

# **THE BEAR NECESSITIES: URSINE SUFFERING, EXPOSED, EXPLAINED, AND EXPELLED.**

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## INTRODUCTION

In August 2012, a 600-pound half-black, half-grizzly bear named Ben was flown cross-country to rehome him to a vast sanctuary pursuant to court order.<sup>1</sup> Ben was previously confined to a 12' by 22' concrete and chain link dog run for more than six years, where he was fed dog food once a day – the food piled onto the same floor he was forced to eat, sleep, urinate, and defecate on.<sup>2</sup> Ben was devoid of the opportunity to roam miles each day in search of food and bathe in streams and ponds. He was deprived of the opportunity to search for food to accommodate his mostly vegetarian diet, along with the opportunity to hibernate for several months of the year. Experts who observed Ben found that he exhibited abnormal pacing and other repetitive behaviors as a result of long-term inhumane confinement. After concerned citizens filed suit, a judge found that the roadside zoo had subjected Ben to cruel treatment in violation of state law, and ordered his immediate transfer to a reputable sanctuary where he would live out the rest of his life.<sup>3</sup> Ben is one of the lucky few who have been rescued and rehomed to a sanctuary that provides the minimum needs of an animal as complex as a bear. Ben's situation is sadly not uncommon. Thousands of bears are kept in similar conditions at roadside zoos, where they are deprived of everything that is natural and important to their wellbeing.

The practice of keeping bears in captivity has been occurring for nearly 4000 years.<sup>4</sup> Despite this extensive timeline, humans are no closer to domesticating bears than they were when they began keeping them captive. Over the last several decades, it has been recognized and

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<sup>1</sup> A "Happily Ever After" Ending for Ben the Bear, PETA, <https://www.peta.org/features/ben-bear-rescue/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> JENNY GRAY, *ZOO ETHICS Zoo: THE CHALLENGES OF COMPASSIONATE CONVERSATION* 11 (Cornell University Press 2017).

universally accepted that the husbandry needs of bears are much more complex and sophisticated than has been previously noted. Experts today have found that bears are every bit as complex as apes, and are in need of special considerations in captivity in order to meet their basic physical and psychological needs.

The behavior that bears exhibit in the wild compared to the behaviors they exhibit when kept in captivity are markedly different. In the wild, bears exhibit constant foraging behavior, and spend significant time swimming. Without the ability to exhibit their natural behaviors, bears may become stressed and agitated, and ultimately display signs of psychological distress and poor welfare through abnormal, stereotypic behaviors like pacing, bar-biting, and head-butting. These behaviors are not only the result of the bears enclosure size and design, but also their inability to exhibit their natural behaviors such as feeding, climbing, foraging, nesting, socializing, exploring, swimming, denning.

As scientific research on numerous warm-blooded mammals has evolved and understanding of their needs has expanded, certain species have been afforded specific protection to ensure their welfare. For example, the United States Department of Agriculture (USDA) has codified specific enclosure size and design, dietary needs, and enrichment activities for marine mammals, non-human primates, and several other animal species.<sup>5</sup> While scientific research has clearly shown that bears are nearly as complex and sophisticated as non-human primates, the standards that govern the care and keeping of bears in captivity relegates them to a “catch-all” subpart of “other warm-blooded animals.”

Existing state and federal laws and regulations are insufficient to ensure that owners do not force bears to endure cruel conditions of confinement. While the private ownership of most

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<sup>5</sup> 9 C.F.R. §§ 3.1- 3.142.

species of bears is governed by inconsistent state wildlife laws, the federal Animal Welfare Act (AWA) is the primary law governing housing, care, and transport of captive bears who are exhibited. The AWA empowers the U.S. Department of Agriculture (USDA) to promulgate rules to carry out Congressional intent of the statute.<sup>6</sup> The bare minimum standards prescribed by the AWA regulations are so vague and insufficient to carry out the purpose and intent of the Act that, in the case of Ben, USDA inspectors only cited the facility for violations of federal regulations except once, for a rusty water trough.<sup>7</sup> Clearly, the lack of standards provided to the USDA, for inspectors with the Animal and Plant Health Inspection Service (APHIS), to follow when conducting inspection of licensed exhibitors leads to insufficient care and handling, which ultimately affects the animal's welfare. APHIS inspectors have demonstrated confusion about how to enforce AWA Regulations as they relate to bears. Moreover, the agency lacks a bear specialist or other specialized inspectors who have expertise in bear behavior to better identify signs of suffering in bears.

In essence, even when the AWA is followed, bears frequently do not live in conditions that most people would find acceptable for these large, highly complex, and intelligent animals to thrive. This note will argue that, in order for the USDA to carry out its obligation of the AWA, the USDA must promulgate species-specific standards for exhibiting bears and appoint at least one bear specialist.

## **I. History**

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<sup>6</sup> 7 U.S.C. § 2151).

<sup>7</sup> *USDA Seeks to Revoke License of Notoriously Cruel Jambbas Ranch*, PETA (June 24, 2013), <https://www.peta.org/media/news-releases/usda-seeks-revoke-license-notoriously-cruel-jambbas-ranch/>.

Keeping exotic animals in captivity began in the 15<sup>th</sup> century as a display of power and wealth.<sup>8</sup> Private animal “collections” and menageries were the result of powerful leaders desiring a facility to display these animals that they accumulated and traded.<sup>9</sup> The first “zoo” in the U.S., known as the Philadelphia zoo, opened in 1868. Its expressed intention was providing education and entertainment to its visitors.<sup>10</sup> This entertainment often involved displaying exotic animals and training them to perform in shows in order to attract paying audiences.<sup>11</sup> In short order, many modern zoos followed this example. Zoo directors often competed to secure “the most exotic animals” but they were woefully unaware of the animal’s particular diets, habits, and needs.<sup>12</sup> The purpose and structure of zoos in America has evolved significantly since the opening of these first modern zoos.

With the increased public awareness and interest in environmental and animal welfare issues, modern zoos have re-trained their focus. Instead of entertainment, modern zoos have shifted their concentration to conservation, scientific research, community engagement with exotic animals, and rehabilitative efforts.<sup>13</sup> The Association of Zoos and Aquariums was founded in 1924 to ensure accredited zoos and aquariums “meet the highest standards in animal care and welfare” and are dedicated to the “advancement of zoos and aquariums in areas of conservation, education, science, and recreation. These modern zoos also engage in scientific research to better understand the species that are in their care. Many zoos have developed cutting edge programs

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<sup>8</sup> Gray, *supra* note 4 at 12.

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

<sup>10</sup> *Id.* at 13, 67.

<sup>11</sup> PAMELA M. HENSON, AMERICAN ZOOS: A SHIFTING BALANCE BETWEEN RECREATION AND CONSERVATION 70 (Ben A. Minter et al. eds., 2018).

<sup>12</sup> *Id.*

<sup>13</sup> IRUS BRAVERMAN, ZOOLAND: THE INSTITUTION OF CAPTIVITY 5 (Stanford University Press 2013).

ranging from veterinary medicine, nutrition requirements specific to each individual species, behavioral studies, and breeding research.<sup>14</sup>

While there has been undeniable progress made in an effort to ensure the welfare of zoo animals, there is still a long way to go to ensure these animals have the husbandry to promote their positive welfare. As scientific research evolves to better understanding exotic animals, it is essential that the laws and standards governing the care and keeping of these animals evolve as well. Nowhere is the need more critical than in the case of captive bears.

## **II. Bears in Captivity v. Bears in the Wild**

The natural behaviors, that are at the core of the wild animals being, are nearly non-existence in many captive animals due to the restraints inherent in living in an enclosure. Animals that live in captivity commonly display behaviors that are atypical to the behaviors that their species display in the wild. The atypical behaviors can be attributed to the complete lack of freedom that captive animals are burdened with, along with the inescapable differences of living in the wild versus living in captivity.<sup>15</sup> The telling differences in behavior among wild and captive animals is especially notable in bears. The behaviors that bears exhibit in the wild are nearly impossible to replicate in man-made enclosures. As a result, captive bears are inclined to suffer from poor welfare, including both physiological and psychological suffering.

