

USDA vs. AZA: Playing with Tiger Cubs Isn't All It's Cracked Up to Be

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I. INTRODUCTION

Animal welfare activists have long criticized federal regulations that apply to roadside zoos for lax and inconsistent enforcement. The general public's exposure to this issue was greatly amplified by the 2020 release of Netflix's docuseries, *Tiger King: Murder, Mayhem, and Madness*.¹ The show centered on Joe Exotic, his roadside zoo, and his notorious rivalry with the owner of Big Cat Rescue, a well-known animal sanctuary.² Tiger King was released just seven days after many schools and workplaces across the country closed their doors and sent students home due to COVID-19, likely contributing to the 34 million viewers amassed within just ten days of the show's release.³ This widespread and recent awareness of roadside zoos has increased public interest in shutting down roadside zoos once and for all.⁴

1. Jules Howard, *A Zoologist's View of Tiger King: A Crass Exposé That Could Do Some Good*, GUARDIAN (Mar. 31, 2020), <https://www.theguardian.com/tv-and-radio/2020/mar/31/a-zoologists-view-of-tiger-king-a-crass-expose-that-could-do-some-good> [https://perma.cc/6R58-587X]. “[M]illions upon millions of people around the world are waking up to this abuse of big cats in a way that a serious, more thorough documentary simply wouldn't have been able to achieve.” *Id.*

2. Mahita Gajanan, *The Wild Story Behind Netflix's New Docuseries 'Tiger King'*, TIME (Mar. 24, 2020), <https://time.com/5807284/tiger-king-netflix-true-story/> [https://perma.cc/GZH7-8VH2].

3. Tyler Hersko, *'Tiger King' Had 34 Million Viewers Within 10 Days of Launch, Fox to Air Special*, INDIEWIRE (Apr. 8, 2020), <https://www.indiewire.com/2020/04/tiger-king-netflix-viewership-fox-special-1202223808/> [https://perma.cc/NWU7-42ZK].

4. See Lindsey McPherson, *House Passes 'Tiger King' Bill to Ban Private Ownership of Big Cats*, ROLL CALL (Dec. 3, 2020), <https://www.rollcall.com/2020/12/03/house-passes-tiger-king-bill-to-ban-private-ownership-of-big-cats/> [https://perma.cc/NWU7-42ZK] (explaining that the House passed the Big Cat Public Safety Act partly in response to attention brought to roadside zoos by Tiger King, and noting that one opponent of the Act said that “reality TV shouldn't serve as the basis for public policy”). A Google Trends search of the popularity of “tiger zoo” showed that the popularity of the phrase went through regular fluctuations and then

The Animal Welfare Act (AWA)⁵ is the only statute that covers roadside zoos at the federal level.⁶ The Endangered Species Act (ESA)⁷ and the Lacey Act⁸ have some connection to the regulation of wild animals but are not targeted toward hampering the practices of unethical animal exhibitors.⁹ This Note explores the effectiveness of federal regulation of roadside zoos and considers how roadside zoos have been affected by federal regulation, if at all. Part II examines the history of zoos and the development of roadside zoos and compares licensing requirements of the United States Department of Agriculture (USDA) with the accreditation standards of the Association of Zoos and Aquariums (AZA). It also explains the legislative history of the AWA and briefly touches on the ESA and the Lacey Act. Part III analyzes how the AWA and ESA have been implemented and considers several possible solutions to the often ill-treated animals in the care of roadside zoos. Part IV recommends (1) amending the USDA licensing requirements using guidance from the AZA accreditation standards, and (2) implementing a citizen suit provision within the AWA.

II. BACKGROUND

A. History of Zoos and the Development of Roadside Zoos

Collecting live animals is a practice that goes back thousands of years to when wealthy individuals kept “animal menageries.”¹⁰ Ancient Egyptian and Mesopotamian wall carvings and other records dating back to roughly 2500 BC have led researchers to believe that these people not only hired workers to take care of their animals, but also traveled great distances to bring exotic species back to their homes.¹¹

spiked immediately after the release of Tiger King. *Tiger Zoo*, GOOGLETRENDS (Oct. 22, 2022), <https://trends.google.com/trends/explore?date=2019-01-01%202022-01-01&geo=US&q=tiger%20zoo> [https://perma.cc/U85K-6Q96] (using the range of January 1, 2019 to January 1, 2022). The most recent spike before the release of Tiger King was in September 2014, when a man scaled a fence to get into a white tiger enclosure at a zoo in New Delhi, India, and was killed by the tiger inside. *Id.* See also *White Tiger Kills Man Who Climbed Over Fence at New Delhi Zoo*, GUARDIAN (Sept. 23, 2014), <https://www.theguardian.com/world/2014/sep/23/white-tiger-kills-man-new-delhi-zoo> [https://perma.cc/CP4M-JXXS].

5. Animal Welfare Act, 7 U.S.C. §§ 2131–2160.

6. *Animal Welfare Act*, U.S. DEP’T AGRIC.: NAT’L AGRIC. LIBR., <https://www.nal.usda.gov/animal-health-and-welfare/animal-welfare-act> [https://perma.cc/33TF-7HX3].

7. Endangered Species Act, 16 U.S.C. §§ 1531–1544.

8. Lacey Act, 16 U.S.C. §§ 3371–3378.

9. 16 U.S.C. § 1531(b) (stating that the purpose of the EWA is to preserve the ecosystems of endangered and threatened species); *Lacey Act*, U.S. DEP’T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. (Dec. 21, 2021), <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/lacey-act/lacey-act> [https://perma.cc/7ETL-38MD] (stating that the Lacey Act regulates importation of protected species and prevents spread of non-native species).

10. Rutledge et al., *Zoo*, NAT’L GEO. (May 20, 2022), <https://www.nationalgeographic.org/encyclopedia/zoo/> [https://perma.cc/8BJM-UHA7]. An animal menagerie was a collection of wild animals that were kept and trained specifically for exhibition. *Menagerie*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/menagerie> [https://perma.cc/MDH6-SQFY].

11. Rutledge et al., *supra* note 10. In the 13th century, King Henry III began assembling his Royal Menagerie with its first animals—a trio of lions that came from the Holy Roman Emperor Frederick II’s own collection. The collection quickly grew with the addition of a polar bear from the King of Norway and an elephant. *The Tower Menagerie: Comprising the Natural History of the Animals Contained in that Establishment, with*

Eventually, zookeepers began to keep animals in enclosures that more closely mirrored their natural habitats so that scientists could effectively study the behavior and anatomy of animals.¹² During the 17th century, René Descartes performed operations on live animals under the theory that they could not feel pain.¹³ At the same time, Baruch Spinoza, among other philosophers at the time, did not deny animals' ability to feel; nevertheless, they believed that humans should still "use them as we please, [and] treat[] them in the way which best suits us."¹⁴ The first facility that resembled a modern zoo opened in 1793 in Paris, France, during the Age of Enlightenment.¹⁵ This era focused heavily on science, and learning more about animals was no exception.¹⁶ The methods used to understand animals were indeed less advanced and less attentive to the well-being of the animals prior to the Age of Enlightenment, during which conceptions began to shift.¹⁷ Scientists gradually began to realize that the way they studied animals was conceivably immoral, but also believed that the harm they caused was outweighed by their understanding that it was for the sake of medical advancement.¹⁸

The United States' first zoo opened in Philadelphia in 1874, nearly a century after Paris' zoo.¹⁹ The Philadelphia Zoo differentiated itself from its French counterpart in many ways, including by allowing public exhibition of animals and encouraging more ethical scientific observation than occurred during the Age of Enlightenment.²⁰ The enclosures, for example, resembled animals' natural habitats and provided them with more space to explore than in menageries.²¹ Suburban zoos,²² like the Philadelphia and Louisville zoos, focused at least partly on research in their early days.²³ And as zoos learned more about animals, they improved upon animal care and management practices.²⁴

The roadside zoo phenomenon has a murkier, lesser-known origin, likely because the

Anecdotes of Their Characters and History, ROYAL COLLECTION TR.,
<https://www.rct.uk/collection/1055535/the-tower-menagerie-comprising-the-natural-history-of-the-animals-contained-in#:~:text=In%201235%2C%20Henry%20III%20established,from%20Louis%20IX%20of%20France>
 [https://perma.cc/38NS-TF5X].

12. Rutledge et al., *supra* note 10.

13. Stefanie Stamm, *Medical Testing on Animals: A Brief History*, ANIMAL JUST. (Jan. 27, 2015), <https://animaljustice.ca/blog/medical-testing-animals-brief-history> [https://perma.cc/8KNN-XUD2].

