] The AWA's relative

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[1] Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (1994).

[2] *See* Animal Welfare Act of 1970, Pub. L. No. 91–579, 84 Stat. 1560 (1970); Animal Welfare Act Amendments of 1976, Pub. L. No. 94–279, 90 Stat. 417 (1976); Pub. L. No. 99–198, Title XVII, 99 Stat. 1650 (1985) (codified as amended at 7 U.S.C. §§ 2131–2159).

[3] *See* 7 U.S.C. §§ 2131, 2132.

[4] *See, e.g.*, Nicole Fox, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 WHITTIER L. REV. 145, 146–47 (1995); Karen L. McDonald, *Creating A Private Cause of Action Against Abusive Animal Research*, 134 U. PA. L. REV. 399, 402–08 (1986).

ineffectiveness has been attributed to many causes, including the law's often vague terminology and inadequate regulatory implementation by the United States Department of Agriculture (USDA). A primary factor in undermining the AWA's objectives, however, is the inability of third parties, specifically animal welfare and animal rights organizations, to litigate claims successfully against the federal government and individual violators under the statute. In virtually all AWA claims, legal failures result not from any deficiency on the merits of the cases brought before the courts, but rather from jurisdictional challenges to third parties.[5] In particular, standing has become a near insurmountable difficulty for third parties seeking a hearing on the substantive claims they have brought under the statute.

This article explores the current state of third-party standing under the AWA. While the analysis reveals the considerable difficulty in achieving third-party standing under the AWA, it also dispels the prevalent notion that the statute necessarily prevents third parties from having their day in court. The article is divided into four parts. Section I provides an overview of the AWA's legislative history. Section II contains a brief review of the standing requirements. Section III is an analysis of standing in past cases brought under the AWA. Section IV discusses the potential for pet consumers to be granted standing under the AWA.

I. Brief History of the Animal Welfare Act

In 1965, United States Representative Joseph Y. Resnick (R-NY) called an animal dealer in his district to inquire about a missing Dalmatian that had been kept on the dealer's property.[6] Incensed by the dealer's lack of concern for the missing pet, the congressman introduced a bill in Congress to regulate the trafficking of dogs and cats for research.[7] In 1966, Congress enacted the Federal Laboratory Animal Welfare Act,[8] later to be named the AWA, to address the abuses that developed as a result of the Nation's vast program of medical research, particularly research involving experimentation with

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[5] *See, e.g.*, Animal Legal Defense Fund, Inc. v. Espy, 23 F.3d 496, 498–99 (D.C. Cir. 1994) [hereinafter *ALDF I*].

[6] *See* David Masci, *Fighting Over Animal Rights: Has Public Support for the Movement Peaked?*, The CQ Researcher, Aug. 2, 1996, at 673–96.

[7] *See id.*

[8] *See* Pub. L. No. 89-544, § 1, 80 Stat. 350 (1966) (current version at 7 U.S.C. §§ 2131–2159 (1994)).

animals.[9] More specifically, the legislation was passed in response to public fears that their pets would be stolen and sold to researchers.[10] Prompted by the need to curb this illicit trade of stolen household pets for use in research facilities, Congress passed the AWA and designed it to: (1) protect dog and cat owners from the theft of their pets for use in research facilities; (2) prevent the sale or use of stolen dogs and cats in research facilities; and (3) insure that certain animals receive humane care and treatment in research facilities.[11]

Congress also recognized that state laws were not dealing adequately with the widespread problem of animal theft.[12] State legislators and enforcement agencies simply could not deal with the growing volume of stolen animals.[13] Their efforts were hampered further by the interstate nature of most operations selling or using stolen animals.[14] As noted in the Senate's report on the bill:

> The demand for research animals has risen to such proportions that a system of unregulated dealers is now supplying hundreds of thousands of dogs, cats, and other animals to research facilities each year. . . . Stolen pets are quickly transported across State lines, changing hands rapidly . . . [and] State laws . . . proved inadequate both in the apprehending and conviction of the thieves who operate in this interstate operation.[15]

Further, the legislators recognized that much of the responsibility for creating the huge demand for medical research animals rested with the Federal Government's vast program of medical research, much of which involved animal experimentation.[16]

As its title implies, the AWA was designed primarily to assure the humane treatment of animals.[17] The 1966 version of the AWA: pro-

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[9] *See* Haviland v. Butz, 543 F.2d 169, 172 (D.C. Cir. 1976).

[10] *See* H.R. REP. No. 94–801, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 758, 759; *see also* Fox, *supra* note 4, at 166 (discussing how a magazine article containing photographs depicting abusive treatment of stolen dogs by animal dealers initiated the public outcry and that Congress received more mail on the pending animal welfare bills than on civil rights or Vietnam).

[11] *See* 7 U.S.C. § 2131; Robert J. Masonis, *The Improved Standards for Laboratory Animals Act and the Proposed Regulations: A Glimmer of Hope in the Battle Against Abusive Animal Research*, 16 B.C. ENVTL. AFF. L. REV. 149, 153 (1988).

[12] *See* S. REP. No. 89–1281, at 4–6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636.

[13] *See id.*

[14] *See id.*

[15] *Id.* at 2636; *see also* David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 766 (1995).

[16] *See* S. REP. No. 89–1281, at 4–6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2636; Fox, *supra* note 4, at 166.

[17] *See* Hoctor v. USDA, 82 F.3d 165, 167 (7th Cir. 1996); H.R. CONF. REP. No. 89–1848, at 1

tected owners of dogs and cats from the theft of such pets; regulated the transportation, purchase, sale, handling, and treatment of dogs, cats, and certain other animals destined for use in research or experimentation; and regulated the handling, care, and treatment of dogs, cats, and certain other animals in research facilities.[18] To achieve these objectives, the AWA required that the Secretary of Agriculture[19] issue licenses to animal dealers as defined by the law's provisions,[20] made it unlawful for research facilities to purchase dogs and cats from unlicensed dealers,[21] and authorized the Secretary to promulgate regulations governing the humane handling, care, treatment, and transportation of animals by dealers and research facilities.[22]

Motivated by a concerned public, Congress revisited the AWA in 1970 and enlarged the number of protected animal species.[23] The amendment extended the definition of "animal" to "all" warm-blooded animals designated by the Secretary with only limited and specifically defined exceptions.[24] Further, Congress expanded the classes of people subject to the Act's statutory provisions,[25] including for the first time animal exhibitors and wholesale pet dealers.[26] Additionally, the amendments recognized the need to supply animals with basic necessities by requiring the Secretary to promulgate standards establishing "the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, [and] sufficient ventilation."[27] Finally, the 1970 amendments strengthened the Secretary of Agriculture's enforcement powers by increasing penalties against individuals convicted of interfering with government inspectors, and expanding the discovery procedures for obtaining information.[28] The

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(1966), *reprinted in* 1966 U.S.C.C.A.N. 2649, 2650, 2653 (the 1966 act limited the definition of "animal" to live dogs, cats, monkeys (all nonhuman primate mammals), guinea pigs, hamsters, and rabbits).

[18] *See* S. REP. No. 89–1281, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2635, 2637.

[19] The Animal and Plant Health Inspection Service, a division of the United States Department of Agriculture, administers the AWA.

[20] *See* S. REP. No. 89–1281, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2639.

[21] *See id.* at 2638.

[22] *See id.* at 2639.

[23] *See* 116 CONG. REC. H40,159 (daily ed. Dec. 7, 1970) (statement of Rep. Mizell).