### **A. Bears in the Wild**

Bears are complex, sentient animals that are tightly programmed with complex instinctual behaviors. They engage in particular habits when searching for food, they have physiological requirements as the seasons change, and they require adequate space to exhibit all of these natural behaviors.

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<sup>14</sup> *Id.*

<sup>15</sup> Marek Spinka et al., *Environmental Challenge and Animal Agency* in ANIMAL WELFARE 39 (3<sup>rd</sup> ed. 2018).

Bears, depending on the season and geographical location, spend 75 % of their time foraging for their food.<sup>16</sup> The behaviors involved in foraging are complex, and require bears to adapt to varied stimuli and environmental contingencies. The food items that bears seek out require extensive time and effort to obtain.<sup>17</sup> Bears spend time gathering fruit, nuts, and grain from the ground and the trees, digging for insects, and preying on fish and small ground mammals.<sup>18</sup>

One of the restrictions that captive living imposes upon animals is the diminishment of home range size, defined as “the area in which an animal usually confines its daily activities.”<sup>19</sup> A bears home-range size varies from a few to thousands of square miles.<sup>20</sup> This home range size varies according to species of bear, along with the geography and the season.

Bears also engage in an intricate behavior known as denning. This process includes building elaborate nests in the ground, or in trees, that they use on a daily basis for rest and recovery.<sup>21</sup> They also engage even more complex denning for long term hibernation. This hibernation lasts anywhere from a couple of weeks to up to 8 months, depending on geographic location and climate conditions.<sup>22</sup> This behavior is highly complex and instinctual, with research demonstrating the positive physiologic value in that activity.<sup>23</sup>

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<sup>16</sup> Garshelis et al., *Activity of Black Bears in the Great Smoky Mountains National Park*, *J. OF MAMMALOGY* 61.1 (1980).

<sup>17</sup> Carlstead, *Environmental Enrichment for Zoo Bears*, 10 *ZOO BIOLOGY* (1991).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Get Smart Bear Society*, <http://www.bearsmart.com/about-bears/general-characteristics/>.

<sup>22</sup> Jones, *Hibernation Means Different Things to Different Animals*, North Carolina Wildlife Resources Commission, (Apr. 1999), [www.ncwildlife.org/wildlife/species/con/wsc/black\\_bear/hibernate.htm](http://www.ncwildlife.org/wildlife/species/con/wsc/black_bear/hibernate.htm)

<sup>23</sup> Laidlaw et al., *Status of Bear Welfare in Cherokee, North Carolina*, PETA (Apr. 2010), [http://www.zoocheck.com/wp-content/uploads/2015/06/Cherokee\\_Bear\\_Welfare\\_Report.pdf](http://www.zoocheck.com/wp-content/uploads/2015/06/Cherokee_Bear_Welfare_Report.pdf).

Socialization among bears is another area of importance. Bears are typically considered solitary animals, although they often engage in affiliative behaviors and share home ranges.<sup>24</sup> They often interact in a non-aggressive manner with other bears in the wild, even when there is competition over resources.<sup>25</sup>

Lastly, in the wild, bears cubs typically rely on their mothers for one to two years following birth for protection, nurturing, training, and feeding.<sup>26</sup> This has a benefit for the bear cub, as well as for the mother. Denying a bear cub and mother this opportunity may have detrimental effects on the cub's development, and cause stress, confusion and depression with the mother.<sup>27</sup>

Wild bears are a highly intelligent and sophisticated animal with varied needs and behaviors. These natural behaviors are necessary for bears to maintain their physical and emotional well-being. These environmental opportunities are exceedingly difficult to achieve in captivity.

## B. Bears in Captivity

As stated by the Humane Society of the United States, bears are one of the “most challenging species to keep humanely in captivity.”<sup>28</sup> The behaviors that bears exhibit in the wild are nearly impossible to replicate in a captive environment. There are over 1,000 bear exhibits in the U.S., with the majority being roadside exhibits that rarely meet the bear minimum standards for bears and have minimum oversight.<sup>29</sup>

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<sup>24</sup> Swaisgood, *supra* note 49 at 504-05.

<sup>25</sup> *Id.*

<sup>26</sup> CAPTIVE BEAR WELFARE ISSUES, Humane Soc’y of the U.S., <https://www.humanesociety.org/sites/default/files/docs/captive-bear-welfare-factsheet.pdf>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Barbara King, *Bears Can Face Summer Challenges in Roadside Zoos*, NPR, (Aug. 17, 2017), <https://www.npr.org/sections/13.7/2017/08/17/543682389/bears-can-face-summer-challenges-in-roadside-zoos>.



The enclosure size that bears are frequently kept in, especially at roadside exhibits, are rarely more than a couple hundred square feet - little more than glorified dog runs. These enclosures are often made up of concrete floors with cyclone fencing.<sup>30</sup> Other enclosures are known as “bear pits” which place these bears at a level beneath the viewing visitor.<sup>31</sup> This is a psychologically vulnerable position for the bear.<sup>32</sup> In addition, these enclosures rarely offer an opportunity for bears to swim and bathe themselves, as they are often given nothing more than a small metal trough to bathe, cool, and drink from. For example, a zoo located in Cherokee, North Carolina was found to be keeping two brown bears in a pit style enclosure that was no more than 280 square feet (equal to a standard sized living room).<sup>33</sup> These pits were made entirely of concrete, did not provide any sort of vegetation or shade, and left the bears with a dirty pool that was intended to serve as their drinking *and* bathing water.<sup>34</sup> The bears were found to be constantly pacing around and frequently begging for food from the visitors.<sup>35</sup>

Feeding behaviors and proper diet is another area that differs greatly when comparing bears in the wild and bears in captivity. Captive bears are often fed dry dog food, at routine, single times every day, leaving little opportunity for a bear to engage in natural foraging behaviors. An ice cream shop located in York, Pennsylvania confined a black bear named Ricki to a cage that was so small he was only able to take 12 steps along the length of his enclosure for sixteen years.<sup>36</sup> Visitors would watch Ricki pace all day long and would feed her dog food

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<sup>30</sup> *Supra* note 26.

<sup>31</sup> Laidlaw, *supra* note 23.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Supra* note 26; Bennett v. McDaniel, *Ricki the Bear Caged at Pennsylvania Ice Cream Shop*, ANIMAL LEGAL DEFENSE FUND (Dec. 15, 2017), <https://aldf.org/case/ricki-the-bear-caged-at-pennsylvania-ice-cream-shop/>.

purchased from a vending machine. The only supplement Ricki was given along with the dog food was corn.<sup>37</sup>

Many bear enclosures, specifically those found in roadside zoos, do not provide an adequate opportunity for bears to retreat from other bears or from the view of the visiting public. This leaves bears feeling vulnerable, especially to the humans that visit their enclosure since bears may perceive humans as predators. These bears are also deprived of proper veterinary care to ensure their well-being. Another bear, also named Ben, was confined at Tregembo Animal Park where he suffered an extreme case of ocular keratitis, where his corneas were so inflamed and irritated, he was likely to become completely blind.<sup>38</sup>

Lastly, captive bear cubs are often prematurely removed from their mothers and transferred to other facilities or kept in separate enclosures. Roadside zoos often engage in photoshoots where the cubs are used as props when they're only weeks old. Cherokee zoo has been fined by the USDA for removing bear cubs from their mothers for photoshoots, and shipping them off to other zoos when they grow too large to be used for this purpose.<sup>39</sup> It takes little imagination to imagine the psychological distress that this puts on the mother bear and cub.