14. Nuno Henrique Franco, *Animal Experiments in Biomedical Research: A Historical Perspective*, 2013 ANIMALS 238, 241 (2013) (citing BENEDICT DE SPINOZA, *THE ETHICS* (Michael Croland & Susan L. Rattiner eds., Robert Harvey Monro trans., Dover Publ'ns 2018) (1677)).

15. Rutledge et al., *supra* note 10.

16. *Id.*

17. *See id.* (discussing the ways that scientists' understanding of animal sentience has evolved, with each generation paying more attention to animal welfare than its predecessors).

18. Stamm, *supra* note 13.

19. *About the Zoo*, PHILA. ZOO, <https://philadelphiazoo.org/about-the-zoo/> [https://perma.cc/3H9S-P62K].

20. *Philadelphia Zoo*, ABOUT ZOOS, <https://aboutzoos.info/zoos/zoo-database/rest-of-the-world-zoo-database/119-philadelphia-zoo> [https://perma.cc/U6KP-DB95].

21. *Id.*

22. Suburban zoos are those zoos that developed as animal parks outside cities, giving animals more space to roam and habitats that better resemble their natural habitats. Rutledge et al., *supra* note 10.

23. Lenny Flank, *Philadelphia Zoo: America's First Zoo*, HIDDEN HIST. (Sept. 8, 2015), <https://lflank.wordpress.com/2015/09/08/philadelphia-zoo-americas-first-zoo/> [https://perma.cc/7CAZ-MJQ4].

24. *See id.* (discussing the Philadelphia Zoo's change in philosophy in 1976 to place more focus on education and conservation instead of just collecting as many animals as possible).

first zoos in Europe were more akin to our roadside zoos than the suburban zoos we know today, and there was no outrage over the treatment of those animals because that was the norm.²⁵ Unlike suburban zoos, roadside zoos in the United States have not substantially changed their practices since their inception and are generally operated purely for profit and entertainment.²⁶ They became popular with the rise in the use of motorcars in the 1950s as middle-class Americans became more inclined to travel for pleasure and, therefore, more likely to stop at roadside establishments on their journeys.²⁷

People who understand what occurs behind the scenes of roadside zoos know the many detriments they cause those animals: cramped, cage-like enclosures; a lack of enrichment; poor nutrition; little veterinary care; and the presence of opportunities for customers to physically interact with animals.²⁸ In contrast, conventional suburban zoos provide larger enclosures that emulate natural habitats; focus on enrichment to keep animals mentally and physically stimulated; hire species-specific animal nutritionists and veterinarians; and rarely allow physical contact with animals in their care.²⁹ In addition, the animals at roadside zoos stay in their enclosures at all times, whereas in suburban zoos, they are either only outside while the zoo is open and are taken inside to rest in the evenings, or they have the choice to go in and out throughout the day.³⁰ Many of the larger

25. See Jennifer Jacquet, *America, Stop Visiting Roadside Zoos – They Make Money from the Inhumane Treatment of Animals*, GUARDIAN (Nov. 26, 2016), <https://www.theguardian.com/sustainable-business/2016/nov/27/roadside-zoos-america-animal-cruelty-welfare> [<https://perma.cc/JJ5E-PMST>] (“Roadside zoos are, in many ways, the way conventional zoos used to be before zoo visitors demanded more.”).

26. Dan Ashe, *Roadside Zoos*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/roadside-zoos/> [<https://perma.cc/DQ95-FTVB>]; Dan Ashe, *Tiger King and the Cruelty of Private Ownership of Wild Animals*, ASS’N OF ZOOS & AQUARIUMS (Mar. 1, 2020), <https://www.aza.org/connect-stories/stories/private-ownership-of-animals?locale=en> [<https://perma.cc/2AUJ-F73H>].

27. *Roadside Zoos*, TIGERS IN AM., <https://www.tigersinamerica.org/roadside.htm> [<https://perma.cc/R2TK-CW7H>].

28. Jacquet, *supra* note 25; Dwight Lawson, *The Truth About Unaccredited Roadside Zoos*, OKLA. CITY ZOO (Feb. 2020), <https://www.okc zoo.org/blog/posts/the-truth-about-unaccredited-roadside-zoos> [<https://perma.cc/Q4RS-2YC5>]; Stephanie Schuttler, *Ethical Zoos: How to Determine the Good from the Bad*, STEPHANIE SCHUTTLE: BLOG (Mar. 31, 2020), <https://stephanieschuttler.com/ethical-zoos-how-to-determine-the-good-from-the-bad/> [<https://perma.cc/H7BW-R7WD>] (listing the characteristics of unethical zoos); *Roadside Zoos*, *supra* note 27. See Anna Sporre, *Judge Orders Animals Be Removed from Iowa Zoo, Citing ‘Deplorable’ Conditions*, DES MOINES REG. (Nov. 25, 2019), <https://www.desmoinesregister.com/story/news/crime-and-courts/2019/11/25/animals-removed-cricket-hollow-zoo-animal-park/4300563002/> [<https://perma.cc/S85W-9F8M>] (noting that an Iowa district court judge had ordered a zoo to be shut down due to “deplorable conditions” and health risks for the animals and human visitors as animal defecated in the same place they ate).

29. *Animal Enrichment*, LOUISVILLE ZOO, <https://louisvillezoo.org/enrichment/> [<https://perma.cc/78WB-8AHQ>]; *Animal Food and Nutrition Center*, SAINT LOUIS ZOO, <https://www.stlzoo.org/animals/animalfoodnutritioncenter> [<https://perma.cc/884S-WPCR>]; Katie Burns, *Zoo Veterinarians, Behind the Scenes and in the Field*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/javma-news/2017-07-15/zoo-veterinarians-behind-scenes-and-field> [<https://perma.cc/884S-WPCR>]; see Schuttler, *supra* note 28 (“At ethical zoos, animals are not forced to be touched or there are limited times when you can touch them.”); see also *id.* (listing the characteristics of ethical zoos).

30. See Sarah Crupi, *Ask the Expert: What Happens When There is a Bad Storm at the Zoo?*, CLEVELAND ZOO SOC’Y (Feb. 26, 2020), <https://www.clevelandzoosociety.org/z/2020/02/26/ask-the-expert-what-happens-when-there-is-a-bad-storm-at-the-zoo> [<https://perma.cc/Y6QG-P4CD>] (explaining that the animals have the choice to go inside and outside throughout the day); see also Jason DeRusha, *Good Question: Where Do Zoo Animals Sleep?*, CBS MINN. (Nov. 5, 2010), <https://minnesota.cbslocal.com/2010/11/05/good-question-where-do-zoo-animals-sleep/> [<https://perma.cc/MF2Z-QYRZ>] (explaining that most of the zoo’s animals go inside to

roadside facilities keep “big cats” like tigers and leopards because they tend to draw visitors but do not provide them with the large habitats that such animals need.³¹

As illustrated, suburban zoos and roadside zoos operate very differently. Suburban zoos have developed with a focus on conservation and care of their animals, and roadside zoos have remained somewhat primitive—more comparable to the menageries of the past—and are more concerned with bringing in revenue than the health and safety of the animals.

B. Differences Between USDA Licensing and AZA Accreditation

The base requirement for anyone exhibiting animals to the public is a Class C USDA license,³² but modern suburban zoos take an additional step after becoming licensed by seeking accreditation from the AZA, as it sets them apart from facilities like roadside zoos.³³ This sub-Part explains the differences between USDA Licensing and AZA Accreditation by detailing the requirements and effectiveness of each.

A Class C USDA license allows the holder to exhibit animals in return for compensation,³⁴ or to exhibit animals that are “on display [performing] for the public or are used in educational presentations.”³⁵ Section 2143 of the AWA requires the USDA to inspect facilities to ensure the applicant satisfies certain minimum requirements before the applicant is issued a Class C license and allowed to become an animal exhibitor.³⁶ The division in the USDA charged with these inspections and responsible for ensuring that all exhibitors are licensed (or at least registered) with the USDA is the Animal and Plant Inspection Service (APHIS).³⁷ Before issuing a license, APHIS must check the facility to ensure it adheres to all the standards and regulations set out in the AWA; after a license is issued, APHIS is expected to make unannounced visits to ensure continued compliance at the facility.³⁸ If an APHIS inspector encounters noncompliance—either through a visit or public report—the inspector is supposed to document the deficiency and direct the facility to correct the issue.³⁹ If the problem persists at the next visit, APHIS may initiate legal

sleep and “leopards sleep more than 20 hours a day”). This makes the fact that roadside zoos frequently keep leopards outside and on exhibit even more alarming.