[24] *See* H.R. REP. No. 91–1651, at 1, 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104.

[25] *See* Pub. L. No. 91–579, 84 Stat. 1560 (1970); *see also* 116 CONG. REC. H40,155 (daily ed. Dec. 7, 1970) (statement of Rep. Foley); Haviland v. Butz, 543 F.2d 169, 172 (D.C. Cir. 1976) ("The Animal Welfare Act of 1970 expanded the coverage of the 1966 statute to enlarge the class of protected animals and to regulate their use for exhibition purposes or as pets as well as their use for research purposes.").

[26] *See* H.R. REP. No. 91–1651, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5104.

[27] *Id.*

[28] *See id.* at 5105.

legislators proclaimed the 1970 amendments part of a "continuing commitment by Congress to the ethic of kindness to dumb animals."[29]

Despite the changes in the AWA, Congressional hearings throughout the early 1970s continued to document widespread animal abuse.[30] This included an extensive record on abuse of animals in the course of air and other long distance transportation, and in the organization of animal fights.[31] Public concern about these animal welfare issues prompted Congress to revisit the AWA in 1976.[32] In the Animal Welfare Amendments of 1976, Congress specifically targeted animal treatment during transportation and the use of animals in animal fights.[33] The amendments extended the Act to cover intermediate handlers and carriers who were not covered under prior provisions,[34] and established a criminal penalty for persons involved in animal fighting.[35] Additionally, the amendments extended the definition of "animal" to include hunting dogs,[36] and established uniform civil penalties for any AWA violation.[37]

In 1985, following a highly publicized scandal involving the shocking mistreatment of baboons at the University of Pennsylvania,[38] and after the release of a General Accounting Office (GAO) report critical of the USDA's Animal Welfare Program,[39] Congress again amended the AWA with the Improved Standards for Laboratory Animals Act.[40] In general, the amendments focused on further reforming institu-

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[29] *Id.* at 5104.

[30] *See, e.g.*, 122 CONG. REC. H2860 (daily ed. Feb. 9, 1976) (statement of Rep. Foley).

[31] *See id.*

[32] *See id.*

[33] *See* Pub. L. No. 94–279, 90 Stat. 417 (1976); H.R. REP. No. 94–801, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 758, 776 (statement of Donald S. Frederickson, Director, National Institutes of Health (NIH), stating that NIH "understand[s] this is intended to eliminate a major problem with the shipment of unhealthy or unsound dogs and cats for the pet trade").

[34] *See* H.R. REP. No. 94–801, at 6 (1976), *reprinted in* 1976 U.S.C.C.A.N. 758.

[35] *See id.* at 796–97.

[36] *See id.* at 758–59; *see also* 122 CONG. REC. H2871 (1976) (statement of Rep. Burke).

[37] H.R. CONF. REP. No. 94–976, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 794.

[38] In 1984, an animal rights group called the Animal Liberation Front released videotapes stolen from the Head Injury Clinic at the University of Pennsylvania. The tapes showed government-funded experiments in which baboons were knocked repeatedly on their heads without first being properly anesthetized. Other scenes recorded the primates coming out of anesthesia before doctors had finished operating on their brains. The tapes were viewed by millions of television viewers across the country. *See* Masci, *supra* note 6, at 673–96.

[39] *See* GENERAL ACCOUNTING OFFICE, THE DEP'T OF AGRICULTURE'S ANIMAL WELFARE PROGRAM, DOCUMENT NO. RCED 85–8 (May 16, 1985). This report found, inter alia, that the Animal Plant Health and Inspection Service encountered major difficulties in administering the AWA because of inadequate funding. These problems included inadequate inspections, both in frequency and quality, and poor training in the Agency's regional and area offices.

[40] *See* Pub. L. No. 99–198, 99 Stat. 1645 (1985); *see also* Masonis, *supra* note 11, at 156–58.

tional treatment of laboratory animals and providing such animals increased protection from abusive research.[41] To ensure such goals were met, Congress directed the Secretary to establish requirements for: (1) the use of anesthetics, analgesics, tranquilizing drugs, and euthanasia when appropriate;[42] (2) the consideration by the principal investigator of alternatives to any procedure likely to cause pain or distress in an animal;[43] (3) the consultation with a veterinarian in planning research protocols that could cause pain to animals;[44] and (4) the use of animals in only one major operation, from which they are allowed to recover, unless it is a scientific necessity, or the Secretary deems that special circumstances require further research to be conducted.[45]

The amendments also created an internal review mechanism for each research facility known as an Institutional Animal Care and Use Committee (IACUC),[46] which was made responsible for representing the public's concerns for the welfare of laboratory animals in experiments.[47] Congress addressed the GAO Report findings by giving the Secretary the authority to conduct periodic inspections,[48] set standards for the handling, housing, and feeding of research animals,[49] and establish reporting, training, and internal review requirements.[50] As characterized by Congress, the 1985 amendments "reflect[ed] the importance of the 'three R's': reduction in the number of animals used, refinement of cruel techniques, and replacement of animals with plants and computer simulations."[51]

In sum, the Animal Welfare Act remains the core federal statute regulating animal use. It establishes that the treatment of animals in a wide range of settings represents a substantial government interest.[52] As currently amended, the AWA regulates research activities in

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[41] *See* H.R. CONF. REP. No. 99–309, at 85 (1985), *reprinted in* 1985 U.S.C.C.A.N. 731, 746 (requiring that federal grantees, inter alia, establish animal care committees to monitor care and treatment of animals used in research).

[42] *See* S. REP. No. 99–145, at 593 (1985), *reprinted in* 1985 U.S.C.C.A.N. 1676, 2519.

[43] *See id.*

[44] *See id.*

[45] *See id.*

[46] *See id.* at 2521.

[47] *See* Masonis, *supra* note 11, at 159.

[48] *See* 7 U.S.C. § 2146(a) (1994).

[49] *See id.* at § 2143(a).

[50] *See id.* at § 2143(a)(7), (b), (d).

[51] 137 CONG. REC. E1295 (1991).

[52] *See* Benigni v. Maas, No. 93–2134, 1993 U.S. App. LEXIS 31629, at *6 (8th Cir. 1993).

interstate and foreign commerce[53] and applies to most facilities that use live animals in research.[54] Through the creation of the AWA and its amendments, and through implementation of the Act by the USDA, Congress sought to ensure that minimum requirements regarding animal treatment within the United States would be met. However, enforcement of these standards has been hampered by court decisions denying public interest plaintiffs standing in cases challenging the substance and merit of the USDA's regulatory and enforcement practices under the AWA.

II. An Introduction To Standing

While the USDA has been delegated the job of fulfilling the AWA mandate, public oversight is a critical ingredient in ensuring that the Act is implemented in a fair and definite manner. Unfortunately, the courts have reduced the public's role in oversight, finding that animals and other third parties often do not have standing to seek redress of their claims under the AWA.[55] Standing is an essential, "threshold determinant of the propriety of judicial intervention."[56] In general, courts draw their standing requirements from two types of considerations—constitutional and prudential.[57] Constitutional considerations mandate that "a plaintiff can have standing only if he satisfies the 'case or controversy' requirement of Article III" of the United States Constitution.[58] Once a plaintiff satisfies Article III, he or she then must satisfy the prudential concerns, which "arise from a perceived institutional need for judicial self-restraint rather than from the Constitution itself."[59]

A. *Article III Standing*

The constitutional requirements for standing derive from Article III's mandate that federal jurisdiction extend only to those situations

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[53] *See* Pinto v. Connecticut Dep't. of Envtl. Protection, Civ. No. B–87–523, 1988 U.S. Dist. LEXIS 4375, at *30 (D. Conn. 1988) ("The AWA regulates the safety and care of animals in the stream of commerce.").