As shown above, several exhibits, mostly roadside zoos, have been found to have all of these concerns present. These spaces are clearly inadequate for the natural requirements of bears, and as one may easily assume, the compressed quarters, lack of proper nutrition, inadequate veterinary care, and deprivation of natural motivations have a detrimental effect on the bears' physiologic and psychologic well-being.

### **III. Development of Stereotypic Behavior Due to Psychological Suffering**

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<sup>37</sup> *Id.*

<sup>38</sup> Jennifer O'Conner, *Tregembo Zoo is Tremendously Awful*, PETA (June 15, 2015), <https://www.peta.org/blog/tregembo-zoo-north-carolina-tremendously-awful/>.

<sup>39</sup> *Bears Confined to Nearly Barren Pits, Begging Tourists for Food*, PETA; <https://www.peta.org/action/action-alerts/urge-cherokee-bear-zoo-close-cruel-bear-pits/>.

## A. What are Stereotypic Behaviors

While many zoos have emphasized the importance of the physical well-being of the animals they exhibit, research has shown that physical health does not signal welfare, and the animals psychological well-being must be considered of equal importance.<sup>40</sup>

Stereotypical behavior is defined as a pattern of repetitive behavior that serves no apparent function.<sup>41</sup> These behaviors are a “physical manifestation of a pathology caused by confinement.”<sup>42</sup> The evidence of confinement causing the pathology is clear because these behaviors “almost never occur in the wild.”<sup>43</sup> This behavioral pathology is so common among captive animals it has been commonly referred to as “zoochosis.”<sup>44</sup> Common stereotypical behaviors among captive animals involve pacing back and forth, pulling out their hair or plucking out their feathers, scratching or rubbing themselves to the point of serious self-injury, biting the bars or walls of their cages, and regurgitating and reingesting their food.<sup>45</sup> Pacing is the most frequently observed stereotypical behavior and is highly prevalent in captive bears.<sup>46</sup>

Stereotypical behavior among animals in captivity is commonly dismissed as “behavioral problems,” or to the general public, admirable behaviors such as “dancing.”<sup>47</sup> The reality of these behaviors is that they are an indication of the animal’s psychological distress and ultimately,

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<sup>40</sup> Bacon, *A Holistic Approach to the Management of Abnormal Repetitive Behaviors* 8 ANIMALS 7 (June 27, 2018), <https://www.mdpi.com/2076-2615/8/7/103>.

<sup>41</sup> Nora Philbin, *Towards an Understanding of Stereotypical Behavior in Macaques*, ANIMAL WELFARE INSTITUTE (<https://awionline.org/content/towards-understanding-stereotypic-behaviour-laboratory-macaques>).

<sup>42</sup> LAUREL BRAITMAN, ANIMAL MADNESS: HOW ANXIOUS DOGS, COMPULSIVE PARROTS, AND ELEPHANTS IN RECOVERY HELP US UNDERSTAND OURSELVES 103 (2014).

<sup>43</sup> *Id.*; Laura Smith, *Zoos Drive Animals Crazy* (June 20, 2014, 9:13 AM), <https://slate.com/technology/2014/06/animal-madness-zoochosis-stereotypic-behavior-and-problems-with-zoos.html>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Carlstead, *supra* note 17 at 17.

<sup>47</sup> *Supra* note 26.

poor welfare.<sup>48</sup> It has been recognized that stereotypical behavior should not be the sole indicator of poor welfare, but it is a strong indicator that there is a high risk of inadequate wellbeing.<sup>49</sup>

## B. What Causes Stereotypical Behavior

### 1. Lack of Competency and Agency

The misconception that animals held in captivity have a superior environment compared to their peer species that live in the wild stems from the misguided idea that captive animals “get fed, taken care of, and are relieved of their kill-to-survive mentality.”<sup>50</sup> The reality of keeping animals in captivity is a lack of agency and competency, ultimately resulting in behaviors that are not seen in wild animals of the same species.<sup>51</sup>

Agency refers to a “propensity to engage actively with the environment with the main purpose of gathering knowledge and enhancing skills for future use.”<sup>52</sup> The lack of stimulation and exploration that an enclosure provides often results in excessive sleeping and laying, which ultimately may lead to boredom and depression.<sup>53</sup> A zoo animal may become increasingly frustrated with this lack of agency and as a result may show aggressive or fearful tendencies and compulsive behaviors.<sup>54</sup>

Competence is the “tools and strategies that animals possess to deal with novel challenges.”<sup>55</sup> An animal that is unable to exhibit its natural behaviors, such as giving birth and raising young, prey-chase behaviors, and the ability to find their food in the environment, is

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<sup>48</sup> Bacon *supra* note 40 at 1.

<sup>49</sup> Ronald R. Swaisgood, David Sheperdson, *Scientific Approaches to Enrichment and Stereotypies in Zoo Animals: Whats Been Done and Where Should We Go Next?*, 24 ZOO BIOLOGY 500 (2005).

<sup>50</sup> MARC BEKOFF ET AL., THE ANIMALS AGENDA: FREEDOM, COMAPSSION, AND COEXISTENCE IN THE HUMAN AGE 106 (2017).

<sup>51</sup> Spinka, *supra* note 15 at 39.

<sup>52</sup> *Id.* at 40.

<sup>53</sup> *Id.* at 46.

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

<sup>55</sup> *Id.* at 39.

likely to lack competency.<sup>56</sup> A lack of competency in an animal may result in an inability to evaluate environmental stimuli, causing the animal to develop fear, anxiety, and compromised social coping.<sup>57</sup>

The suppression of an animal's agency and competency often results in the emergence of the stereotypical behaviors that correlate with higher levels of stress.<sup>58</sup> An animal's "lack of control over their daily routines and resources" is a large factor in the development of stereotypical behavior.<sup>59</sup> Providing animals with greater agency may increase competence in captive animals and as a result, improve or absolve stereotypical behavior.

## 2. Inadequate Space

One of the main factors that contribute to stereotypical behaviors is the insufficient space that many captive animals are afforded. Inadequate space is particularly an issue with wide ranging species, as these animals are most susceptible to stereotypical pacing.<sup>60</sup> Many accredited zoos have attempted to address this issue with some success, but the largest problem remains the inadequate enclosure size of animals that are kept in captivity at roadside zoos. The minimum enclosure size requirements laid out by the USDA are generally measured in feet/meters.<sup>61</sup> This is despite the knowledge that wide ranging mammals and carnivores, like bears, range several *miles* per day. Subjecting a highly intelligent, sophisticated animal to this type of pinched confinement no doubt leads to psychological suffering.

## 3. Lack of Enrichment Activities and Ability to Exhibit Natural Behaviors

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<sup>56</sup> Bekoff et al., *supra* note 50 at 106.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Bacon, *supra* note 40 at 2.

<sup>60</sup> M. Elsbeth McPhee et al., *The Importance of Maintaining Natural Behaviors in Captive Mammals* 306 (Jan. 2010).

<sup>61</sup> *Animal Welfare Act and Animal Welfare Regulations*, USDA (May 2019), [https://www.aphis.usda.gov/animal\\_welfare/downloads/bluebook-ac-awa.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/bluebook-ac-awa.pdf).