31. See ASS'N OF ZOOS & AQUARIUMS, TIGER (PANTHERA TIGRIS) CARE MANUAL 11–12 (2012), https://assets.speakcdn.com/assets/2332/tiger_care_manual_2016.pdf [<https://perma.cc/T6YJ-W6CQ>] (stating that the size of outdoor tiger exhibits must meet or exceed federal regulations and are recommended to be 1600 square feet, and their holding enclosures should be at least 64 square feet). The typical size of tiger exhibits at AZA-accredited institutions is 2500 to 10,000 square feet. *Id.*

32. Rachel Garner, *Who Are the USDA Class C Exhibitors?*, WHY ANIMALS DO THE THING (Nov. 2, 2017), <https://www.whyanimalsdothething.com/who-are-the-usda-class-c-exhibitors> [<https://perma.cc/N8CE-N74T>].

33. *Currently Accredited Zoos and Aquariums*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/current-accreditation-list> [<https://perma.cc/YXP4-NEFH>].

34. This need not be financial compensation. Garner, *supra* note 32.

35. *Id.* (alteration in original).

36. 7 U.S.C. § 2143.

37. ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., ANIMAL CARE FACTSHEET, PRE-LICENSE APPLICATION PACKAGE: CLASS C-EXHIBITORS (2017), https://www.aphis.usda.gov/animal_welfare/downloads/forms/APHIS_Form_7003-7003A_Class-C_AppKit.pdf [<https://perma.cc/HMH3-FKQS>].

38. *Id.*

39. *Id.*

action.⁴⁰ In addition, APHIS may send warning letters or agency stipulation letters to set civil penalties in the case of alleged AWA violations. If warranted, they are expected to pass evidence onto the USDA's Office of the General Counsel for review.⁴¹ The frequency of routine inspections of facilities by the USDA depends on the compliance history of facilities, but inspections must occur at least once a year.⁴² A Class C USDA license is required for any operation whose main function is the public exhibition of animals for compensation, so all zoos—roadside and suburban—must apply for this license to operate legally.⁴³

In addition to USDA licensing, animal exhibitors may also go a step further and seek AZA accreditation. There are an estimated 2800 animal exhibitors licensed by the USDA across the country,⁴⁴ and less than ten percent of them are accredited by the AZA.⁴⁵ The AZA is a nationally recognized 501(c)(3) nonprofit organization focused on improving animal welfare.⁴⁶ Ever since the AZA's accreditation process began in 1971, it has been considered the “national standard” for determining whether a zoo is treating its animals well.⁴⁷ When a zoo fails to maintain its practices in accordance with the AZA standard, its accreditation is revoked, and it can no longer be a member of the organization.⁴⁸ The USDA has been known to use AZA accreditation status when evaluating zoos for compliance with licensing requirements.⁴⁹

Unlike USDA licensing, AZA accreditation is not a mandatory prerequisite for zoos to operate, but accreditation is the gold standard that ethical animal exhibitors strive to achieve and maintain.⁵⁰ Along with increasing public trust in the facility, AZA

40. *Id.*

41. *Id.*

42. *AWA Inspection and Annual Reports*, U.S. DEP'T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. (Feb. 5, 2021), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/awa-inspection-and-annual-reports [<https://perma.cc/PB6V-GLP2>].

43. *See* 7 U.S.C. § 2143 (requiring a valid license for exhibition of animals); 7 U.S.C. § 2132(h) (defining the term “exhibitor”).

44. “If you have animals on display to the public or conduct performances featuring animals, you must become licensed as an exhibitor, unless you fall under one of the exemptions.” U.S. DEP'T OF AGRIC., LICENSING AND REGISTRATION UNDER THE ANIMAL WELFARE ACT: GUIDELINES FOR DEALERS, EXHIBITORS, TRANSPORTERS, AND RESEARCHERS 14 (Apr. 2004), <https://naldc.nal.usda.gov/download/6009255/pdf> [<https://perma.cc/L43A-953X>].

45. *Accreditation FAQs*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/accred-faq?locale=en> [<https://perma.cc/AAU7-W2FN>]. The disparity between the total number of animal exhibitors and the number of AZA-accredited animal exhibitors is likely due to the AZA's high standards for accreditation, which are much more demanding than USDA licensing requirements.

46. *About Us*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/about-us?locale=en> [<https://perma.cc/5E5R-2CHE>].

47. *About AZA Accreditation*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/what-is-accreditation> [<https://perma.cc/7GUF-LUVF>]; *see also Association of Zoos and Aquariums*, LOUISVILLE ZOO, <https://louisvillezoo.org/about-the-zoo/association-of-zoos-and-aquariums/> [<https://perma.cc/67AG-ZWV9>] (explaining that AZA-accredited zoos provide excellent care for their animals and have “met the mandatory, rigorous, professional standards for animal welfare and management”).

48. *About AZA Accreditation*, *supra* note 47.

49. *Id.* A recent study found that AZA accreditation correlates with increased compliance with the AWA. Kailer K. Riedman, Gregory B. Cunningham & Louis DiVincenti, *Does Accreditation by the Association of Zoos and Aquariums Correlate with Animal Welfare Act Compliance?*, J. APPLIED ANIMAL WELFARE SCI. (2022).

50. ASS'N OF ZOOS & AQUARIUMS, THE ACCREDITATION PROCESS OF THE ASSOCIATION OF ZOOS & AQUARIUMS AND ANIMAL WELFARE 1 (Feb. 2021),

accreditation provides the holder with a host of other benefits, such as AZA membership; increased eligibility for funding; exemption from certain government requirements; and improved attraction and retention of staff.⁵¹ Zoos that forego or are denied accreditation are not afforded the same public approval that accredited facilities receive. Many websites recommend that patrons check a zoo's accreditation status before visiting to avoid supporting a zoo that does not meet AZA standards.⁵² In 2020, the AZA implemented its Pathway Toward Membership (PTM) program for prospective member zoos and aquariums that are preparing to submit their accreditation applications.⁵³ The program requires that the prospective members be one to five years away from submitting their application and provides peer coaches to advise the participants and write reports about their visits to the facility.⁵⁴

The AZA implements a lengthy process for the accreditation of zoos.⁵⁵ An Accreditation Commission of 15 individuals who are leaders in “zoo and aquarium operations, animal management, and veterinary medicine” have the responsibility of evaluating all accreditation candidates.⁵⁶ Each zoo candidate fills out a detailed questionnaire, which takes six or more months,⁵⁷ and then the Commission takes six more months to study and evaluate it.⁵⁸ The next step is for a group of animal and zoo operations experts and at least one veterinarian to visit the zoo.⁵⁹ This visit spans several days and involves evaluating every animal's welfare, interviewing staff, and examining zoo records to gather information that the Commission uses to determine whether the zoo meets the AZA's accreditation standards.⁶⁰ The Commission then receives a report from the inspection team and waits until it convenes at one of the twice-yearly meetings to consider accreditation candidates.⁶¹ If a zoo successfully receives accreditation, it is not permanent: accreditation may be revoked, and each facility must undergo accreditation anew every five years.⁶²

https://assets.speakcdn.com/assets/2332/aza_accreditation_process_and_welfare_final.pdf

[<https://perma.cc/4GAA-FBJ6>].

51. *Benefits of Accreditation*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/benefits-of-accreditation> [<https://perma.cc/58JS-ZMXR>].

52. See Rachel Garner, *How to Understand Zoo Accreditation*, WHY ANIMALS DO THE THING (July 4, 2016), <https://www.whyanimalsdothething.com/how-to-understand-zoos-accreditation> [<https://perma.cc/6SH4-VS8T>]; Samantha Sullivan, *Not All Zoos Are Bad... But How Do You Know?*, EARTHWISE AWARE, <https://www.earthwiseaware.org/not-all-zoos-are-bad-but-how-do-you-know/> [<https://perma.cc/3BT4-DCQ6>]; Roxy Furman, *How to Tell if the Zoo You're Looking to Visit Is Ethical*, POINTS GUY (June 14, 2019), <https://thepointsguy.com/guide/visiting-ethical-zoos/> [<https://perma.cc/HP9U-TJUW>].

53. *Pathway Toward Membership Program*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/PTM-program> [<https://perma.cc/W65W-HLWQ>].

54. *Pathway Toward Membership*, ASS'N OF ZOOS & AQUARIUMS, https://assets.speakcdn.com/assets/2332/pathway_overview-jan2023.pdf [<https://perma.cc/PRC9-V3GG>].

55. *Accreditation Basics*, ASS'N OF ZOOS & AQUARIUMS, <https://www.aza.org/becoming-accredited> [<https://perma.cc/J4VH-WEDQ>].

56. *Id.*

57. *Accreditation FAQs*, *supra* note 45.