[54] *See generally* Thomas DeCapo, Note, *Challenging Objectionable Animal Treatment With The Shareholder Proxy Proposal Rule*, 1988 U. Ill. L. Rev. 119, 126 (1988).

[55] *See, e.g.*, Animal League Defense Fund v. Espy, 23 F.3d 496, 498 (D.C. Cir. 1994).

[56] Warth v. Seldin, 422 U.S. 490, 517–18 (1975).

[57] *See* Craig R. Gottlieb, *How Standing Has Fallen: The Need To Separate Constitutional and Prudential Concerns*, 142 U. Penn. L. Rev. 1063, 1066 (1994).

[58] *Id.*

[59] *Id.*

in which a plaintiff can demonstrate a "case or controversy" between himself and the defendant.[60] Article III of the Constitution requires that a party invoking the jurisdiction of the federal courts meet an irreducible minimum containing three elements: First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized[61] and (b) actual or imminent, not conjectural or hypothetical.[62] Second, there must be a causal connection between the injury and the complained-of conduct—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.[63] Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.[64]

Thus, to meet the first requirement of Article III standing, plaintiffs must have a legally protected interest, allege injuries or threatened injuries that are "concrete and particularized," and demonstrate that plaintiffs have "an actual stake in the outcome [of the case] that goes beyond intellectual or academic curiosity."[65] Courts recognize three classes of legally-protected interests: constitutional, statutory, and judicially-created interests.[66] In addition, the concrete and particularized "injury-in-fact" test requires a party seeking judicial review be among the injured.[67] However, the alleged injuries need not be particularly severe or costly; "even a minor or non-economic injury will satisfy the strictures of Article III."[68] The Supreme Court has explained further that the requirement of a particularized injury "mean[s] that the injury must affect the plaintiff in a personal and individual way."[69] Finally, the plaintiff's injury must be likely to occur[70]

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[60] *See* Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994).

[61] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[62] *See id.*

[63] *See id.* (citing Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 41–42 (1976)).

[64] *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 42). For purposes of jurisdictional issues, the courts must accept as true all the material allegations and construe the complaint in favor of the plaintiffs. *See* Community for Creative Non-Violence v. Pierce, 814 F.2d 663, 666 (D.C. Cir. 1987) (citing Warth v. Seldin, 422 U.S. 490, 501 (1975)).

[65] Family & Children's Center, Inc. v. School City of Mishawaka, 13 F.3d 1052, 1058 (7th Cir. 1994); *see also* Schmidling v. City of Chicago, 1 F.3d 494, 498 (7th Cir. 1993) (injury or threat "must be both real and immediate, not conjectural or 'hypothetical'").

[66] *See* Gottlieb, *supra* note 57, at 1076.

[67] Sierra Club v. Morton, 405 U.S. 727, 734–35 (1972).

[68] *Family & Children's Center, Inc.*, 13 F.3d at 1058.

[69] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992).

[70] *See, e.g.*, Coral Construction Co. v. King County, 941 F.2d 910, 929–30 (9th Cir. 1991), *cert.*

and not be merely speculative.[71] The determination whether an injury has occurred or is threatened does not lend itself to precise calculation and requires careful consideration of the individual circumstances in each case.[72]

After meeting the injury requirements of Article III standing, a plaintiff must show that there is a causal relationship between the alleged injury and complained of illegal action (causation).[73] In most cases, the causation inquiry will be identical to the third requirement of Article III standing, redressability.[74] "To the extent that a difference does exist, 'it is that the [causation inquiry] examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the [redressability inquiry] examines the causal connection between the alleged injury and the judicial relief requested.'"[75] In sum, a plaintiff can satisfy both the second and third elements of Article III standing by showing that his or her injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision."[76]

B. *Prudential Standing*

In addition to meeting the constitutional minimums necessary to confer standing, the plaintiffs often must satisfy the prudential elements established for standing. In cases challenging the actions of federal agencies, these requirements are set out in the Administrative Procedure Act:[77] plaintiffs must demonstrate they are within the "zone of interest" Congress sought to protect by enacting the statutes under which the action is brought.[78] "For prudential standing, a plaintiff usually must show, in addition [to the elements of constitutional standing], that 'the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question.'"[79] "The essential inquiry is whether Congress 'intended for a particular class of plaintiffs to be relied on to

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denied, 502 U.S. 1033 (1992) (injury prong of standing test must meet an independent requirement of imminence).

[71] *See, e.g.*, City of Los Angeles v. Lyons, 461 U.S. 95, 101 (1983).

[72] *See* Schmidling v. City of Chicago, 1 F.3d 494, 498 (7th Cir. 1993).

[73] *See* Gottlieb, *supra* note 57, at 1070.

[74] *See id.* at 1085.

[75] *Id.* (quoting Allen v. Wright, 468 U.S. 737, 753 n.19 (1984)).

[76] *Schmidling*, 1 F.3d at 498 (quoting Whitmore v. Arkansas, 495 U.S. 145, 155 (1990)).

[77] 5 U.S.C. § 702 (1994) (judicial review of agency action).

[78] *See* Banks v. Secretary of Ind. Family & Social Serv. Admin., 997 F.2d 231, 241–42 (7th Cir. 1993).

[79] National Recycling Coalition, Inc. v. Browner, 984 F.2d 1243, 1248 (D.C. Cir. 1993) (quoting

challenge the agency disregard of the law.'"[80] As courts have noted, "while the zone test is obviously meant to serve as a limitation on those who can use the federal courts to challenge agency action, it is 'a quite generous standard,'" exemplified by the use of the terms "arguably" and "zone."[81] Courts have found further that satisfying the "zone of interest" test is "not . . . especially demanding."[82] A plaintiff need demonstrate only that his or her claim has a "'plausible relationship' to at least one of the policies or concerns that motivated Congress to take legislative action."[83] Furthermore, the "zone of interests" inquiry begins with the presumption that all plaintiffs who meet Article III standing requirements have prudential standing to challenge agencies.[84] All that remains to be determined is whether Congress intended to preclude a certain class of plaintiffs from bringing an action.[85]

III. Standing Under The Animal Welfare Act

A. *The Animal As Plaintiff*

In his much publicized 1972 dissent in *Sierra Club v. Morton*, Justice William O. Douglas asked the controversial question of whether or not trees should have standing.[86] Douglas felt that full implementation of environmental protection legislation might require granting elements of nature standing to sue. With the passage of the AWA, it has become appropriate to ask whether, for full implementation of the Act, animals in their own right have standing as plaintiffs, or whether at a minimum third parties claiming to represent such animals should have standing to sue under the statute.

Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 282 (D.C. Cir. 1988) and Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970)).

[80] Mausolf v. Babbitt, 913 F. Supp. 1334, 1341–42 (D. Minn. 1996) (quoting Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 399 (1987) and Block v. Community Nutrition Inst., 467 U.S. 340, 347 (1984)).

[81] Southern Mutual Help Assoc. v. Califano, 574 F.2d 518, 523 (D.C. Cir. 1977) (quoting Tax Analysts & Advocates v. Blumenthal, 566 F.2d 130, 140 (D.C. Cir. 1977)).