Enrichment is a commonly employed mechanism for preventing and treating stereotypical behaviors. Enrichment may be defined as a “principle that seeks to enhance the quality of captive care by identifying and providing environmental stimuli necessary for optimal psychological and physiological wellbeing.”<sup>62</sup> Enrichment activities include sophisticated feeding challenges, frequent structural changes, visual and olfactory stimulation, social opportunities, and cognitive provocation.<sup>63</sup> It is essential that these devices address the underlying cause of the stereotypical behavior, rather than attempting to entertain the animal and provide for quick behavioral fixes.<sup>64</sup> Further, it is important to tailor the enrichment programs to each specific species, as the needs of each species may differ greatly.<sup>65</sup>

It is not enough that an exhibit reflects a naturalistic enclosure, the enclosure must provide an avenue for the animal to exhibit their natural behaviors. Through suppressing natural behaviors, captive animals become stressed, leading to an impairment in brain development and an inability to exhibit flexibility and adjust adequately to their environment.<sup>66</sup>

### C. Why are Bears Susceptible to Stereotypical Behavior

The scientific community has recognized stereotypical behavior among captive animals as an issue. However, most published research on this issue is centered around “large, charismatic, and often endangered species.”<sup>67</sup> While the nature of confinement has detrimental effects on many captive animals, bears are, for several reasons, particularly susceptible to stereotypical behaviors. As stated by the AZA, bears are in need of enrichment activities and

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<sup>62</sup> Swaisgood *supra* note 49 at 499.

<sup>63</sup> TERRY MAPLE ET AL., *ZOO ANIMAL WELFARE*, (Springer-Verlag Berlin Heidelberg 2013).

<sup>64</sup> *Id.*, Bacon, *supra* note 40 at 7.

<sup>65</sup> Maple, *supra* note 63.

<sup>66</sup> Ros Clubb, *Captivity Effects On Wide Ranging Carnivores* 425 *Nature* 473 (2003), [www.nature.com/nature](http://www.nature.com/nature).

<sup>67</sup> Swaisgood, *supra* note 49 at 499.

complex environments, “more than other species with similarly advanced cognition,”<sup>68</sup> due to their solitary nature and their home-range size.

Bears require an enclosure with adequate space, along with sufficient stimulation and enrichment.<sup>69</sup> Enrichment activities are mere substitutes for natural behaviors and therefore must allow for natural motivations as well as cognitive challenges that bears exhibit in the wild. This should include but not be limited to food motivated behaviors.<sup>70</sup> Short these conditions, bears, more than any of 33 carnivorous species studied, demonstrate stereotypic behavior indicative of physiological and psychological distress.

#### 1. Enclosure Size and Improper Design

Due to their home range size and explorative daily activities, bears are likely to suffer from psychological stress and dysfunction if they are confined to an enclosure that does not provide adequate space and opportunity for exploration. Bears are typically active for up to 18 hours a day, yet they are forced to remain relatively sedentary due to the extreme confinement that is often present at zoos, especially roadside zoos.<sup>71</sup> This forced inactivity can cause bears to become stressed, frustrated, and bored which in turn leads to a greater likelihood that they will exhibit stereotypic behaviors.<sup>72</sup>

In addition to the inadequate space requirements, many bears are kept in enclosures that have a harmful design. The concrete flooring that is often the base of their enclosure can be damaging to the paw pads, their foot and ankle joints, and their knees and hips. It further prevents many of their instinctual behaviors such as digging and rooting. This inability to

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<sup>68</sup> Sun Bear and Sloth Bear Care Manual, AMERICAN ZOO ASSOCIATION, pg. 6-7, [https://assets.speakcdn.com/assets/2332/sun\\_and\\_sloth\\_bear\\_care\\_manual\\_2019.pdf](https://assets.speakcdn.com/assets/2332/sun_and_sloth_bear_care_manual_2019.pdf).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

construct a nest gives a bear no alternative but to sleep on hard concrete floor, which exacerbates the joint and tissue damage that occurs when they are active on this rigid surface.

## 2. b. Inability to Exhibit Natural Behaviors and Improper Enrichment Activities

One of the most significant alleviators for stereotypic behavior amongst captive animals is the presence of enrichment activities tailored specifically for the species at issue.<sup>73</sup> As previously stated, bears continuously engage with their environment and manipulate stimuli they are exposed to in the wild. Bears in captivity are often placed in enclosures that don't offer the bears an opportunity to climb, dig, swim, or exhibit other naturalistic behaviors.

Simply employing enrichment activities along with naturalistic exhibits does not provide relief from the suffering that captive animals are subject to. These exhibits are merely a fraction of what these animals encounter in the wild, and they are often "bored out of their skin" as a result.<sup>74</sup> It is essential to ensure these exhibits provide the resources and space that a bear needs in order to perform its natural activities of daily living.

Another of the daily activities that a captive bear is often deprived of is the ability to fully submerge itself in bodies of water, for cleansing, play, or hunting purposes. The metal troughs that are so often substituted for these bodies of water are often filled with stagnant water that is not optimal for the good health of the animal.

A captive bear is also commonly deprived of a choice to engage in social behaviors. Research shows that social interaction may be beneficial to captive bears, but the element of choice is essential to promote the well-being of the bear.<sup>75</sup> Forcing multiple bears into cramped enclosures does not provide the bear with the choice to engage in social activities but forces the

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<sup>73</sup> Carlstead, *supra* note 17.

<sup>74</sup> Braverman, *supra* note 13 at 34.

<sup>75</sup> Bacon, *supra* note 40 at 14.



bear to accept socialization. The forced socialization has been found to cause non-aggressive bears to become aggressive toward others they share an enclosure with.<sup>76</sup>

Lastly, because of the extensive time bears spend foraging for food, the predictable and monotonous feeding routines, coupled with the lack of nutritious and varied food contributes to the frequency and severity of stereotypic behavior in bears.

#### **IV. Current Laws, Regulations, and Protective Measures for Captive Bears**

##### **A. General Overview of the AWA**

Currently, the laws that protect animals in general are limited. The largest body of law that seeks to protect animals is the Animal Welfare Act (AWA), enacted in 1966.<sup>77</sup> The AWA was the first federal law safeguarding animals. It had the express intention of protecting the welfare of laboratory animals.<sup>78</sup> Amendments have refined the standards and the animals covered by the Act. In its current form, the AWA “sets minimum standards for the treatment of animals by various commercial enterprises, including animal research facilities, animal breeders, and animal exhibitors.”<sup>79</sup> The category of exhibitor covers facilities that range from public zoos, to roadside zoos, and animals used at circuses.<sup>80</sup>

The AWA is enforced by the United States Department of Agriculture (USDA), through the Animal and Plant Inspection Service (APHIS).<sup>81</sup> As explained in 7 U.S.C. § 2151, the Secretary of Agriculture is “authorized to promulgate such rules, regulations, and orders as he may deem necessary” in order to carry out the purpose of the AWA. APHIS has inspectors that

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<sup>76</sup> *Id.*

<sup>77</sup> Benjamin Adams, *Legislative History of the Animal Welfare Act: Introduction*, <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction>.

<sup>78</sup> *Id.*

<sup>79</sup> 7 U.S.C. § 2132; 9 C.F.R. § 11.1.

<sup>80</sup> Kali S. Grech, *A Detailed Discussion of the Laws Affecting Zoos*, ANIMAL LEGAL & HISTORICAL CENTER (2004).

<sup>81</sup> 7 U.S.C. §§ 2131 et seq.; 9 C.F.R. §§ 1.1 et seq.

conduct unannounced visits to licensed facilities where they “review the care and treatment of animals covered under law” at least once a year.<sup>82</sup> Violations of the AWA can result in a suspension of such person’s license.<sup>83</sup> The USDA Licensing and Regulations department further provides protection of captive animals. Under their standards, “if you have animals on display to the public or conduct performances featuring animals, you must become licensed as an exhibitor.”<sup>84</sup> This standard is required for any exhibit open to the public, whether they are owned by a governmental entity, corporation, foundations, or private entities.<sup>85</sup>

While the AWA has been a huge step in a desirable direction toward providing animals with positive welfare, it is important to note that the standards within it are minimum requirements for keeping exotic animals with many recognized deficiencies unaddressed.