58. *Accreditation Basics*, *supra* note 55.

59. This team is separate from the commission. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* The Columbus Zoo recently lost its accreditation after the five-year review process, in part due to the accreditation commission's concerns with the zoo's practice of transferring young animals with non-AZA

The process for an animal exhibitor to receive AZA accreditation is much more demanding than receiving a license from the USDA, which is why such a small percentage of USDA-licensed animal exhibitors are also AZA-accredited.⁶³ As an example of the varying standards for a specific species, the average Mantled Guereza colobus monkey is typically in group 4 of the USDA “Nonhuman Primates” chart.⁶⁴ Group 4 corresponds to a USDA requirement of 12 square feet of floor space for two animals and a height of 5 feet and 6 inches.⁶⁵ In contrast, the AZA requires at least 3375 square feet of floor space and a minimum height of 15 feet for two colobus monkeys.⁶⁶

One of the most significant differences between USDA licensing and AZA accreditation is that the AZA’s standards change over time: facilities must improve or update their practices as the AZA updates its standards or risk losing its accreditation status.⁶⁷ To show continued compliance with the ever-heightening standards, facilities must undergo the entire accreditation process every five years.⁶⁸ In addition, rather than providing general animal welfare standards like the USDA, the AZA has detailed and species-specific care sheets for most animals.⁶⁹ Overall, a facility must jump through many more hoops to achieve AZA accreditation than it must for a Class C USDA license, but modern suburban zoos go through the process because of the benefit of setting themselves apart from roadside zoos.

members for entertainment purposes. Jennifer Shaffer, *Columbus Zoo Loses Accreditation Appeal with Association of Zoos & Aquariums*, COLUMBUS DISPATCH (Dec. 14, 2021), <https://www.dispatch.com/story/news/local/2021/12/13/columbus-zoos-loss-accreditation-stands-after-appeal-aza/6497018001/> [<https://perma.cc/3KDS-5P2Y>].

63. 9 C.F.R. §§ 2.1–2.13 (2018); *The AZA Accreditation Standards & Related Policies 2022*, ASS’N OF ZOOS & AQUARIUMS, <https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf> [<https://perma.cc/TU54-95XD>]; *Accreditation FAQs*, *supra* note 45. Of course, another hurdle on the path to accreditation may very well be the cost, as first-time accreditation applicants who are not enrolled in the Pathway Toward Membership Program could pay a non-refundable filing fee of \$8000 to \$15,000 and an additional \$2000 toward visiting accreditation committee expenses. ASS’N OF ZOOS & AQUARIUMS, *THE GUIDE TO ACCREDITATION OF ZOOLOGICAL PARKS AND AQUARIUMS* 21 (2023). However, the application is significantly cheaper for first-time applicants who are enrolled in PTM, as the non-refundable filing fee is only \$3500. *Id.* This huge discount, coupled with the prestige provided by accreditation status, provides a good argument for aspiring members to join the PTM program and work on their applications.

64. Meg Stark, *Mantled Guereza*, GLOBIO (Oct. 9, 2020), <https://globio.org/october-primate-of-the-month-mantled-guereza/> [<https://perma.cc/GTV7-XXFL>]; 9 C.F.R. § 3.80 (2018).

65. 9 C.F.R. § 3.80 (2018).

66. ASS’N OF ZOOS & AQUARIUMS, *COLOBUS MONKEY (COLOBUS) CARE MANUAL* 9 (2012), https://assets.speakcdn.com/assets/2332/colobus_care_manual_2012.pdf [<https://perma.cc/9Y39-UYAE>].

67. *Id.*

68. *Id.*

69. There are completed care manuals for 34 animals, and care manuals are in progress for 25 animals. *Animal Care Manuals*, ASS’N OF ZOOS & AQUARIUMS, <https://www.aza.org/animal-care-manuals?locale=en> [<https://perma.cc/JXL9-2BGJ>]. Each manual contains information on the ambient environment, habitat design, nutrition, veterinary care, and reproductive care recommended for the animal, among other things. See TIGER (PANTHERA TIGRIS) CARE MANUAL, *supra* note 31 (discussing what tigers need in order to thrive); ASS’N OF ZOOS & AQUARIUMS, *CHIMPANZEE (PAN TROGLODYTES) CARE MANUAL* (2010), <https://assets.speakcdn.com/assets/2332/chimpanzeeccaremanual2010r.pdf> [<https://perma.cc/4V26-MB9S>] (discussing what chimpanzees need in order to thrive).

C. Federal Laws and Regulations

All Class C animal exhibitors are private owners of exotic animals and are therefore regulated by three federal acts: the Animal Welfare Act (AWA), the Endangered Species Act (ESA), and the Lacey Act.⁷⁰ This sub-Part discusses these three federal laws in order of decreasing importance to this Note.

Congress originally passed the AWA in 1966 in response to public outrage over the treatment of laboratory animals and theft of animals for use in experiments.⁷¹ It focused on six species and required interstate travel for the activity to be covered.⁷² The AWA has been amended numerous times since its enactment.⁷³ APHIS, under the USDA, used the AWA as statutory authority to promulgate the Animal Welfare Regulations, which provide requirements for licensing and standards for the agency to use in enforcement.⁷⁴

The ESA passed in 1973, just seven years after the AWA.⁷⁵ In enacting the ESA, Congress provided a means for classifying native animal species as endangered and afforded them protection based on such classification.⁷⁶ Relevant to this Note, the ESA made it illegal for people subject to United States jurisdiction to “possess, sell, deliver, carry, transport, or ship” any endangered species that were taken in the United States, in the territorial sea of the United States, or on the high seas.⁷⁷

Almost a century before the ESA, Congress passed the original Lacey Act in 1900.⁷⁸ The Lacey Act protects wild animals by prohibiting the trade of those that have been “illegally taken, possessed, transported, or sold” and enforces the prohibition through civil and criminal penalties for various violations.⁷⁹ The most recent amendment changed the felony provision so that an individual could be convicted if they either “knew of the import or export of the species” or were “involved in the sale or purchase of wildlife, fish, or plants with a market value greater than \$350.”⁸⁰

The AWA, ESA, and Lacey Act all attempt to protect privately-owned animals.⁸¹ The

70. Animal Welfare Act, 7 U.S.C. §§ 2131–2160; Endangered Species Act, 16 U.S.C. §§ 1531–1544; Lacey Act, 16 U.S.C. §§ 3371–3378.

71. *Animal Welfare Act Timeline*, U.S. DEP’T OF AGRIC.: NAT’L AGRIC. LIBR., <https://www.nal.usda.gov/collections/exhibits/awahistory/list> [<https://perma.cc/49VK-2DCK>].

72. *Id.*

73. *Id.*

74. 9 C.F.R. §§ 1.1–12.10 (2023); ANIMAL WELFARE ACT AND ANIMAL WELFARE REGULATIONS I (2019), U.S. DEP’T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV., https://www.aphis.usda.gov/animal_welfare/downloads/bluebook-ac-awa.pdf [<https://perma.cc/9XPK-WUWB>]; see *supra* Part II.B (discussing USDA Class C licenses, which came about after the passage of the AWA).

75. Cynthia Hodges, *Brief Summary of the Endangered Species Act (ESA)*, MICH. STATE UNIV. ANIMAL LEGAL & HIST. CTR. (2010), <https://www.animallaw.info/intro/endangered-species-act-esa> [<https://perma.cc/7279-7UBB>].

76. *Id.*

77. 16 U.S.C. § 1538 (a)(1)(D).

78. Rebecca F. Wisch, *Overview of the Lacey Act (16 U.S.C. SS 3371-3378)*, MICH. STATE UNIV. ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/overview-lacey-act-16-usc-ss-3371-3378> [<https://perma.cc/44TA-V2UV>].

79. *Id.*

80. *Id.*

81. The AWA “promulgate[s] standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.” Henry Cohen, *The Animal Welfare Act*, MICH. STATE UNIV. ANIMAL LEGAL & HIST. CTR. (2006), <https://www.animallaw.info/article/animal-welfare-act>

Animal Welfare Guidelines that sprung from the AWA supplied APHIS with licensing requirements and enforcement standards; the ESA prohibits the possession, transaction, and transportation of endangered animals, and the Lacey Act outlaws the trade of animals that have been illegally possessed, transported, or sold. Unfortunately, the continued existence of roadside zoos—Class C animal exhibitors subject to the aforementioned federal laws—and the conditions that commonly exist therein seem to demonstrate that all three fail to fulfill their purpose to some degree.