[82] *Banks*, 997 F.2d at 242 (quoting *Clarke*, 479 U.S. at 399–400).

[83] *Id.* (quoting *Clarke*, 479 U.S. at 403).

[84] *See id.*

[85] *See id.*

[86] *See* Sierra Club v. Morton, 405 U.S. 727, 741–42 (1972); *see also* Christopher D. Stone, *Should Trees Have Standing—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 456–57 (1972).

The issue is not without precedent. Over the years, animal species have been named as plaintiffs in several legal actions and have achieved standing when not challenged by opposing parties.[87] In several cases brought under statutes other than the AWA, the courts have analyzed the plausibility of animals meeting the standing requirements.[88]

The stage was set for animals becoming plaintiffs in the 1988 case of *Palila v. Hawaii Department of Land and Natural Resources*.[89] In this case, plaintiffs were challenging an action under the Endangered Species Act (ESA) and named a bird species as one of the plaintiffs. Although the defendants did not contest the bird's status as plaintiff, the court stated:

> As an endangered species under the Endangered Species Act . . . the bird (*Loxioides bailleui*), a member of the Hawaiian honeycreeper family, also has legal status and wings its way into federal court as a plaintiff in its own right . . . represented by attorneys for the Sierra Club, Audubon Society, and other environmental parties.[90]

Based upon this dicta, public interest plaintiffs brought several subsequent cases attempting to have courts grant standing to animal species, but these plaintiffs were not successful in extending standing to non-human animals.[91] In *Hawaiian Crow ('Alala) v. Lujan*, a federal district court ruled that the 'Alala, an endangered species of bird, did not have standing to maintain a suit challenging a program under the ESA.[92] The court reasoned that the ESA citizen suit provisions provided for suits brought by "persons," not animals, and that other plaintiff environmental organizations met the standing requirements.[93]

In similar cases, the courts have found that individual animals did not have standing.[94] In the most famous of such suits, a dolphin named Kama was found not to have standing to challenge a transfer of its

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[87] *See, e.g.*, Mt. Graham Squirrel v. Yeutter, 930 F.2d 703, 703 (9th Cir. 1991); Northern Spotted Owl v. Lujan, 758 F. Supp. 621, 621 (W.D. Wash. 1991); Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 479 (W.D. Wash. 1988).

[88] *See, e.g.*, Citizens To End Animal Suffering and Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45, 48–49 (D. Mass. 1993).

[89] Palila v. Hawaii Dep't of Land and Natural Resources, 852 F.2d 1106, 1106 (9th Cir. 1988).

[90] *Id.* at 1107.

[91] *See, e.g., Citizens To End Animal Suffering and Exploitation, Inc.*, 836 F. Supp. at 45; *see generally* Hawaiian Crow v. Lujan, No. 91–00191–DAE (D. Haw. Sept. 13, 1991).

[92] *See Citizens To End Animal Suffering and Exploitation, Inc.*, 836 F. Supp. at 49 (citing *Hawaiian Crow*, No. 91–00191–DAE).

[93] *See id.*

[94] *See, e.g.*, id. at 45.

location to the Naval Oceans Systems Center under the Marine Mammal Protection Act (MMPA).[95] Following the court's reasoning in *Hawaiian Crow*, the district court found that the MMPA expressly authorized suits by persons, not animals.[96] In yet another case, a person seeking damages for pesticide exposure on behalf of herself and, inter alia, three opossums and five neighborhood cats who died, summarily was denied standing to sue on behalf of neighborhood animals that were not her property.[97] Thus, despite the dicta in *Palila*, courts routinely have denied animals standing to serve as plaintiffs.

B. *Past Animal Welfare Act Cases*

Since the passage of the AWA, animal rights advocates have sought to use the Act as a means of enforcing statutory requirements for the treatment of animals in an ethical and humane manner.[98] This interest was bolstered by early court decisions under other statutes such as the MMPA,[99] which provided animal welfare organizations with standing to bring suit under federal laws to protect the well-being of animals.[100]

Until 1986, however, the courts had not resolved the question of whether animal welfare organizations, much less animals themselves, had standing to sue under the AWA to protect animals, or even whether a private cause of action could be implied under the AWA.[101] In 1986, private individuals and the International Primate Protection League (IPPL) brought an action seeking to be named guardians of medical research animals seized from a research organization (operating under a National Institutes of Health (NIH) grant) convicted of state animal cruelty violations.[102] The lawsuit also challenged the pri-

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[95] *See id.* at 49–50; 16 U.S.C. § 1361–1407 (1995).

[96] *See Citizens to End Animal Suffering and Exploitation, Inc.*, 836 F. Supp. at 49.

[97] *See* Jensen v. County of Santa Clara, 69 F.3d 544, Nos. 94–16063, 94–16824, 1995 U.S. App. LEXIS 31565, at *7–*8 (Oct. 26, 1995).

[98] *See generally* McDonald, *supra* note 4, at 400.

[99] 16 U.S.C. §§ 1361–1407.

[100] *See, e.g.*, Animal Welfare Inst. v. Kreps, 561 F.2d 1002, 1007 (D.C. Cir. 1977) ("Where an act is expressly motivated by considerations of humaneness toward animals, who are uniquely incapable of defending their own interests in court, it strikes us as eminently logical to allow groups specifically concerned with animal welfare to invoke the aid of the courts in enforcing the statute.").

[101] *See* A. Camille Holton, Note, *International Primate Protection League v. Institute for Behavioral Research: The Standing of Animal Protection Organizations Under The Animal Welfare Act*, 4 J. CONTEMP. HEALTH L. & POL'Y 469, 470 (1988).

[102] *See* International Primate Protection League v. Institute for Behavioral Research, Inc.,

mary medical researcher's failure to comply with the AWA standards for the care of laboratory animals.[103] The case represented the first federal court decision concerning standing under the AWA.

In *International Primate Protection League v. Institute for Behavioral Research, Inc.* (*International Primate Protection League*), the plaintiffs asserted that they would suffer financial and non-financial injuries if the defendant regained control of the mistreated research monkeys.[104] The United States Court of Appeals for the Fourth Circuit rejected the plaintiffs' financial-based arguments that their tax payments created an entitlement of assurance that the NIH and its grant recipients complied with the AWA,[105] and that the plaintiffs' personal expenditure of funds in maintaining the animals while in state custody created a personal stake in the outcome of the controversy.[106] The non-financial injuries alleged were two-fold. First, the plaintiffs alleged a detrimental impact to the IPPL members' personal interest in the preservation and humane treatment of animals.[107] The court rejected this argument based upon court precedent that "a mere interest in a problem; no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to create standing."[108] Second, the plaintiffs asserted that the return of the monkeys to the defendant would disrupt their personal relationship with the animals.[109] The court rejected this argument, reasoning that the plaintiffs' personal relationships with the monkeys only existed because of the litigation at hand and, thus, could not create an injury on which to predicate standing.[110]

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799 F.2d 934, 936 (4th Cir. 1986), *cert. denied*, 481 U.S. 1004 (1987); *see also* Taub v. State, 463 A.2d 819, 819–20 (Md. 1983) (reversing earlier conviction of researcher under state animal cruelty law for failing to provide necessary care for animals of interest in *International Primate Protection League*).

[103] *See International Primate Protection League*, 799 F.2d at 935, 936; *see also Taub*, 463 A.2d at 819–20.

[104] *See International Primate Protection League*, 799 F.2d at 937.