#### 1. The AWA’s Application to Captive Bears

The AWA regulations are contained in 9 C.F.R. parts 1, 2, and 3. Parts 1 and 2 define terms and administrative responsibilities. Part 3 contains the standards and specifications for the “humane handling, care, treatment, and transportation” of a finite list of animals. Subpart A-E contain specific standards for: A, dog and cats, B, guinea pigs and hamsters, C, rabbits, D, nonhuman primates, and E, marine mammals, including polar bears.<sup>86</sup> Subpart F functions as a “catch all” and sets forth standards for all other warm-blooded animals not otherwise specified in part 3. Bears fall under subpart F, and as a result their species-specific standards are not

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<sup>82</sup> *Id.*, *AWA Inspection and Annual Reports*, APHIS (last modified Sept. 2019).  
<https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/awa-inspection-and-annual-reports>.

<sup>83</sup> *Id.*

<sup>84</sup> *Licensing and Registration Under the Animal Welfare Act*, USDA (Feb. 2019),  
[https://www.aphis.usda.gov/animal\\_welfare/downloads/aw/awlicreg\\_gray-book.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/aw/awlicreg_gray-book.pdf).

<sup>85</sup> *Id.*

<sup>86</sup> Subpart A, 9 C.F.R. §§ 3.1-3.19, subpart B, *id.* §§ 3.25-3.41, subpart C, *id.* §§ 3.50-3.66, subpart D, *id.* §§ 3.75-3.92, subpart E, *id.* §§ 3.100-3.118.

considered.<sup>87</sup> Subpart F merely provides minimum standards food/water, sanitation, and enclosure space.<sup>88</sup>

While some of the regulation gives inspectors a general guide on husbandry needs of bears, the standards are insufficient to properly guide an inspector on what positive welfare of a bear is. The USDA has recognized that bears require specific guidelines to provide humane care, as exemplified in their Animal Care Aids, Bear Care Topics appendices.<sup>89</sup> These guidelines lay out the nutrition needs, hibernation habits, husbandry and habitat needs, veterinary care, and environmental enrichment needs.<sup>90</sup> While these guidelines may provide important information for inspectors when considering the welfare of a bear used in exhibition, it is critical to note that these are mere suggestions for inspectors, and are by no means firm standards that inspectors are required to follow.

## B. AZA Standards

### 1. General Overview

Another useful protective measure for animals in captivity is accreditation with the Association of Zoos and Aquariums (AZA). The AZA is a 501(c)3 non-profit organization that strives to meet high standards of animal welfare and care while advancing areas of conservation, education, science, and recreation.<sup>91</sup> Of the approximately 2,800 exhibitors licensed by the USDA, fewer than 10% are accredited by the AZA.<sup>92</sup> Accreditation requires the candidate to complete an application and undergo a “multiple day on-site inspection and an in-person hearing

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<sup>87</sup> Subpart F, 9 C.F.R. §§ 3.125 – 3.142.

<sup>88</sup> *Id.*

<sup>89</sup> *Animal Care Aids*, APHIS (last Dec. 16, 2019), [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/caw/at\\_caw\\_animal\\_care\\_aids](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/caw/at_caw_animal_care_aids).

<sup>90</sup> *Id.*

<sup>91</sup> *About Us*, AZA, <https://www.aza.org/what-is-accreditation>.

<sup>92</sup> *About AZA Accreditation*, AZA, <https://www.aza.org/what-is-accreditation>.

in front of the Accreditation Commission.”<sup>93</sup> This in person inspection involves a team with at least one veterinarian, and several “animal and operations experts.”<sup>94</sup> Members are required to repeat the entire process every five years in order to ensure the facility is meeting the high and the evolving standards.<sup>95</sup>

Outside of ensuring high standards of husbandry and animal welfare, AZA emphasizes the importance of education and conservation. Education is intended to build the connection between people and animals.<sup>96</sup> It is also intended to raise awareness about the effects that people have on animals, and to promote feelings of empathy and further knowledge in order to “influence pro-environmental behavior.”<sup>97</sup> Conservation is intended to help ensure the survival of certain species.<sup>98</sup> For example, AZA has enacted a “Species Survival Plan” (SSP) for an enumerated list of animals. The plan outlines breeding and transfer plans to ensure a genetically diverse population and to combat any concerns over surplus animals in zoos.<sup>99</sup>

While the AZA provides top of the line standards for the care and keeping of exotic animals in captivity, the overall effect that it has on many species and facilities is minimal. Roadside zoos and other licensed facilities have routinely failed to incorporate these high standards into their practices. Since these exhibits are where the majority of exotic animals are kept captive, most captive animals don’t benefit from the AZA aegis.

## 2. AZA Standards for Captive Bears

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> SHELLY GROW ET AL., SAVING ANIMALS FROM EXTINCTION: UNIFYING THE CONSERVATION APPROACH OF AZA-ACCREDITED ZOOS AND AQUARIUMS 124 (Ben A. Minteer et al. eds., 2018).

<sup>97</sup> *Id.*

<sup>98</sup> Grech, *supra* note 79.

<sup>99</sup> *Id.*

The AZA has a 137-page care manual that is specific to bear species. This manual addresses the habitat design, social environment, nutritional needs, veterinary care, behavior management, and several other subsections to assist with ensuring the highest standard of welfare to these animals.<sup>100</sup> The AZA explicitly states that due to bears high intelligence, they must have a stimulating and complex environment via enrichment activities, “similar to what primates receive.”<sup>101</sup>

The enclosure standards set forth provide a range of square footage that is recommended for bears.<sup>102</sup> In addition, the standards state that exhibit size alone is insufficient to ensure welfare, and provide a detailed section laying out recommended enclosure complexity.<sup>103</sup> This includes climbing structures, foraging opportunities, resting and sleeping locations, safe retreats, visual barriers, and water sources.<sup>104</sup> Most importantly, this care manual that is set forth for bears is considered a “living document that is updated as new information becomes available and at a minimum of every five years.”<sup>105</sup> The Woodland Park Zoo in Seattle Washington is an attestation to the high standards that the AZA enforces. There “Northern Trail” is a 6-acre exhibit<sup>106</sup>, home to brown bears, who are given a stream and deep pool that contains 20-30 live trout to allow for natural feeding. The exhibit implements several other features for environmental enrichment, such as a bear cave and a scatter-feeding plan to allow the bears to wander in search of food.<sup>107</sup>

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<sup>100</sup> *Animal Care Manuals*, AZA, <https://www.aza.org/animal-care-manuals>.

<sup>101</sup> *Sun Bear and Sloth Bear Care Manual*, AZA, [https://assets.speakcdn.com/assets/2332/sun\\_and\\_sloth\\_bear\\_care\\_manual\\_2019.pdf](https://assets.speakcdn.com/assets/2332/sun_and_sloth_bear_care_manual_2019.pdf).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> Award Winning Exhibits, Woodland Park Zoo, <https://www.zoo.org/Document.Doc?id=211>.

<sup>107</sup> *Id.*

Currently, there are over 1,100 bears held in non-accredited facilities.<sup>108</sup> These roadside zoos rarely practice the minimum husbandry standards, and as a result, bears exhibited in these facilities often suffer physiologically and psychologically.

### C. Wildlife Sanctuaries

Although Wildlife Sanctuaries have no legal authority, they are hugely beneficial to the wellbeing of animals that have suffered from sub-standards conditions in captivity. Many animals are unable to be safely returned to the wild following a life in captivity, but a wildlife sanctuary gives these animals a second chance. Sanctuaries are similar to zoos in that way that some are accredited, and some are not. Like accredited zoos, accredited sanctuaries often employ animal care standards that are far more extensive and in line with the needs of each species than those standards set out by the USDA.