III. ANALYSIS

This Part discusses how failures of the USDA licensing system allow roadside zoo businesses to continue to operate despite violations, how human–animal physical interaction can be an indicator of the trustworthiness of animal exhibitors, and how U.S. Congress and a number of states have tried to remediate these issues.

A. How the USDA Licensing Requirements Fail Animals

Roadside zoos are largely characterized by animals receiving inadequate nutrition, very little medical care, and a lack of mental and physical stimulation.⁸² In most cases, these animals are kept in enclosures that are too small and unsanitary.⁸³ As previously explained, these squalid conditions are prevalent because USDA licensing requirements are drastically less strict than the standards which AZA-accredited zoos must achieve.⁸⁴ Animal exhibitors that run roadside zoos are likely aware that their most profitable practices are also the very thing that disqualifies them from AZA accreditation.

Though widespread public awareness of the treatment of animals at roadside zoos only recently gained momentum, groups such as the Animal Legal Defense Fund (ALDF) have been working on the issue for some time, utilizing strategies such as impact

[<https://perma.cc/37QU-H9VV>]. The ESA outlawed private possession of endangered animals taken in the United States. Hodges, *supra* note 75. The Lacey Act outlawed the trade of animals that were illegally possessed. Wisch, *supra* note 78.

82. *Roadside Zoos*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/roadside-zoos/> [<https://perma.cc/BV6E-5GV4>]; *Road Side Zoos*, TURPENTINE CREEK (Apr. 20, 2020), <https://www.turpentinecreek.org/road-side-zoos/> [<https://perma.cc/6WQL-RVWM>]; see ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP'T OF AGRIC., INSPECTION REPORT (July 8, 2020), <https://911animalabuse.com/wp-content/uploads/Jeff-Lowe-GW-Zoo-Final-Inspection.pdf> [<https://perma.cc/LX3V-MFU4>] (An investigative report of the zoo covered in Netflix's Tiger King series that revealed unrefrigerated decaying flesh being fed to the animals, a wolf with arthritis not being cared for adequately, and a number of animals missing. The USDA suspended the zoo's license after this visit.).

83. *Roadside Zoos*, *supra* note 82; see also Sporre, *supra* note 28 (discussing an Iowa district court judge's visit to a zoo where she saw “deplorable conditions” that were “subpar in all manners,” animals were defecating where they ate, and a lack of access to clean water for the animals).

84. See e.g., *supra* notes 63–69 and accompanying text.

litigation.⁸⁵ For example, two notable cases are *Kuehl v. Sellner*⁸⁶ and the Pablo Escobar Hippos case.⁸⁷

In *Kuehl v. Sellner*, the ALDF secured a victory for animals at the Cricket Hollow Zoo in Eastern Iowa.⁸⁸ The Iowa Court of Appeals affirmed a district court's decision to shut down the zoo on public nuisance grounds, citing the district court's findings that the zoo was "injurious to the health of the animals and potentially to the invitees due to the poor care and living conditions of the animals" and that the zoo was "unreasonably offensive to the senses in the inhumane manner of living of the animals."⁸⁹ The language in *Kuehl* emphasized the growing public concern for the animals' living conditions and well-being in roadside zoos. *Kuehl* was also argued at the federal level, and in that case, the Eighth Circuit affirmed the federal district court's findings that Cricket Hollow Zoo's housing and care of its lemurs and tigers constituted harassment and that the zoo owners had injured endangered tigers by failing to provide adequate veterinary care.⁹⁰

In the 2021 case involving Pablo Escobar's hippos,⁹¹ the ALDF was involved in an

85. See *Roadside Zoos*, *supra* note 82 (discussing roadside zoos and what the ALDF does to help the animals); Press Release, Animal Legal Def. Fund, Born Free USA and Animal Rescue League of Iowa File Second Petition to Strengthen Roadside Zoo Oversight in Iowa (Aug. 26, 2015), <https://aldf.org/article/born-free-usa-and-animal-rescue-league-of-iowa-file-second-petition-to-strengthen-roadside-zoo-oversight-in-iowa/> [<https://perma.cc/9HWN-3HQH>] (explaining that Born Free USA and the Animal Rescue League of Iowa filed a petition with the Iowa Department of Agriculture and Land Stewardship (IDALS) that said, in significant part, that IDALS was interpreting the "state's exotic animal ownership regulations . . . in the weakest way possible"); Wayne Pacelle, *HSUS Undercover Investigations at Roadside Zoos in Virginia, Oklahoma Reveal Severe Abuse*, HUMANE SOC'Y U.S. (Jan. 22, 2015), <https://blog.humanesociety.org/2015/01/roadside-zoos-investigation.html> [<https://perma.cc/2ZG6-3TBM>] (reporting the results of an investigation conducted by the Humane Society of a roadside zoo in Virginia).

86. *Kuehl v. Sellner*, No. 19-1980, 2021 WL 3392813 (Iowa Ct. App. Aug. 4, 2021); *Kuehl v. Sellner*, 887 F.3d 845 (8th Cir. 2018).

87. *Pablo Escobar's "Cocaine Hippos" Are Legally People, U.S. Judge Rules*, CBS NEWS (Oct. 26, 2021), <https://www.cbsnews.com/news/pablo-escobar-cocaine-hippos-legally-people-us-judge/> [<https://perma.cc/2CJ3-HFA5>]. Recent cases appear to reflect the change in the public's view of animal rights and welfare. See generally *In re Nonhuman Rts. Project, Inc. v. Lavery*, 54 N.Y.S.3d 392 (N.Y. App. Div. 2017) (holding that human-like characteristics in chimpanzees were insufficient to grant them personhood for purposes of habeas corpus relief). On appeal in the Court of Appeals of New York, one judge wrote in his concurrence that "[w]hile it may be arguable that a chimpanzee is not a 'person,' there is no doubt that it is not merely a thing." *In re Nonhuman Rts. Project, Inc. v. Lavery*, 100 N.E.3d 846, 849 (N.Y. 2018) (Fahey, J., concurring). Tommy the chimpanzee's case began in 2013. *Id.*; see also *Citizens to End Animal Suffering and Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45 (D. Mass. 1993) (dismissing a suit seeking to block Kama, a dolphin, from being transferred to the Navy for use in training because Kama, a "non-human," lacked legal standing).

88. Press Release, Animal Legal Def. Fund, Animals Rescued and Removed from Manchester, Iowa, Roadside Zoo (Dec. 9, 2019), <https://aldf.org/article/animals-rescued-and-removed-from-manchester-iowa-roadside-zoo/> [<https://perma.cc/3LSD-RPZC>].

89. *Kuehl v. Sellner*, No. 19-1980, 2021 WL 3392813, at *4 (Iowa Ct. App. Aug. 4, 2021).

90. *Kuehl v. Sellner*, 887 F.3d 845, 852–54 (8th Cir. 2018).

91. Pablo Escobar, the infamous drug lord, had a private collection of illegally imported animals at his estate in Colombia. Associated Press, *Fear and Love Surround Pablo Escobar's Hippos Thriving in Colombia*, TAMPA BAY TIMES (Feb. 9, 2021), <https://www.tampabay.com/news/environment/2021/02/09/fear-and-love-surround-pablo-escobars-hippos-thriving-in-colombia/> [<https://perma.cc/68AG-MZD3>]. Four hippos were part of this menagerie, and in 2007, though hippos are not native to Colombia, people began to spot the animals roaming the countryside. William Kremer, *Pablo Escobar's hippos: A Growing Problem*, BBC (June 26, 2014), <https://www.bbc.com/news/magazine-27905743> [<https://perma.cc/SYC6-MP6V>]. Now, 30 years after Escobar's death, at least 130 hippos are in the Colombian ecosystem, and Colombia's government has planned to declare them an invasive species. Associated Press, *Colombia to Make Hippos, Illegally Imported by*

international dispute to prevent the Colombian government from slaughtering or sterilizing the offspring of Escobar's hippos.⁹² A federal judge in Ohio granted the ALDF's request that the hippos be given the status of "interested persons,"⁹³ thereby protecting the hippos' legal right to obtain information in the United States pursuant to 28 U.S.C. §1782.⁹⁴ Both *Kuehl* and the Pablo Escobar Hippos case reflect small steps of progress in the law and in cultural attitudes with regard to animal welfare.