[105] *See id.*

[106] *See id.* at 938.

[107] *See id.* (plaintiffs specifically sought standing by describing themselves as "individuals and members having a personal interest in the preservation and encouragement of civilized and humane treatment of animals, whose own aesthetic, conservational, and environmental interests are specifically and particularly offended and affected by the matters hereinafter described, and which interests, along with their educational interests, will be detrimentally impacted upon if the relief sought is not granted").

[108] *Id.*

[109] *See International Primate Protection League*, 799 F.2d at 938.

[110] *See id.*

While *International Primate Protection League* denied standing based upon the inadequacy of the specific injuries alleged by the plaintiffs, the Fourth Circuit also found that the plaintiffs failed to prove that the AWA authorized their right to seek relief.[111] After highlighting legislative intent that the AWA not chill progress in medical research, the court determined that enforcement of the AWA was not to be realized through a succession of private lawsuits, and that the Act did not imply any provision for lawsuits by private individuals as a complement to the authority of the Secretary of Agriculture.[112] In sum, the decision in *International Primate Protection League* prevented third parties from suing researchers under the AWA for violations of the Act.

The prohibition against third-party enforcement suits established by *International Primate Protection League* was quickly adopted by other courts. In 1990, People for the Ethical Treatment of Animals (PETA) sued the University of Oregon's Institutional Animal Care and Use Committee for, inter alia, violating the AWA by approving a professor's grant proposal to study the auditory system of barn owls.[113] In reviewing the case, the Court of Appeals of Oregon adopted the decision in the *International Primate Protection League* case, without analysis particularized to the case at hand.[114] The court adopted the Fourth Circuit's reasoning in *International Primate Protection League* "that private individuals and organizations, including PETA, do not have standing to sue in federal court for alleged violations."[115] The Supreme Court of Oregon upheld the lower court's decision, and also found that the plaintiffs failed to establish standing under a state statute allowing for petitions of judicial review.[116]

The lack of specificity in the *PETA v. Institutional Animal Care and Use Committee of the University of Oregon* decision allows for at least two interpretations of the holding. Interpreted broadly, the court's decision could be viewed as a continuation of the *International Primate Protection League* rule that third parties may not use the AWA to sue researchers who violate the Act. Thus, the court may

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[111] *See id.* at 938–39.

[112] *See id.* at 940–41.

[113] *See* PETA v. Institutional Animal Care and Use Comm. of Univ. of Or., 794 P.2d 1224, 1225 (Or. Ct. App. 1990).

[114] *See id.* at 1226–28.

[115] *Id.* at 1227.

[116] PETA v. Institutional Animal Care and Use Comm. of Univ. of Or., 817 P.2d 1299, 1300 (Or. 1991).

have been indicating that the AWA was not designed to accommodate significant public legal challenges and denial of standing enabled the courts to limit or deny public challenges. However, the court decision also could be interpreted narrowly as a holding restricted to challenges of decisions by an IACUC. From this perspective, the court could be seen as limiting third-party involvement only to public participation in the make-up and charge of the IACUC, and finding that the public is barred statutorily from challenges concerning the quality and substance of IACUC participation.[117]

Subsequent to *PETA*, the lower courts continued to bolster the *International Primate Protection League* decision. In 1991, several animal organizations brought suit against the Cleveland Metroparks Zoo alleging that the move of a lowland gorilla from one zoo to another for purposes of mating violated, inter alia, the AWA.[118] Following the Fourth Circuit's decision in *International Primate Protection League*, the district court found that the AWA does not provide a cause of action for private suits to enforce its terms.[119]

In summary, the *International Primate Protection League*, *PETA*, and *Metroparks Zoo* cases set a judicial tone against standing for third parties under the AWA.[120] The legacy of these decisions is an extension of the long established precedent that public citizens cannot sue an agency solely for the agency's failure to enforce the law. As the United States Supreme Court established in *Heckler v. Chaney*, an agency's refusal to initiate enforcement proceedings is discretion-

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[117] *See* Animal Legal Defense Fund, Inc. v. Institutional Animal Care and Use Comm. of the Univ. of Vt., 616 A.2d 224, 227 (Vt. 1992) (finding IACUC subject to state Open Meeting Law and state Public Record Act); Citizens for Alternatives to Animal Labs, Inc. v. Board of Trustees of State Univ. of N.Y., 643 N.Y.S.2d 323, 324 (N.Y. App. Div. 1996) (finding IACUC subject to state Freedom of Information Law); Dorson v. State of Louisiana, 657 So. 2d 755, 757 (La. Ct. App. 1995) (finding IACUC not subject to state Open Meetings Law); Students for the Ethical Treatment of Animals UNC-CH, Inc. v. Huffines, 399 S.E.2d 340, 344 (N.C. Ct. App. 1991) (finding IACUC records subject to limited disclosure under state Public Records Act provided identifying information of researchers is redacted and unapproved grant applications remain confidential). *Contra* Medlock v. Board of Trustees of Univ. of Mass., 580 N.E.2d 387, 388 (Mass. App. Ct. 1991) (finding IACUC not subject to open meeting law); American Soc'y for the Prevention of Cruelty to Animals v. Board of Trustees of State Univ. of N.Y., 568 N.Y.S.2d 631, 632 (N.Y. App. Div. 1991) (finding IACUC was not a "public body" within the meaning of state open meeting law).

[118] *See* In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 101 (N.D. Ohio 1991) [hereinafter *Metroparks Zoo*].

[119] *See id.* at 103.

[120] *See* International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 941 (4th Cir. 1986); PETA v. Institutional Animal Care and Use Comm. of the Univ. of Or., 817 P.2d 1299, 1301 (Or. 1991); *Metroparks Zoo*, 785 F. Supp. at 103.

ary and not subject to review, unless Congress has indicated otherwise.[121] Indeed, the AWA cases through *Metroparks Zoo* held that the legislative history of the AWA retained enforcement decisions exclusively within the discretion of the United States Department of Agriculture (USDA), and that the public may not circumvent Agency discretion by bringing an action to compel enforcement under the AWA.[122] Ultimately, courts have found that decisions to enforce the AWA are within the sole discretion of the USDA.[123]

Despite the holdings limiting judicial review of the AWA, third parties have continued to file AWA claims. Several recent cases have reexamined standing in actions brought against the USDA for decisions in implementing the AWA. In *Animal Legal Defense Fund, Inc. v. Espy (ALDF I)*,[124] for example, two animal rights organizations and two individuals sued the USDA under the Administrative Procedure Act (APA)[125] for implementing a regulatory definition of "animal" that excluded birds, aquatic animals, rats, and mice in violation of the AWA amendments of 1970, which had expanded greatly the definition of "animal."[126] In the district court, the plaintiffs prevailed over the Agency's motion to dismiss for lack of standing.[127] The plaintiff organization's injury to its informational activities resulting from the USDA's action was deemed to satisfy the constitutional requirements of standing.[128] The court further found that the plaintiffs satisfied the requirements of prudential standing because "the defendants . . . failed to demonstrate that it cannot be assumed that Congress intended to permit this lawsuit."[129] In a subsequent decision, the district court also granted the plaintiffs' motion for summary judgment concerning the USDA's failure to implement an expanded regulatory definition of "animal."[130] The case was appealed immediately to the United States Court of Appeals for the District of Columbia Circuit.[131]

Applying the Article III standing requirements from *Lujan v. Defenders of Wildlife* and the traditional prudential standing test, the

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[121] *See* Heckler v. Chaney, 470 U.S. 821, 838 (1985).