The Global Federation of Animal Sanctuaries (GFAS) requires an extensive application process to become accredited or verified.<sup>109</sup> In order to be eligible to apply for verification, a facility must demonstrate that they do not breed captive animals, they do no commercial trade animals, they do not exhibit animals, and the public does not have direct contact with the wildlife.<sup>110</sup> To apply for accreditation, a facility must meet the above criteria, in addition to demonstrating that they adhere to the specific standards of animal care laid out by the organization.<sup>111</sup> These standards include species specific standards that address housing, nutrition requirements, veterinary care, well-being and handling, and several others.<sup>112</sup> The standards are

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<sup>108</sup> Barbara King, *Bears Can Face Summer Challenges in Roadside Zoos*, NPR, (Aug. 17, 2017),

<https://www.npr.org/sections/13.7/2017/08/17/543682389/bears-can-face-summer-challenges-in-roadside-zoos>.

<sup>109</sup> *Accreditation*, GLOBAL FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/>.

<sup>110</sup> *How to Apply*, GLOBAL FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/definitions/>.

<sup>111</sup> *Id.*

<sup>112</sup> *Standards of Excellence*, GLOBAL FED’N OF ANIMAL SANCTUARIES, <https://www.sanctuaryfederation.org/accreditation/definitions/>.

constantly evolving with the “improved knowledge and understanding of the needs of animals and capacities of sanctuaries.”<sup>113</sup>

The American Sanctuary Association (ASA) is another organization that provides detailed standards and a rigorous application process to become a member. ASA membership requires that the sanctuary does not breed, does not use animals for any commercial activity, maintains individual policies that outline care and welfare of animals in their custody, and several other criteria.<sup>114</sup>

Sanctuaries continually place the well-being of the animals in their care as their top priority. The Wild Animal Sanctuary in Keenesburg, Colorado is the largest carnivore sanctuary in the world, with nearly 10,500 acres of natural habitat and more than 520 animals that have been rescued from and are being rehabilitated with the goal of releasing these animals back into the wild.<sup>115</sup> The Wild Animal Sanctuary is home to many exotic animals that were confiscated by the USDA for AWA violations. Fifi, Bruno, Pocahontas, and Marsha were bears that were forced to perform tricks, such as riding a tricycle, at the Big Bear Farm at a roadside zoo in Honsedale PA.<sup>116</sup> This facility received several AWA violations, were forced to close the facility, and kept the bears in tiny pens they were not allowed to leave from for 2 decades.<sup>117</sup> Thankfully, these 4 bears from relocated to the Wild Animal Sanctuary to live out their lives.

There are many US facilities aspiring to the highest of animal care standards. These organizations should be lauded and encouraged to continue their good works. However, too many animal-based businesses are more concerned with profit than the welfare of the animals.

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<sup>113</sup> *Id.*

<sup>114</sup> *Sanctuary Criteria*, AM. SANCTUARY ASS'N, [http://www.asaanimalsanctuaries.org/sanctuary\\_criteria.htm](http://www.asaanimalsanctuaries.org/sanctuary_criteria.htm).

<sup>115</sup> THE WILD ANIMAL SANCTUARY, <https://www.wildanimalsanctuary.org/copy-of-about-us>

<sup>116</sup> *After Decades in Cages, Four Elderly Bears Find a Real Life Together Outdoors* (2015); <https://www.peta.org/media/news-releases/after-decades-in-cages-four-elderly-bears-find-a-real-life-together-outdoors/>.

<sup>117</sup> *Id.*

#### D. Insufficiency of Laws and Regulations to Afford Proper Protection to Bears

While the AWA and AZA were strides in the right direction toward animal welfare, specifically as it relates to keeping exotic species captive, the current laws and regulations that govern the exhibition of bears is insufficient to ensure their positive welfare. First, the lack of guidance for USDA inspectors in regard to species specific standards result in many violations of the AWA going unreported. In addition, the USDA does not engage in thorough investigations of licensed facilities to ensure proper care. Instead, they have been found to engage in “rubber-stamping” license renewals, leaving animals in the care of a licensee who violates the AWA and allows the animals to continue to suffer. Finally, the USDA blackout leaves the visiting public and animal welfare organizations with no way to verify the facilities that they are visiting are meeting these minimum standards.

##### 1. No Specific Standards

As previously stated, the standards in place for the handling, care, treatment, and transportation for bears is contained in a “catch-all” group of all other warm-blooded animals not previously listed. The lack of species-specific standards for APHIS inspectors to utilize may leave the inspectors unsure if violations exist and they may err on the side of under reporting any violations as a result. The standards set, and the culture developed, sets a floor for care that prioritizes ease of licensing renewal over welfare of the animals. This value is specifically stated in the Animal Care strategy plan for APHIS inspections.<sup>118</sup>

APHIS, the USDA’s investigative arm, has listed specific standards for specific animals such as, but not limited to, marine mammals, non-human primates, even hamsters and guinea

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<sup>118</sup> *Animal Care’s Purpose*, APHIS, [aphis.usda.org](https://aphis.usda.org).



pigs.<sup>119</sup> It has been scientifically demonstrated that bears are equally as demanding as these enumerated animals and require specific husbandry practices to ensure their welfare.<sup>120</sup>

While many zoos, specifically those accredited by the AZA, provide species specific requirements for the care and keeping of bears, the great majority of them do not. To combat these deficiencies, it is essential that bear specific standards are created to ensure that exhibitors are providing proper care for these animals and ensuring that inspectors are fully aware of the proper care, needs, and requirements.

## 2. Lack of inspector expertise and lack of resources for more inspectors

Currently, the USDA employs roughly 200 persons to perform pre-licensing inspections and routine, unannounced compliance inspections.<sup>121</sup> While the inspectors are all classified veterinary medical officers or Animal Care Inspectors, there are few veterinarians who have specialized knowledge and experience in a particular animal species.<sup>122</sup> In 2018, the USDA Animal Care employed specialists with “expertise with birds, elephants, marine mammals, exotic cats, and non-human primates.<sup>123</sup> In addition, the inspectors conduct nearly 10,000 annual inspections under the AWA (averaging 50 inspections per inspector per year), with 6,614 of those inspections being licensed breeder’s, dealers, or exhibitors.<sup>124</sup>

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<sup>119</sup> Subpart A, 9 C.F.R. §§ 3.1-3.19, subpart B, *id.* §§ 3.25-3.41, subpart C, *id.* §§ 3.50-3.66, subpart D, *id.* §§ 3.75-3.92, subpart E, *id.* §§ 3.100-3.118

<sup>120</sup> Law, G., and A. Reid. *Enriching the Lives of Bears in Zoos*, INTERNATIONAL ZOO YEARBOOK 44.1 (2010).

<sup>121</sup> *Animal Welfare Act Inspections*, APHIS (Nov. 13, 2017), [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct\\_awa\\_inspections](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct_awa_inspections).

<sup>122</sup> *Id.*

<sup>123</sup> *Ask the Expert*, USDA (June 2018), <https://www.usda.gov/ask-expert>.

<sup>124</sup> *Fiscal Year 2018: Animal Care Impact Report*, APHIS [https://www.aphis.usda.gov/animal\\_welfare/downloads/FY2018-Animal-Care-Impact-Report.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/FY2018-Animal-Care-Impact-Report.pdf).

Lack of inspectors with expertise in bears, coupled with the minimum standards set forth by the AWA leaves this highly intelligent species with inadequate protection and leaves them prone to psychologic harm.<sup>125</sup>

### 3. USDA's Lack of Transparency

In addition to the lack of bear-specific standards and expert inspectors to ensure the humane treatment of bears in captivity, the USDA's continued practice of rubberstamping renewal licenses, their frequent use of "teachable moments" to excuse facilities in violation of the AWA, and their practice of "blacking out" inspection records have a harmful effect on all animal, including bears. The portion of the law that is intended to provide back end protection for facilities that are already licensed fails by allowing facilities that are in violation to continue exhibiting these animals in inhumane standards.