The AZA updates and raises its standards regularly to reflect the evolving understanding of animal needs, which is the main difference between USDA-licensed zoos that are AZA accredited and those that are not.⁹⁵ Unfortunately, the USDA's licensing requirements and enforcement methods do not appear to have kept up with increased public awareness and concern.⁹⁶ Although the USDA updated its licensing requirements in 2020,⁹⁷ it is uncertain if the updates meaningfully improve animal welfare, and the updates did not address opportunities for abuse. Prior to the update, for instance, the USDA was known to reissue licenses to many roadside zoos irrespective of documented violations by APHIS.⁹⁸ This is known as "rubber-stamping," and it went on for almost fifty years until the USDA refined its regulations in 2020 to require all licensees to reapply for licenses every three years and "demonstrate compliance with minimum standards . . . through pre-license inspections."⁹⁹ Unfortunately, this change will likely be offset by the fact that the

Escobar, an Invasive Species, NEWSENDIP (Feb. 20, 2022), <https://www.newsendip.com/colombia-to-make-hippos-illegally-imported-by-escobar-an-invasive-species/#post-bottom-source> [<https://perma.cc/NY4U-5ZL5>].

92. Press Release, Animal Legal Def. Fund, Animals Recognized as Legal Persons for the First Time in U.S. Court (Oct. 20, 2021), <https://aldf.org/article/animals-recognized-as-legal-persons-for-the-first-time-in-u-s-court/> [<https://perma.cc/UR2R-XRRT>]. While this was the first time a federal U.S. court has granted animal rights, a criminal law professor in Colombia has explained that the ruling will have no effect on the Colombian government. *Pablo Escobar's "Cocaine Hippos" Are Legally People*, *U.S. Judge Rules*, *supra* note 87. However, various other courts have ruled similarly to the United States. For example, the Supreme Court of India said that every nonhuman animal was a person and had both statutory and constitutional rights. *Animal Welfare Bd. of India v. A. Nagaraja and Ors.*, (2014) 5 SCJ 614 (India), <https://www.nonhumanrights.org/content/uploads/Animal-Welfare-Board-v-A.-Nagaraja-7.5.2014.pdf> [<https://perma.cc/X93W-R6SU>].

93. The ALDF asked the U.S. district court to grant the hippos the status of "interested persons" because they wanted to depose two wildlife sterilization experts and needed the hippos to be interested persons to conduct these depositions. *Pablo Escobar's "Cocaine Hippos" Are Legally People*, *U.S. Judge Rules*, *supra* note 87.

94. An "interested person" may apply to the district court of the district where a person lives to order such a person to provide a document for use in a foreign proceeding. 28 U.S.C. § 1782. The district court judge ruled that the hippos were interested persons under the meaning of the statute, and thus able to apply to the district court with the help of ALDF to order production of a document. *Pablo Escobar's "Cocaine Hippos" Are Legally People*, *U.S. Judge Rules*, *supra* note 87.

95. *Accreditation Basics*, *supra* note 55.

96. *See supra* notes 63–69 and accompanying text.

97. *USDA Steps Up—and Steps Back—With New License Renewal Rules*, ANIMAL WELFARE INST. Q. (2020), <https://awionline.org/awi-quarterly/summer-2020/usda-steps-and-steps-back-new-license-renewal-rules> [<https://perma.cc/UNT7-T9FS>].

98. *See* Philip Joens, *Mountain Lions, Grizzly Bears Among 110 Animals Missing From Iowa Roadside Zoo*, *Group Says*, DES MOINES REG. (Jan. 9, 2020), <https://www.desmoinesregister.com/story/news/2020/01/09/cricket-hollow-animal-park-animals-missing-iowa-roadside-zoo-animal-legal-defense-fund-claims/4420426002/> [<https://perma.cc/3BHA-GWVG4>] (explaining that the USDA had reissued a zoo's license even though the USDA had also issued multiple violations).

99. *USDA Steps Up—and Steps Back—With New License Renewal Rules*, *supra* note 97; *see also* *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 861 F.3d 502, 504–05 (4th Cir. 2017) (bringing a

USDA allows facilities three chances to pass the pre-license inspection, and each inspection is scheduled in advance, rather than the unannounced inspections that had previously been standard practice for APHIS.¹⁰⁰ APHIS inspectors are still encouraged to perform unannounced inspections, but they may not have time to do so because of the additional, scheduled pre-license inspections they are now expected to conduct.¹⁰¹ Furthermore, the USDA does not consider violations uncovered during unannounced inspections during the license-reissuing process, meaning over-burdened inspectors may not even deem unannounced inspections to be worth the effort.¹⁰²

Though there have been cases showing growing public concern for animal rights and welfare, the loopholes left by the licensing requirements leave too much potential for violations without repercussions.

B. Cub-Petting and the Big Cat Public Safety Act

Another significant difference between AZA-accredited and non-accredited zoos is the level of close physical interaction that visitors can have with animals, specifically young animals.¹⁰³ Cub-petting¹⁰⁴ is the primary profit-making practice at roadside zoos, and it occurs in conjunction with “speed-breeding.”¹⁰⁵ All parties involved—visitors, staff, and animals—are at risk in these situations. The mothers deal with health complications due to excessive breeding, and the cubs, who do not yet have developed immune systems, are exposed to diseases from humans, dehydration, and stress from human interaction, such as being passed from person to person when the cub is as young as a few days old.¹⁰⁶ Additionally, the public is put at risk of physical harm and deceived into believing that their money is going to conservation efforts when, in reality, “the continued breeding of hybrid cats offers no conservation value,” thereby diminishing the work done by actual wildlife conservationists by siphoning away money that might have gone to work that actually benefits the animal.¹⁰⁷

Some roadside zoos publicize opportunities for physical interaction with animals on their websites with the intent of drawing visitors from around the country.¹⁰⁸ The Myrtle

claim against USDA alleging that USDA’s policy, pattern, and practice of “rubber-stamping” Class C licenses for animal exhibitors with recent, documented violations of USDA regulations violated the Administrative Procedure Act).

100. *USDA Steps Up—and Steps Back—With New License Renewal Rules*, *supra* note 97.

101. *Id.*

102. *Id.*

103. *Cub-Petting – The Sad Reality Behind This Industry*, WILDCAT SANCTUARY (Apr. 24, 2017), <https://www.wildcatsanctuary.org/cub-petting-reasons-avoid/> [https://perma.cc/UK4T-7R3Q].

104. Cub-petting is the practice of allowing patrons to pay for photos with baby animals. *Id.*

105. Speed-breeding refers to removing newborn animals from their mothers within days (or hours) of their birth. In their natural habitats, female tigers stay with their young for at least two years, and usually only have a litter every three years. In contrast, female tigers at roadside zoos have been known to give birth up to three times in a single year. *Id.* “Big cats are subject to factory-like breeding to produce a constant supply of cubs, and few visitors realize that many of them die young.” Sharon Guynup, *‘Tiger King’ Stars’ Legal Woes Could Transform Cub-Petting Industry*, NAT’L GEO. (Apr. 15, 2021), <https://www.nationalgeographic.com/animals/article/tiger-king-stars-legal-cases-change-industry?loggedin=true> [https://perma.cc/PUF4-FTE8].

106. *Cub-Petting – The Sad Reality Behind this Industry*, *supra* note 103.

107. *Id.*

108. *Preservation Station Photo Encounters*, MYRTLE BEACH SAFARI, <http://docantlespreservationstation.com/> [https://perma.cc/9QNL-W6BX].

Beach Safari, for example, advertises that it allows patrons to pet cubs and swim with elephants.¹⁰⁹ Scientific and ethical studies have shown that animal-visitor physical interactions (AVI) in uncontrolled environments have negative effects on captive animal behavior and welfare, while many zoo species are generally unaffected by visitors when viewed from a distance.¹¹⁰

To address issues of public and animal safety, the U.S. House of Representatives introduced the Big Cat Public Safety Act (BCPSA) in January 2021.¹¹¹ The BCPSA was largely the work of Senators who seized the opportunity provided by public outrage over the treatment of animals in Tiger King, and a bipartisan House voted in its favor thereafter.¹¹² President Joe Biden passed the BCPSA in December 2022.¹¹³ The BCPSA appears promising; notably, it amends the requirements governing the trade of big cats under the Lacey Act and strictly regulates direct contact between the public and big cats.¹¹⁴ Additionally, it “prohibit[s] public petting, playing with, feeding, and photo ops with cubs,¹¹⁵ hopefully making the practice of cub petting—the profit driver for roadside zoos—much more difficult to sustain.

The BCSPA is specifically aimed at protecting big cats that are kept in unsafe and/or unhealthy conditions.¹¹⁶ As is relevant here, the BCSPA prohibits purchasing, breeding, or possessing wildlife species by Class C animal exhibitors (such as roadside zoos) which allow individuals who are not trained professionals, veterinarians, or involved in the animal

109. *Id.* This roadside zoo was featured on Tiger King and has dozens of photos of past visitors holding cubs on its website. *Id.*; see also *Pricing*, EXOTIC ANIMAL EXPERIENCE ORLANDO, <https://www.exoticanimalexperience.net/exotic-animal-encounter.html> [<https://perma.cc/FSR8-ALAL>] (providing another example of cub-petting advertisements).