[122] *See, e.g., International Primate Protection League*, 799 F.2d at 941.

[123] *See, e.g., id.*

[124] Animal Legal Defense Fund v. Espy, 23 F.3d 496 (D.C. Cir. 1994).

[125] 5 U.S.C. §§ 551–706 (1994 & Supp. 1996).

[126] *See ALDF I*, 23 F.3d at 497–98.

[127] *See* Animal Legal Defense Fund, Inc. v. Yeutter, 760 F. Supp. 923, 924 (D.D.C. 1991).

[128] *See id.* at 925.

[129] *Id.* at 928.

[130] *See* Animal Legal Defense Fund v. Madigan, 781 F. Supp. 797, 799 (D.D.C. 1992).

[131] Animal Legal Defense Fund v. Espy, 23 F.3d 496, 496 (D.C. Cir. 1994).

court of appeals overruled the district court and denied both the animal organizations and the individual plaintiffs standing.[132] For each of the plaintiffs the court found a particular requirement of standing unsatisfied.[133] First, the court addressed the injuries of a psychobiologist who had worked with rats and mice at various laboratories registered with the USDA under the AWA.[134] The plaintiff alleged that the Agency's failure to include rats and mice within the AWA's definition of "animal" made her unable to control her employer institutions' treatment of rats and mice and the resulting inhumane treatment of such animals impaired her ability to perform her professional duties.[135] Overlooking the aesthetic and professional injuries alleged, the court found that the plaintiff failed to satisfy the constitutional elements of standing because she no longer worked in the registered laboratories.[136] As a result, the plaintiff failed to satisfy *Lujan*'s requirement that her injury be presently suffered or imminently threatened.[137] Additionally, the court found that her claim rested primarily upon an assertion of future injury; that she will be engaged in research dealing with rats and mice in the future.[138] The court concluded that the plaintiff's claims of injury were not about to occur and would be suffered only if she chose to engage in such work.[139] As the court stated, "[w]hether she will do so is wholly within her control."[140]

Second, the court addressed the injuries of a plaintiff lawyer and member of an IACUC which oversees research facilities registered with the USDA under the AWA.[141] The plaintiff alleged that the USDA's failure to define "animals" adequately left him, a chosen oversight representative of the general community, without relevant guidance upon which to judge a registered facility's treatment of birds, rats, and mice.[142] He further claimed that the USDA's actions prevented him from performing his statutory duties for the committee.[143]

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[132] *See id.* at 504.

[133] *See id.* at 500–01.

[134] *See id.* at 500.

[135] *See id.*

[136] *See ALDF I*, 23 F.3d at 500.

[137] *See id.*

[138] *But see id.* at 504–06 (Williams, J., dissenting in part) (finding plaintiff met requirements of standing).

[139] *See id.* at 500.

[140] *Id.*

[141] *See ALDF I*, 23 F.3d at 501.

[142] *See id.*

[143] *See id.*

The court found that this claim failed to present any cognizable injury and amounted to nothing more than an attempt to compel executive enforcement of the law detached from any factual claim of injury.[144] This determination appears to be consistent with the judicial principle of the *Heckler v. Chaney* and *International Primate Protection League v. Institute for Behavioral Research, Inc.* findings that third parties do not have standing to compel enforcement of the AWA.[145]

Third, the court addressed the alleged injuries of two organizational plaintiffs asserting informational standing.[146] The plaintiffs claimed that the USDA's exclusive definition of "animal" hampered their attempts to gather and disseminate information on laboratory conditions of these animals.[147] The plaintiffs reasoned that if the definition of "animal" were broadened, regulated laboratories would be obligated legally to provide information about the treatment of the animals to the USDA, which in turn would include the information in the Secretary's annual report to Congress.[148] The organizations then could acquire the information and use it in public education and rulemaking proceedings.[149] The court found that the plaintiffs' alleged "informational standing" met the Article III standing requirements, but failed to meet the prudential "zone of interest" requirements.[150] The plaintiffs failed to show a congressional intent to benefit the organization or some indication that the organization was a peculiarly suitable challenger of administrative neglect.[151] The court found that the AWA precluded any showing that the informational and educational interests of the plaintiff organizations were in any way peculiar to the organizations.[152] The court further found that the congressional intent to entrust the IACUCs with the function of oversight and dissemination of information precluded the plaintiff organizations from asserting that their informational injury made them "peculiarly suitable challenger[s] of administrative neglect."[153]

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[144] *See id.*

[145] *See* Heckler v. Chaney, 470 U.S. 821, 837 (1985); International Primate Protection League v. Institute for Behavioral Research, Inc., 799 F.2d 934, 937–38 (1986).

[146] *See ALDF I*, 23 F.3d at 501–04; *see generally* Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1086 n.29 (D.C. Cir. 1973) (granting informational standing).

[147] *See ALDF I*, 23 F.3d at 501.

[148] *See id.*

[149] *See id.*

[150] *Id.* at 501–02.

[151] *See id.* at 503 (quoting Hazardous Waste Treatment Council v. EPA, 861 F.2d 277, 283 (D.C. Cir. 1988)).

[152] *See ALDF I*, 23 F.3d at 503.

[153] *Id.*

Thus, *ALDF I* indicates further limits upon attempts to seek standing in cases brought under the AWA. Specifically, the court suggests that attempts to seek informational standing will never meet the prudential standing requirements.[154] A dissent by Judge Williams, however, indicates that certain plaintiffs may suffer the requisite injuries to achieve standing.[155]

Williams argued that the plaintiff psychobiologist had met the standing requirements and noted that the inhumane treatment of any animal the psychobiologist might purchase for any privately conducted research would establish a sufficient injury to convey standing.[156] As a result, the application of the Article III test to the individual plaintiffs and the dissent by Judge Williams finding that the plaintiff psychobiologist met the standing requirements suggest that courts are unwilling to foreclose all plaintiffs from gaining standing under the AWA.

The subsequent decision in *Animal Legal Defense Fund, Inc. v. Espy* (*ALDF II*)[157] expanded upon the decision of *ALDF I*. Plaintiffs consisting of some of the same parties in *ALDF I*, other individuals, and additional animal welfare organizations, successfully challenged the USDA's promulgation of final regulations[158] designed to conform to the 1985 amendments of the AWA,[159] also known as the Improved Standards for Laboratory Animals Act,[160] at the district court level.[161] Upon review, the court of appeals held that all of the plaintiffs lacked standing.[162]

Using the same reasoning as in *ALDF I*, the court immediately rejected the standing of the plaintiffs who had participated in *ALDF I*.[163] The identical injuries asserted in this case by an individual plaintiff member of an IACUC and two animal organizations were rejected by recounting and referencing the reasoning in *ALDF I*.[164] Next, the court turned its attention to a plaintiff primate housing system company and the company's president as an individual plaintiff.[165] These

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[154] *See id.*

[155] *See id.* at 504 (Williams, J., dissenting in part).

[156] *See id.* at 504–06 & n.2 (Williams, J., dissenting in part).

[157] Animal Legal Defense Fund v. Espy, 29 F.3d 720 (D.C. Cir. 1994) [hereinafter *ALDF II*].

[158] *See* 9 C.F.R. §§ 3.b(d), 3.8, 3.80, 3.81 (1996).