#### a. Practice of Rubberstamping License Renewal

As previously stated, the USDA is tasked with pre-licensed inspections to determine if a specific exhibitor has met the federal standards for keeping specific species in their care.<sup>126</sup> In order to renew their license, the USDA sends a renewal kit to the licensee/applicant, the applicant completes the renewal form and submits it with an application fee, and the application is reviewed for completeness.<sup>127</sup> The USDA does not mandate any inspection before issuing a renewal license, despite the requirement that the exhibitor demonstrates compliance with the AWA before a license may be issued.<sup>128</sup> The lack of renewal inspections often result in facilities that are in violation of the AWA remaining licensed with no repercussions.

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<sup>125</sup> *Supra* note 79.

<sup>126</sup> *Licensing and Registration Application Kit*, APHIS, [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA\\_Regulated\\_Businesses/SA\\_Request\\_License\\_Registrat ion\\_Application\\_Kit](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/SA_Regulated_Businesses/SA_Request_License_Registrat ion_Application_Kit).

<sup>127</sup> *Id.*

<sup>128</sup> 9 C.F.R. § 2.2(b).

This rubberstamping practice was a partial cause in Ben the bears suffering. Jambbas Ranch was cited for numerous violations of the AWA over a period of six years.<sup>129</sup> While an agency is given broad discretion to interpret statutes,<sup>130</sup> this interpretation of the renewal policy undermines the provision of the AWA that states the exhibitor “shall have demonstrated that his facilities comply with the standards.”<sup>131</sup> This interpretation of the renewal policy leaves animals, in a situation like Ben the bear, for prolonged periods of time with no humane remedy. Bens case is not a rare occurrence, either. In 2015, the USDA renewed the license of the Cricket Hollow Zoo, despite the facility having over 100 AWA violations in the prior 5 years.<sup>132</sup> These violations included inadequate staffing, unsanitary facilities, and poor veterinary care.<sup>133</sup> Allowing a facility to renew their license despite the knowledge that they are grossly violating the bear minimum standards is counterproductive to assuring the humane care and treatment of animals.

#### b. USDA Blackout and Intentionally Withholding Records

Another major issue surrounding the proper protection of bears is the USDA’s practice of purging inspections records that allege violations of the AWA.<sup>134</sup> While information surrounding a facilities inspections may be obtained through a formal Freedom of Information Act (FOIA) request,<sup>135</sup> this process can take several months or even years, and may hinder an advocates ability to inspect a facility before supporting it. In 2017, the USDA purged tens of thousands of documents, including, but not limited to, inspection reports that documented violations of the

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<sup>129</sup> *Ben the Bear Caged at Roadside Zoo in North Carolina*, ALDF (Aug. 27, 2018), <https://aldf.org/case/ben-the-bear-caged-at-roadside-zoo-in-north-carolina/>.

<sup>130</sup> *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 468 U.S. 837 (1984).

<sup>131</sup> 7 U.S.C. § 2133 (2012).

<sup>132</sup> *Challenging the USDA for Reissuing Roadside Zoo’s License*, ALDF (Dec. 27, 2019), <https://aldf.org/case/challenging-the-usda-for-reissuing-roadside-zoos-license/>.

<sup>133</sup> *Id.*

<sup>134</sup> *Exposing Animal Abusers: Update on the Animal Welfare Blackout*, ALDF (Sept. 2019), <https://aldf.org/article/exposing-animal-abusers-update-on-the-animal-welfare-blackout/>.

<sup>135</sup> 5 U.S.C. § 522.

AWA, official warning letters, and administrative complaints against the facilities that were in violation.<sup>136</sup>

The USDA was sued by the Animal Legal Defense Fund, along with several other animal advocacy groups, alleging a violation of the AWA for purging these important inspection documents.<sup>137</sup> The USDA was ordered to restore inspection records to their database, yet the database now has limited information and several inspection records contained redacted material.<sup>138</sup> This lack of transparency leaves facilities that are not in compliance with the ability to continue operation without any regard for the animals welfare, similar to the situation with Ben the bear at Jambbas Ranch.

In addition, The USDA has withheld information that was could have ended tremendous suffering for the animals at Greater Wynnewood Exotic Animal Park (G.W. Zoo). PETA requested the inspection records for this zoo, and the USDA responded by stating that they were entitled to withhold this information under an exemption because “it has been determined that there is a substantial privacy interest. . . the risk of revealing the inspection findings could cause embarrassment, harassment, or other stigma to the licensee.”<sup>139</sup> Nearly two years after the request, the USDA provided inspection records, but withheld 38 of the 49 documents.<sup>140</sup> Further, the records that were provided were almost entirely blacked out. In summary, the USDA “complied” with the FOIA request, but clearly showed their interest in preserving the business of the exhibitor over the wellbeing of the animals in their care.

## V. Remedies

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<sup>136</sup> *Id.*

<sup>137</sup> *Supra* note 133.

<sup>138</sup> *Victory: Lawsuit Over USDA Website Blackout to Return to Court*, PETA (March 2019), <https://www.peta.org/media/news-releases/victory-lawsuit-over-usda-website-blackout-to-return-to-court/>.

<sup>139</sup> *USDA Response to FOIA Request*, (Dec. 26, 2017), [https://www.peta.org/wp-content/uploads/2018/03/2017-12-26\\_USDA-FOIA-Response\\_Garold-Wayne.pdf](https://www.peta.org/wp-content/uploads/2018/03/2017-12-26_USDA-FOIA-Response_Garold-Wayne.pdf).

<sup>140</sup> *Id.*

The Animal Welfare Act of 1966 was a monumental step for the protection of animals, however the Act falls short of affording proper protection to many of the animals that are kept in captivity. While the amendments that have been added throughout the years to the AWA have provided improved standards for several animal species, bears are still not afforded proper protection under the AWA to ensure they have positive welfare in captivity. The constraints placed on the USDA, because of the meager guidance present in the captive animal section of the AWA, relegates it to providing mere suggestions to zoos and exhibitors and fails to give it adequate authority to assure positive animal welfare. The AWA, in its current form, imposes the bare minimum standards that a facility must meet in order to become licensed to possess and display bears. To ensure that all captive bears have positive welfare, rather than minimally adequate welfare, the AWA must provide, with species specific standards, regulations for licensing and procedures to ensure that licensed facilities are sustaining positive welfare to the bears in their charge. This could be done in three different ways: first, incentivizing AZA accreditation, second, requiring non-accredited exhibitors to undergo stringent annual inspections governed by expanded USDA requirements for captive bears, and third, eliminating the ability of exhibitors to have bears if they are unable to adhere to either of the first two options.

A. Encouraging Accreditation with the Association of Zoos and Aquariums (AZA)

Currently, AZA accreditation is not required to obtain a license as an exhibitor, however, U.S. agencies, including the USDA, often use the AZA standards as their baseline when evaluating institutions. Harmonious standards amongst all levels and types of captive animal facilities (including zoos, roadside exhibits, etc.) may help the USDA in their evaluation of these facilities. Without a codified set of standards or policies in place the USDA/APHIS is limited to

mere suggestions without the authority needed to offer licit protection to the animals. By incentivizing AZA accreditation these concerns could be mitigated.

While accreditation may not be an option for some exhibitors, for numerous reasons, it is important that these facilities are still held to high and consistent standards for animal welfare. Those that choose not to seek accreditation should be required to have more frequent and intensive inspections to ensure the animals in their charge have continuing positive welfare. The practice of self-assessment and rubber-stamped renewal would be eliminated ensuring that inspections identify sites where standards aren't being upheld.

If an exhibitor is unable to meet and continually implement the high species-specific standards promulgated by the AZA, it is precarious to allow them to keep exotic animals in their possession. Many of these animals (e.g. bears, elephants, lions, etc.) do not fare well in captivity, despite excellent standards of dietary and veterinary care by the institution. With this knowledge, allowing bears to continue to be placed in non-accredited exhibits seems the height of hypocrisy.