110. See Mark J. Learmonth, *Human-Animal Interactions in Zoos: What Can Compassionate Conservation, Conservation Welfare and Duty of Care Tell Us about the Ethics of Interacting, and Avoiding Unintended Consequences?*, 10 ANIMALS 1, 3–4 (2020) (This commentary evaluated human-animal interaction using three ethical frameworks that zoos could incorporate when considering AVI—Compassionate Conservation, Conversation Welfare, and Duty of Care. Under the Compassionate Conservation framework, AVIs would be strongly discouraged because they violate the framework’s central tenets of ‘first do no harm’ and ‘peaceful co-existence,’ and the risk of direct contact interactions is too high. The Conversation Welfare framework would allow AVIs only in certain situations where the animals “ask” for the interaction and when the interaction can occur in a safe and controlled manner. Finally, the Duty of Care framework focuses on the effects on individual animals within a particular captive environment and provides what is best for them, so this would allow AVIs that are “positive and rewarding” for the animals.); Neil D’Cruze et al., *A Global Review of Animal-Visitor Interactions in Modern Zoos and Aquariums and Their Implications for Wild Animal Welfare*, 9 ANIMALS 1, 14–15 (2019) (discussing the effects that different forms of AVI have on animals); Samantha J. Chiew et al., *Effects of Regulating Visitor Viewing Proximity and the Intensity of Visitor Behaviour on Little Penguin (*Eudyptula minor*) Behaviour and Welfare*, 9 ANIMALS 1, 13–16 (2019) (discussing a study that regulated viewing proximity of visitors at a little penguin exhibit using various methods, and concluding that installation of a physical barrier and closing the exhibit to visitors encouraged little penguins to swim and reduced penguin behavior that is traditionally indicative of fear, while installing signs to regulate visitor behavior was much less effective because visitors were much closer to the penguins).

111. Big Cat Public Safety Act, H.R. 263, 117th Cong. (2021–22).

112. Press Release, Animal Welfare Inst., Big Cat Public Safety Act Reintroduced in Senate (Apr. 19, 2021), <https://awionline.org/press-releases/big-cat-public-safety-act-reintroduced-senate> [<https://perma.cc/5N7Z-G9Y2>].

113. Christine Chung, *President Biden Signs Bill Outlawing Private Ownership of Big Cats*, N.Y. TIMES, <https://www.nytimes.com/2022/12/21/us/politics/biden-tiger-king-law.html> [<https://perma.cc/UR2R-XXRT>].

114. Big Cat Public Safety Act, H.R. 263, 117th Cong. (2021–22).

115. Press Release, *supra* note 112.

116. *Big Cat Public Safety Act*, ANIMAL WELFARE INST., <https://awionline.org/legislation/big-cat-public-safety-act> [<https://perma.cc/KA9V-PRN8>].

exhibitor's conservation programs to come in direct contact with animals.¹¹⁷ The BCSPA also requires that, when showing a big cat to the public, whether it is a cub or an adult, the animal must be at least 15 feet from members of the public “unless there is a permanent barrier sufficient to prevent public contact.”¹¹⁸ These provisions will likely prove to be sufficient to significantly decrease both cub-petting and overall physical contact with exotic animal species nationwide.

Though the passage of the BCPSA is encouraging, it only protects big cats and focuses on restricting direct contact between big cats and the public. This is a huge step in the right direction, but greater efforts are necessary to further improve conditions in roadside zoos.

C. What Do the States Do?

Due to the lack of federal regulation of animal welfare in many circumstances, a number of states have enacted comprehensive animal protection laws.¹¹⁹ Many states, however, have animal protection laws that lack sufficient meaningful impact.¹²⁰ The ALDF releases an annual report ranking states by the quality of these laws.¹²¹ Iowa, for example, jumped 11 spots from 2019 to 2020 after passing a bill that updated its protections for companion animals, but it remains in the lowest tier because those protections do not apply to farm animals or most wild animals.¹²² Because states are left with the responsibility and discretion of filling in gaps unaddressed by federal law, the resultant oversight is inconsistent from state to state.¹²³

Additionally, the Commerce Clause gives Congress the power “to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹²⁴ Implicit within the Commerce Clause is the Dormant Commerce Clause—the prohibition against

117. Big Cat Public Safety Act § 3(e)(2)(A)(i), H.R. 263, 117th Cong. (2021–22).

118. Big Cat Public Safety Act § 3(e)(2)(A)(ii), H.R. 263, 117th Cong. (2021–22).

119. According to the ALDF's ranking system of animal protection laws, Illinois, Oregon, California, Maine, and Rhode Island are the top five states for animals. These rankings are largely based on 14 factors, ranging from the availability of felony penalties for specific offenses to veterinarians being mandatory reporters of animal cruelty to the state court's ability to restrict ownership of animals after a conviction. *See generally* ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT (2020), <https://aldf.org/wp-content/uploads/2021/02/2020-Animal-Protection-US-State-Laws-Rankings-Report-Animal-Legal-Defense-Fund-1.pdf> [<https://perma.cc/Q2BX-TVX6>].

120. *Id.* *But see* H.B. 1248, 122nd Gen. Assemb., 2nd Reg. Sess. (In. 2022) (banning direct contact with specified animals, including bears and many species of big cats).

121. *See, e.g.*, ANIMAL LEGAL DEF. FUND, 2017 U.S. ANIMAL PROTECTION LAWS RANKINGS: COMPARING OVERALL STRENGTH & COMPREHENSIVENESS (2017), https://aldf.org/wp-content/uploads/2018/06/Rankings-Report-2017_FINAL.pdf [<https://perma.cc/J6LH-FLP6>]; ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT (2019), <https://aldf.org/wp-content/uploads/2020/02/2019-Animal-Protection-US-State-Laws-Rankings-Report.pdf> [<https://perma.cc/32WW-B4QY>]; ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT (2020), <https://aldf.org/wp-content/uploads/2021/02/2020-Animal-Protection-US-State-Laws-Rankings-Report-Animal-Legal-Defense-Fund-1.pdf> [<https://perma.cc/RT9L-4FTT>].

122. ANIMAL LEGAL DEF. FUND, ANIMAL PROTECTION: U.S. STATE LAWS RANKINGS REPORT (2020), <https://aldf.org/wp-content/uploads/2021/02/2020-Animal-Protection-US-State-Laws-Rankings-Report-Animal-Legal-Defense-Fund-1.pdf> [<https://perma.cc/CW5S-4YHK>].

123. *See id.*, at 22–34 (discussing the various animal protection laws across states and noting the vast differences between the top five states for animals and bottom five).

124. U.S. CONST. art. I, § 8, cl. 3.

state legislation that “discriminates against or excessively burdens interstate commerce.”¹²⁵ There are several tests used to determine whether a state law is prohibited by the Dormant Commerce Clause. Under the strict *Hughes* test, if a state law facially discriminates against out-of-state residents, it is virtually per se invalid unless the state has a legitimate local purpose that could not be served by alternative, non-discriminatory means.¹²⁶ Though the former element is easy to pass, the latter is more difficult because courts almost always find a non-discriminatory alternative that the state could have employed.¹²⁷ The *Hughes* test is also used for state laws that are facially neutral but have discriminatory effects.¹²⁸

Thus, consider the situation where a state attempts to pass legislation that prevents large exotic animals from being exhibited. To ensure application to roadside zoos specifically—not suburban zoos—the state could add a specification that the law applies only to animal exhibitors with facilities that do not meet certain criteria that suburban zoos are certain to meet. This is a discriminatory law because exotic animals are necessarily brought in from outside the state, hence the title “exotic,” because they are not native to the region. In applying the *Hughes* test, such a law may be found to have a legitimate local purpose, like protecting their citizens from the risk of diseases brought by animals living in unhealthy conditions or the risk of physical harm by the close contact that roadside zoos provide. However, this law would be struck down because there is an alternative, non-discriminatory means of achieving the aforementioned purpose—prohibiting any large animals from being exhibited. The state could, without concerns about a law’s constitutionality, pass a law prohibiting the exhibition of any large animal before meeting certain criteria. These criteria could be pulled from the AZA accreditation standard.

Though there may be a way for states to regulate roadside zoos without violating the Dormant Commerce Clause, the states would then likely run into the Supremacy Clause. Animal protection laws that states consider will likely reference the activities that the AWA, ESA, and Lacey Act attempt to regulate. Pursuant to the Supremacy Clause in the United States Constitution, when a federal law and state law conflict, the federal law takes precedence.¹²⁹ Therefore, any action that states attempt to take to improve the legal landscape of animal protections will be nullified by the federal law that governs activities like the possession, transportation, and selling of captive animals. Therefore, it is more practical to amend the current federal laws rather than add new state and federal laws.