[159] Food Security Act of 1985, Pub. L. No. 99–198, §§ 1751–59, 99 Stat. 1645 (1985) (codified at 7 U.S.C. §§ 2131, 2132, 2143, 2144, 2145, 2146, 2149, 2157 (1994)).

[160] *See* Masonis, *supra* note 11, at 151, 158 & n.58.

[161] *See* Animal Legal Defense Fund, Inc. v. Secretary of Agric., 813 F. Supp. 882 (D.D.C. 1992).

[162] *See* Animal Legal Defense Fund v. Espy, 29 F.3d 720, 724-26 (D.C. Cir. 1994).

[163] *See id.* at 723–24.

[164] *See id.*

[165] *See id.* at 724.

plaintiffs alleged that the inadequate regulations resulted in their inability to sell primate housing systems for pairs or groups of primates.[166] Responding to the plaintiffs' economic claims, the court stated that "the [AWA]'s purpose is to promote the humane treatment of animals, not the sale of any particular housing systems."[167] The court denied these plaintiffs standing for failing to meet the prudential standing requirements.[168] Focusing only on the AWA's "zone of interest," the court failed to analyze whether these plaintiffs met the Article III standing requirements.[169]

Finally, the court addressed the standing of an individual plaintiff who was the director of a chimpanzee and human communications center.[170] This plaintiff claimed that the "vagueness" of the USDA's promulgated regulations injured him by preventing him from establishing a plan for his chimpanzee research institute and, in particular, from addressing how a chimpanzee housing facility currently under construction would comply with the USDA standards.[171]

First, the court held that plaintiff did not assert a distinct and palpable injury to himself.[172] Reasoning that the plaintiff alleged injuries to his employing facility rather than himself, the court concluded that the plaintiff did not risk any personal injury in the event of noncompliance with the AWA and could not claim standing based upon potential harm to his employer.[173] Second, even if the court assumed the plaintiff did face some personal harm from his employer's noncompliance with the AWA, the prospect of such an injury did not satisfy the imminence requirements of Article III standing.[174]

Although the holding in *ALDF II* suggests that plaintiffs may have a difficult time establishing standing under the AWA, a different conclusion can be drawn from the concurrence of Chief Judge Mikva.[175] In his concurrence, Mikva directly addressed the failure of the plaintiffs, especially the public interest organizations, to allege injuries adequate to confer standing.[176] In what is sure to become an argument

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[166] *See id.*
[167] *ALDF II*, 29 F.3d at 724.
[168] *See id.* at 724–25.
[169] *See id.*
[170] *See id.* at 725.
[171] *See id.*
[172] *See ALDF II*, 29 F.3d at 725.
[173] *See id.*
[174] *See id.*
[175] *See id.* at 726 (Mikva, J., concurring).
[176] *See id.* (Mikva, J., concurring).

for future actions brought by public interest organizations, the judge stated:

> Had the public interest organizations and individuals challenging the Secretary's regulations alleged an interest in protecting the well-being of specific laboratory animals (an interest predating this litigation), I think appellees would have had standing to challenge those regulations for providing insufficient protection to the animals. Such allegation would satisfy the requirements for constitutional standing, as enumerated in [*Lujan*]. This claim would also place appellees within the "zone of interests" of the Animal Welfare Act: the Act, too, aspires to protect laboratory animals. But appellees never made this claim, and they had the burden of demonstrating the specific basis of their standing.[177]

Whether future plaintiffs take Judge Mikva up on this offer remains to be seen. Nonetheless, the most recent cases under the AWA, and especially Judge Mikva's concurrence, suggest that third parties will not be rejected summarily under Article III and prudential standing requirements and, once the proper formula is found, may use the AWA as an effective tool to compel the USDA to implement fully regulations for the humane treatment of animals.

Indeed, the recent United States District Court decision in *Animal Legal Defense Fund v. Glickman* (*Glickman*) indicates that some judges are willing to use the Mikva road map and grant standing to an animal protection organization or individuals seeking to rectify errors and delays in the implementation of humane care regulations.[178] In *Glickman*, organizational and individual plaintiffs sued the USDA for, inter alia, its regulatory failure to require animal exhibitors to submit plans for primate psychological well-being and the agency's unreasonable delay in promulgating regulations requiring federal submission and approval of such plans.[179] The case brought by an animal rights organizational plaintiff and individual plaintiffs consisted of two individuals described as animal lovers and a third retired park ranger and former humane investigator.[180] The organizational plaintiffs asserted standing based upon: long standing interest in the particular issue at hand; the informational injuries it suffered from not being able to review and distribute government-approved primate plans;

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[177] *ALDF II*, 29 F.3d at 726 (Mikva, J., concurring).

[178] *See generally* Animal Legal Defense Fund v. Glickman, No. 96–00408, slip op. (D.D.C. Oct. 30, 1996).

[179] *See id.* at 4–5.

[180] *See id.* at 22–23.

and the significant organizational resources it had spent on this issue and other animal welfare issues administered under the AWA.[181] Specifically, the individual plaintiffs detailed their aesthetic and emotional injuries incurred by witnessing the ongoing inhumane housing of primates at several local zoos.

In an extraordinary ruling, United States District Court Judge Charles Richey granted both the organizational and individual plaintiffs standing under the AWA.[182] The decision shed further light on the breadth of the decisions in both *ALDF I* and *ALDF II*. Richey found that the organizational plaintiff's claim of informational injury in the prior ALDF cases had satisfied the requirements of *Lujan*'s Article III test and, thus, met the burden of Constitutional standing.[183] Nonetheless, in those two cases the statutory standing, or prudential standing, had not been met by the organizational plaintiff.[184] In the *Glickman* decision, however, Richey distinguished the type of information sought in *ALDF I* and *II* from the case at hand.[185] In *ALDF I* and *II* the organizational plaintiff sought information concerning research facilities that was normally the province of the statutorily created IACUCs and, thus, fell outside the "zone of interests" protected by the AWA. In contrast, the court found that, in this case, the organization sought information covering exhibitors for whom there is no statutorily created public oversight body similar to an IACUC. Therefore, the court found that the organization's informational injuries fell within the AWA's "zone of interest" protection and that the organization was a particularly suitable challenger to the defendant's administrative neglect.[186]

In addressing the individual plaintiffs, the court found that the specificity with which the plaintiffs alleged their injuries gave rise to standing to sue under the AWA.[187] By alleging their individual and continuous injuries in witnessing particular inhumane primate exhibits, the plaintiffs were able to establish personal and direct injuries that were distinguishable from injuries suffered by the public at large.[188] Moreover, the court found these injuries fairly traceable to the USDA's

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[181] *See id.* at 15–22.
[182] *See id.* at 14–31.
[183] *See Glickman*, No. 96–00408, at 19.
[184] *See id.* at 20.
[185] *See id.* at 19.
[186] *See id.* at 19–22.
[187] *See id.* at 23–27.
[188] *See Glickman*, No. 96–00408, at 25–27.

failure to promulgate regulations for a physical environment adequate to promote the psychological well-being of primates.[189] Thus, the court found that the relief sought would redress these injuries and that the plaintiffs fell within the AWA's "zone of interest."[190]

Clearly, the district court's decision in *Glickman* has provided animal welfare advocates with hope that the courts have carved out a standing niche for organizational and individual plaintiffs. However, an intervenor in the case, the National Association for Biomedical Research, along with the USDA, appealed the *Glickman* standing decision in January of 1997. Should the court of appeals uphold the *Glickman* decision, the substantive merits of many actions brought under the AWA finally may be addressed.