#### B. Bear-Specific Standards Adopted By the USDA

As stated above, 90% of the facilities that house captive bears are not AZA accredited facilities. It is this large majority of bears that are in need of species-specific standards to ensure their welfare. The forthcoming recommendations are designed to address these needs.

Bears have complex behaviors, specific dietary needs, social preferences, and home-range sizes that vary greatly from other captive species. It is impractical to believe that generalist inspectors are able to evaluate, with precision, the global welfare of all of the species that are captive in every facility. This issue has already been addressed by the USDA for other complex species, such as marine mammals, non-human primates, etc., by employing specialists with expertise and experience with these individual animals. It has been shown that bears are every bit

as complex as the animals listed above, therefore, it is essential that the USDA employ a specialist for them as well. With a bear specialist, the historical record of inaccurate or misleading reports on the well-being of the bears inspected will be avoided or eliminated.

Further, this would help prevent inspectors from overlooking subtle cases of bears suffering from physiological or psychological deprivation. The proposed language for the USDA to adopt is as follows:

**Subpart F. Specifications for the Humane Handling, Care, Treatment, and Transportation of Bears**

*Licensees must comply with the following requirements for all species of bears with the exception of polar bears.*

**(a) Primary enclosure general requirements.**

**(1) primary enclosures must be designed and constructed of suitable substrate that mimics a natural habitat of a bear such as: soil, soft earth, grass, mulch.**

**(2) Concrete substrate shall be prohibited except for enclosure features designed for spectator safety.**

**(3) Primary enclosures must provide shelter and protection from the viewing public. The bears must have an opportunity to seek solitude and privacy at their discretion.**

**(4) Primary enclosures must provide shelter and protection from extreme temperatures and weather conditions and give them a chance to retreat from sun light by providing adequate accessible shaded areas at all times of the day.**

**(5) Primary enclosure must provide bears with easy and convenient access to clean food and water.**

**(6) Primary enclosures for bears must include a pool that is large enough for the bear to fully submerge itself and express species-typical behaviors. The pool cannot be made of metal material. The pools must be cleaned regularly (water for drinking must be freshened daily) to ensure proper water quality.**

**(7) Primary enclosures must include a den that is not made of metal and is large enough for a bear to stand up; the den must be large enough to allow mothers and their cubs to den together.**

**(b) Minimum space requirements. The primary enclosures size must be measured in integral multiples of acres rather than in square feet. If several bears are housed together, the enclosure must expand by the multiples of the animals, (i.e. 2 bears require 2 acres, 3 bears require 3 acres, etc.).**

**(c) Environmental Enhancement. Exhibitors must develop and follow an appropriate plan for environmental enhancement adequate to promote the psychological well-being of bears.**

**(1) Social grouping.** The environment enhancement plan must include specific provisions to address the proper socialization of bears. Bears must be given the opportunity to choose to socialize or remain in solitude.

**(2) Handling of bear cubs.** Bear cubs may not be removed from their mothers until brought out of the den by the female. Bear cub handling by the public is prohibited.

**(3) Environmental enrichment.** The physical environment of the primary enclosure must be enriched by providing means of expressing species behavior that bears would exhibit in the wild.

**(a) Sensory stimulation.** Environmental enhancement must offer olfactory, visual, auditory and tactile stimuli. If an enrichment activity's affect wears off, it must be revised or replaced. The minimum standards of enrichment must provide bears with the opportunity for all of the following behaviors:

**i. Climbing**

**ii. Digging**

**iii. Nest Building**

**iv. Hibernating**

**(d) Feeding.** Bears must be fed a varied diet that includes fresh, seasonally available food, similar to what they would eat in the wild, that is presented in a stimulating manner that encourages natural foraging behavior. Public feedings are prohibited.

**(e) Veterinary Care.** Bears must have ready access to acute veterinary care. They must have regularly scheduled veterinary check-ups to ensure their physical and psychological well-being. Veterinary findings of illness or insufficient well-being must be addressed with a plan to resolve, or demonstrate progress toward resolution of, the issue within one week.

**(f) Adequately-trained employees.** Every exhibit subject to the Animal Welfare regulations for maintaining bears must have sufficient employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide husbandry practice and care, or handle bears, must be trained and supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of bears.

### C. Remedies That Focus on the Animal Rather Than the Exhibitor

Currently, the inspection process focuses on the exhibitor rather than the well-being of the animal. An exhibitor that is found in violation will first receive warning letters, or if numerous or repetitive, serious violations have been found, a civil penalty of a \$4,000 may be imposed.<sup>141</sup> This minimal penalty allows exhibitors to factor violation penalties into the cost of doing business, and continue operating a zoo that does not provide its animals with even merely

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<sup>141</sup> 7 USCS § 2149(b); Animal Welfare Act Decisions, Animal Legal & Historical Center.



adequate care. To ensure the well-being of bears in captivity, facilities that are discovered to be in violation of the AWA must have swift and corrective discipline imposed.

It is necessary to prioritize the well-being of the animal above the fiscal condition of the exhibit. Exhibitors unable, or unwilling, to ensure the health of the animals in their charge should be excluded from the privilege of displaying them to the public. If a facility continually demonstrates their lack of willingness to abide by the bare minimum ursine standards set out by the USDA, their license should be summarily revoked. Most importantly, bears exhibiting psychological stress/distress should be afforded rapid intervention to prevent permanent damage or incidents dangerous to the animal, the staff, or visitors of the facility. The AWA must provide corrective remedies for the bears whether or not the facility is in compliance with the standards and regulations. The long-term welfare of the animal has to, at all times, be at the top priority of the inspection process.

If the zoo/exhibit in violation of the AWA cannot swiftly remedy a bears suffering, they must be required to relocate it to a facility or location that is able to care for its specific needs and provide assessment of its recovery. This relocation process should be mandated to be done at the violators expense. This may mean reintroducing the bear back to its natural habitat, transferring the bear to a facility that exhibits positive animal welfare with that specific species, or transferring the bear to an accredited or verified animal sanctuary.

The lack of positive animal welfare may not always be the direct result of facility negligence as non-domesticable animals, such as bears, are often poorly adapted for captivity. If a facility is found to be in full compliance with the AWA, yet has an animal that is displaying signs of poor animal welfare, there must be a rapid and curative remedy enacted for the animal's

benefit. This remedy would be identical to the one listed above, however the relocation would not be done at the exhibitor's expense and no financial penalties shall be imposed.

There are several examples of animals that have suffered cruel psychological and physiological distress due to their captive living conditions. Fortunately, many of these animals have been relocated to a facility or sanctuary that promotes the welfare of the animal above all else. For example, Ben the Bear was transferred to the PAWS Sanctuary, where he will live out the rest of his life in a 2-acre habitat (340 time the size of his previous enclosure) that allows him to act on his naturalistic instincts. Since his transfer in 2012, Ben has not engaged in stereotypical behaviors. This remedy refocuses the AWA on the well-being of the animals, rather than the wrongdoing of the exhibitor, and should be used as a template for cure of violations going forward.

#### CONCLUSION

“The public is becoming more sensitive to the exploitation of captive big cats and elephants, yet they are not as aware of the problems bears face in captivity.<sup>142</sup> The AWA is obsolete in regards to its protection of captive bears. Scientific research has demonstrated that they require more care and attention than they are currently afforded in the majority of bear exhibits. The congressional intent of the AWA is not being met for these complex animals with the current standards in place. There are imminently feasible, reasonable changes to the AWA that can cure this current deficiency. This paper has attempted to outline those cures and hopes to alleviate the continued suffering of these intelligent animals.

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<sup>142</sup> - <https://www.all-creatures.org/articles/ar-bears-in-captivity.html>