125. Michael DeBow, *Codifying the Dormant Commerce Clause*, PUB. INTL. L. REV. 69, 70–71 (1995).

126. *Hughes v. Oklahoma*, 441 U.S. 322, 331 (1979) (dealing with a state that was hoarding resources for local residents).

127. I’m not sure if I need a citation for this because it seems to just be universally accepted, and I’m also not sure if its worth finding a bunch of cases illustrating this.

128. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270–71 (1984) (holding that Hawaii’s tax exemption for certain local liquors had discriminatory purpose and effects); *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 352–53 (1977) (discussing North Carolina’s law that prohibited the apple company from displaying its grading on containers of apples shipped to North Carolina). The *Hughes* test could theoretically also be used for a state law that is facially neutral but has discriminatory purpose, but the U.S. Supreme Court has yet to hear such a case.

129. U.S. CONST. art. VI, cl. 2.

IV. RECOMMENDATION

This Note recommends a complete federal overhaul of the USDA licensing requirements to make them more closely resemble the stringent standards required for AZA accreditation. As discussed in Part III, roadside zoos are harmful due to (1) the availability of opportunities for unsafe physical contact with animals via cub petting and other practices, (2) inconsistent state laws, and (3) lax enforcement of the USDA licensing requirements.¹³⁰ The first two can be adequately tackled by the Big Cat Public Safety Act, which will combat the availability of opportunities for unsafe physical contact with animals, and the BCPSA will preempt current inconsistent state laws.¹³¹ However, lax enforcement of the USDA licensing requirements will need to be addressed by using the AZA accreditation standards to amend the USDA licensing requirements.

The requirements that animal exhibitors must fulfill to receive Class C USDA licenses should be amended so that they align more closely with the AZA accreditation standards. At present, the licensing requirements are complicated and inconsistently applied to licensees, with the biggest issue being that AWA violations uncovered during unannounced inspections of facilities will no longer be considered by the USDA when deciding whether to reissue licenses.¹³²

As this Note has discussed, zoos that strive for AZA accreditation must meet much more stringent standards.¹³³ It would be unrealistic to recommend that the USDA licensing requirements replicate the AZA accreditation standards for two reasons: (1) many animal exhibitors probably lack the resources to attain such standards, and (2) the reason large suburban zoos seek accreditation is likely because it sets them apart from other animal exhibitors and encourages patrons to visit suburban zoos,¹³⁴ rather than smaller animal exhibitors who do not have the resources to contribute to animal research. And although ensuring economic stability for such large zoos is an important interest due to their contribution to wildlife rescue, rehabilitation, and conservation, it is also vital to consider the state of animal welfare at roadside zoos. Therefore, instead of recommending that the USDA licensing requirements replicate the AZA accreditation standards, I suggest that the requirements for USDA licensees be heightened. This will ensure that animals are

130. See *supra* Part III.

131. See *supra* Part III.B–C.

132. *USDA Steps Up—and Steps Back—With New License Renewal Rules*, ANIMAL WELFARE INST. Q. (2020), <https://awionline.org/awi-quarterly/summer-2020/usda-steps-and-steps-back-new-license-renewal-rules> [https://perma.cc/Z5EN-JBBB].

133. See *supra* text accompanying notes 63–69.

134. Many AZA-accredited zoos mention their AZA accreditation on their websites and explain what it means, showing that they likely believe this accreditation is necessary to distinguish themselves from the smaller, more unethical animal exhibitors like roadside zoos. *Association of Zoos and Aquariums*, LOUISVILLE ZOO, <https://louisvillezoo.org/about-the-zoo/association-of-zoos-and-aquariums/> [https://perma.cc/B8FP-9AAZ]; *Awards and Recognition (as of 2/2022)*, CHI. ZOOLOGICAL SOC'Y, <https://www.czs.org/Chicago-Zoological-Society/About/Awards-Recognition> [https://perma.cc/ZZM2-5U8U]; *What We Do*, DENVER ZOO, <https://denverzoo.org/what-we-do/> [https://perma.cc/DW9E-8ZZM]; *About*, PHX. ZOO, <https://www.phoenixzoo.org/about/> [https://perma.cc/RD64-C3FV]. AZA accreditation standards require a significant amount of space in each habitat, and the USDA licensing requirements could adopt a midpoint between the small amount of space currently provided by roadside zoos and the large amount of space required by AZA standards. These differences in habitat space would be a separating factor that would draw people to support suburban zoos but would not harm the animals at roadside zoos the way that the small habitats currently do.

adequately cared for while still separating roadside zoos from suburban zoos in the eyes of potential visitors due to their facility sizes and numbers of animals rather than the state of their animals. To accomplish this, the USDA should look to section 2 (Veterinary Care)¹³⁵ and section 4 (Physical Facilities) of the AZA accreditation standards.¹³⁶

The ESA provides a good reference point for enforcing an updated USDA licensing regime. Like most federal environmental laws, the ESA has a citizen-suit provision that gives citizens a private right of action against those who violate the law.¹³⁷ Courts in these situations can grant injunctive relief or impose penalties.¹³⁸ With the rapid and significant rise in public awareness of roadside zoos,¹³⁹ it is foreseeable that citizens will file these suits when they encounter such facilities if there is a citizen-suit provision in the AWA. An AWA citizen suit provision should include language similar to that in sections 1540(g)(1)(A), (B), and (C) of the ESA and have a provision inserted between (A) and (B) that provides that a citizen may commence a civil suit to require APHIS to conduct an official in-person investigation of the facility, regardless of how recently the last inspection took place.¹⁴⁰

As with many other statutes containing citizen suit provisions, there is the question of whether the public will abuse such an opportunity by bombarding the courts with frivolous suits. Citizen suit provisions are generally found in environmental laws, such as the Clean Water Act,¹⁴¹ Clean Air Act,¹⁴² and the Resource Conservation and Recovery Act.¹⁴³ The major concern in this area is the “sue and settle” strategy.¹⁴⁴ “Sue and settle” is a term created by the United States Chamber of Commerce and industry groups to describe an alleged tactic employed by environmental activist groups.¹⁴⁵ The Chamber of Commerce and Congress have provided suggestions for reformation of the citizen suit process to remedy these harmful tactics.¹⁴⁶ Many allegations of potential citizen suit provision abuse have already been unfounded, but should there be any evidence to the contrary, it can be remedied by employing the Chamber of Commerce and Congressional suggestions to the

135. Sections 2.0.2, 2.0.3, 2.0.4, 2.1.1, 2.3.1, 2.4.2, 2.5.1, 2.5.3, 2.6.1, 2.6.2, 2.6.4, *The AZA Accreditation Standards & Related Policies 2022*, ASS’N OF ZOOS & AQUARIUMS, <https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf> [<https://perma.cc/L7D5-T9RJ>].

136. Section 10.3, *The AZA Accreditation Standards & Related Policies 2022*, ASS’N OF ZOOS & AQUARIUMS, <https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf> [<https://perma.cc/HEC2-F2ZX>].

137. 16 U.S.C. § 1540(g).

138. 16 U.S.C. § 1540.

139. See *supra* note 4 and accompanying text.

140. 16 U.S.C. § 1540(g)(A)–(C).

141. 33 U.S.C. § 1365.

142. 42 U.S.C. § 7604.

143. 42 U.S.C. § 6972.

144. Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE UNIV. L. REV. 891, 891–93 (2014); see also *Sue and Settle Updated: Damage Done 2013-2016*, U.S. CHAMBER OF COM. (May 24, 2017), <https://www.uschamber.com/regulations/sue-and-settle-updated-damage-done-2013-2016> [<https://perma.cc/PJ4F-H2E5>].

145. See Johnson, *supra* note 144, at 892. The U.S. Chamber of Commerce believes that “sue and settle” occurs when agencies accept suits from these activist groups and the groups are thereby able to “dictate the priorities and duties of the agency through legally binding, court-approved settlements negotiated behind closed doors.”

146. Johnson, *supra* note 144, at 905–09.

AWA citizen suit provision.

V. CONCLUSION

Inconsistent application and enforcement of the USDA licensing requirements have exacerbated the health and safety issues of roadside zoos. The accreditation standards laid out by the AZA are a prime example of a proper approach to animal welfare regulation. Though the AZA is not a public entity, its standards can, and should, provide guidance for future amendments to the USDA licensing requirements, which should require Class C animal exhibitors to establish better practices and ensure better care of the animals in their care.