IV. Pet Consumers and Future Plaintiffs

Successful use of the AWA to seek greater federal supervision of animal welfare will be highly dependent on selecting plaintiffs capable of satisfying the standing requirements. The decisions in *International Primate Protection League*, *PETA*, and *Metropark Zoo* have established that third parties will not be able to bring legal actions against individual AWA violators as a way of circumscribing the USDA's discretionary enforcement.[191] Similarly, the decisions in *ALDF I* and *II* indicate that animal welfare organizations will be unable to claim informational injuries related to IACUC activities to meet the standing requirements of Article III and prudential standing.[192] However, the *ALDF I* and *ALDF II* decisions do suggest that third parties are able to sue the federal government concerning its implementation of the AWA so long as the plaintiffs fulfill the standing requirements of *Lujan*.[193] While the court of appeals mulls over the standing issue in the *Glickman* appeal, the concurrence in *ALDF II* still suggests that plaintiffs alleging an interest in protecting the well-being of specific animals may meet the requisite injuries and fall within the "zone of

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[189] *Id.* at 27.

[190] *See id.* at 28–31.

[191] *See* In Defense of Animals v. Cleveland Metroparks Zoo, 785 F. Supp. 100, 101 (D. Ohio 1991); International Primate Protection League v. Institute for Behavioral Research, 799 F.2d 934, 934 (4th Cir. 1986); PETA v. Institutional Animal Care and Use Comm. of the Univ. of Or., 817 P.2d 1299, 1299 (Or. 1991).

[192] *See* Animal Legal Defense Fund v. Espy, 23 F.3d 496, 496 (D.C. Cir. 1994); Animal Legal Defense Fund v. Espy, 29 F.3d 720, 720 (D.C. Cir. 1994).

[193] *See ALDF I*, 23 F.3d at 496; *ALDF II*, 29 F.3d at 720.

interest" necessary to confer standing by demonstrating a careful and well-thought-out interest in protecting certain animals.

One potential plaintiff is the individual who is a pet owner and/or a "consumer" buying pets. In theory, a pet consumer could be able to take Judge Mikva up on his offer and challenge USDA implementation of the AWA as it relates to regulation of pet dealers. Such a plaintiff could express an interest in the animals he or she has examined when considering an imminent purchase or express an economic injury caused by the purchase of an unhealthy pet. While such injuries might appear as indirect injuries caused by the USDA, they would not preclude a plaintiff consumer's standing.[194]

While the Mikva concurrence suggests that such a consumer interest may satisfy the Article III requirements, the potential bar to such standing would be the prudential requirements. In *Block v. Community Nutrition Institute,* the United States Supreme Court held that the congressional intent of the Agricultural Marketing Agreement Act precluded standing for consumers of dairy products to obtain judicial review of milk market orders issued by the Secretary of Agriculture.[195] Thus, the legislative history of the AWA must be revisited to understand the role legislation plays in protecting consumers. Unlike *Block*, the AWA does not express a "fairly discernible" congressional intent to preclude pet consumers from standing. While the AWA contains no particular provisions granting or limiting who may sue under it, the legislative history suggests that pet consumers are well within the realm of potential plaintiffs.[196] In fact, the legislative history of the AWA is filled with references to Congress' intent to regulate the transfer of animals, especially cats and dogs, in commerce.[197] With such a legislative history, the courts would be hard

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[194] *See* Robinson Rubber Prod. Co. v. Hennepin County, No. 4–95–220, 1996 U.S. Dist. LEXIS 4365, at *12–*18 (D. Minn. Mar. 29, 1996).

[195] *See* Block v. Community Nutrition Inst., 467 U.S. 340, 340 (1984); *see also* Overton Power Dist. No. 5 v. Valley Elec. Assoc., Inc., 73 F.3d 253, 256 (9th Cir. 1996) (finding the Boulder Canyon Project 9 (Hoover Dam) statute, 43 U.S.C. § 619a, expressed a "fairly discernible" congressional intent that only contractors named in statute have standing to challenge rate-setting decisions).

[196] *See* H.R. REP. No. 91–1651, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5105.

[197] *See, e.g.*, H.R. REP. No. 94–801, at 24 (1976), *reprinted in* 1976 U.S.C.C.A.N. 776 (stating that this legislation "is intended to eliminate a major problem with the shipment of unhealthy or unsound dogs and cats for the pet trade"); H.R. REP. No. 91–1651, at 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 5103, 5108 (amending the definition of "affecting commerce" to include "or held for sale as pets"); S. REP. No. 89–1281, at 16 (1966), *reprinted in* 1996 U.S.C.C.A.N. 2635, 2647 (statement of Fred B. Smith, acting General Counsel of the Treasury).

pressed to find pet consumers outside the "zone of interest" of the AWA. In analogous cases, the courts have held that consumers can meet the standing requirements of Article III.[198] Indeed, consumers who challenged the Food and Drug Administration's approval of a genetically engineered cow hormone were found to meet both the Article III and prudential standing requirements.[199] In that case, a district court specifically found that the intent of the Federal Food Drug and Cosmetic Act was to protect consumers' well-being.[200] With an analogous legislative history, the AWA would appear to support similar consumer-based legal actions. In late 1996, the Doris Day Animal League and several pet consumers filed a legal action against the USDA that may compel the United States District Court for the District of Columbia to address the issue of pet consumer standing.[201] The lawsuit alleges, inter alia, that the USDA has failed to regulate hunting, security, and breeding dog dealers as mandated by the AWA.[202] Whether the *Glickman* decision and Judge Mikva's concurrence in *ALDF II* carry over into this area of the AWA remains to be seen. However, the decisions certainly create a more favorable judicial climate in which to pursue a consumer-based legal challenge.[203]

CONCLUSION

The AWA just celebrated its thirtieth year of existence. Compared to many environmental statutes, the Act has seen only sporadic use as a legal weapon throughout its existence. The ever-narrowing interpretation of standing under the AWA has limited the pool of plaintiffs able to bring AWA claims before the courts, and thereby limited the number of claims filed. Thus far, court decisions have dismissed a number of possible plaintiff groups, including individuals seeking enforcement of the AWA, members of statutorily mandated Institutional Animal Care and Use Committees, animal researchers seeking research facility AWA compliance, and business entities with tangential economic interests in animal care regulation.

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[198] *See, e.g.*, Barnes v. Shalala, 865 F. Supp. 550, 560 (W.D. Wis. 1994).

[199] *See id.*

[200] *See id.* at 561.

[201] *See* Doris Day Animal League v. Glickman, No. 96–02806 (D.D.C. filed Dec. 19, 1996).

[202] *See id.*

[203] *See* Animal Legal Defense Fund v. Glickman, No. 96–00408, slip. op. at 17 (D.D.C. Oct. 30, 1996); Animal League Defense Fund v. Espy, 29 F.3d 720, 720 (D.C. Cir. 1994).

Yet, these court decisions have not foreclosed third-party use of the AWA fully. While the courts may never allow animals standing under the Act, third parties representing the interests of animals, through careful selection of plaintiffs, still may be able to satisfy the constitutional and prudential elements of standing. Moreover, the recent lower court decision in *Glickman* suggests that the judicial climate may be becoming more amenable to suits brought under the AWA. Whether achieved through the courts or through further amendment of the Act, allowing third-party legal standing under the AWA undoubtedly would reinvigorate use of the AWA as a means of protecting animals from widespread abuse.