

## DEPARTMENT OF AGRICULTURE

## Animal and Plant Health Inspection Service

## 9 CFR Parts 1, 2 and 3

[Docket No. APHIS–2029–0068]

RIN 0579–AE61

## Standards for Birds Not Bred for Use in Research Under the Animal Welfare Act

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

**SUMMARY:** We are amending the regulations to establish standards governing the humane handling, care, treatment, and transportation of birds, excluding birds bred for use in research, covered under the Animal Welfare Act. This action will ensure the humane handling, care, treatment, and transportation of birds not bred for use in research and covered under the Act.

**DATES:** This rule is effective March 23, 2023. For current AWA licensees and registrants, this rule is applicable August 21, 2023. For new AWA licensees and registrants, this rule is applicable February 21, 2024.

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## SUPPLEMENTARY INFORMATION:

## Background

Under the Animal Welfare Act (AWA, or the Act, 7 U.S.C. 2131 *et seq.*), the Secretary of Agriculture is authorized to promulgate standards and other requirements governing the humane handling, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. The Secretary has delegated responsibility for administering the AWA to the Administrator of the U.S. Department of Agriculture's (USDA, or the Department) Animal and Plant Health Inspection Service (APHIS). Within APHIS, the responsibility for administering the AWA has been delegated to the Deputy Administrator for Animal Care. Regulations and standards are established under the AWA and are contained in 9 CFR parts 1, 2, and 3 (referred to below as the regulations). Part 1 contains definitions for terms used in parts 2 and 3; part 2 provides administrative requirements

and sets forth institutional responsibilities for regulated parties, and part 3 contains standards for the humane handling, care, treatment, and transportation of animals covered by the AWA.

In 2002, Congress amended<sup>1</sup> the definition of *animal* in the AWA by limiting the exclusion of birds from that definition to only those birds “bred for use in research,” which by so doing explicitly placed birds not bred for research and not otherwise excluded from regulation under the protection of the AWA. While that amendment placed birds not bred for research under the protection of the Act, the USDA did not immediately promulgate regulatory standards specific to birds, causing several animal welfare organizations to file lawsuits against the Department. In 2020, an opinion by the U.S. Court of Appeals for the District of Columbia in one such case<sup>2</sup> resulted in the District Court’s ordering USDA to publish a proposal in the **Federal Register** to establish regulatory standards for birds no later than February 22, 2022, and to publish a final rule no later than 1 year after publication of the proposal. Establishing standards in the AWA regulations specifically for birds is necessary to ensure animal welfare and align the regulations with the intent of the Act.

## Discussion of Comments

On February 22, 2022, we published in the **Federal Register** (87 FR 9880–9913, Docket No. APHIS–2020–0068) a proposal<sup>3</sup> to amend the animal welfare regulations by establishing standards governing the humane handling, care, treatment, and transportation of birds, excluding birds bred for use in research, covered under the AWA. We began soliciting comments concerning the proposal for 60 days, ending April 25, 2022, and in response to several requests by commenters we extended<sup>4</sup>

the comment period by 30 days, to May 25, 2022.

We received 19,195 comments by the extended date. They included comments from breeders and fanciers of finches, budgerigars, canaries, parrots, cockatiels, and other pet and show birds; falconers, raptor breeders, exhibitors, hobbyists, and conservationists; businesses and educational organizations exhibiting birds to the public; ratite and poultry producers; exotic poultry hobbyists; owners and breeders of show and racing pigeons; national and regional animal welfare organizations; biologists; laboratories and other research facilities; universities; organizations representing zoos, shelters, and rescues; avian veterinarians, ornithologists, aviculturists, and organizations representing them; organizations promoting the conservation of waterfowl and wild birds; State and Federal government agencies; and members of the public.

A substantial number of comments we received consisted of duplicate and near-duplicate comments endorsed by members and supporters of several animal welfare advocacy organizations. Many of the comments submitted on the proposal expressed broad concerns about ensuring animal welfare for birds or excessive government regulation, but relatively few referred to specific parts of the proposal. We also received a substantial number of comments regarding the regulatory status of falconry, as well as comments from small businesses that breed and sell pet birds. We reviewed and considered all the comments we received prior to drafting this final rule.

## Summary of Amendments to the Proposed Rule

Our review of comments received on the proposal led us to re-examine some of the provisions in the proposed rule. For reasons that we will explain in this final rule, we are revising some of regulatory provisions and requirements that we had proposed in 9 CFR parts 1, 2, and 3. Following is a list of substantive revisions that we are making to the proposed rule in response to comments:

- Excluding falconry under the definition of *animal* in § 1.1 of the regulations, as the use of birds for falconry is not covered under the uses listed for the definition in the Act: “[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.”
- Revising our proposed definition of *bred for use in research* to mean “an animal that is bred in captivity and used for research, teaching, testing, or

<sup>1</sup> The AWA, signed into law in August 1966, has been amended numerous times since its original passage.

<sup>2</sup> *American Anti-Vivisection Society and Avian Welfare Coalition v. USDA*: <https://www.cadc.uscourts.gov/internet/opinions.nsf/80846063820C52F6852584EB005413E4/%24file/19-5015-1823484.pdf>.

<sup>3</sup> To view the proposal, supporting documents, and the comments we received, go to [www.regulations.gov](http://www.regulations.gov). Enter APHIS–2020–0068 in the Search field. Among the available supporting documents is a draft environmental assessment prepared in accordance with the National Environmental Policy Act. The environmental assessment evaluates potential effects of the proposed action on the human environment.

<sup>4</sup> The comment extension notice was published on April 22, 2022 (87 FR 24072–24073, Docket No. APHIS–2020–0068).

experimentation purposes,” in order to clarify that it pertains to actual use of the birds in research rather than stated intended use at the time of breeding.

- Establishing a *de minimis* threshold exemption for sales of 200 or fewer pet birds 250 grams or less annually, and/or sales of 8 or fewer birds over 250 grams annually, which we will add to § 2.1(a)(3) of the regulations.

- Establishing a *de minimis* threshold exemption for exhibition of four or fewer raptors, which we will add to § 2.1(a)(3) of the regulations.

- Revising water and electric power requirements in proposed § 3.150(d), so that they would only be required for the purpose of complying with other standards in proposed subpart G rather than be broadly applicable to all facilities.

- Revising proposed § 3.150(e) to replace proposed food storage temperature and shelf-life requirements with performance-based requirements.

- Revising temperature and humidity requirements in proposed § 3.151(a) to allow facilities to develop temperature and humidity levels using professionally accepted standards, and removing our proposed requirement that prescribed levels be part of the written program of veterinary care.

- Revising space requirements in proposed § 3.153(b) to allow facilities to develop space requirements using professionally accepted standards in consultation with the attending veterinarian, and removing the requirement that the space requirements be part of the written program of veterinary care.

- Revising the environmental enhancement plan requirement in proposed § 3.154 in order to allow facilities to document the plan using professionally accepted standards and in consultation with and approved by the attending veterinarian, and removing the requirement that the plan be part of the written program of veterinary care.

- Revising proposed § 3.154(a)(3) to allow individuals other than the attending veterinarian to make decisions of compatibility by facilities based on professionally accepted standards, and removing the requirement that the plan be part of the written program of veterinary care.

- Revising a proposed daily feeding requirement in § 3.155 in order to allow exceptions as directed by the attending veterinarian, normal fasts, or other professionally accepted practices.

- Revising proposed § 3.161(f) to require that if delays will cause a shipment of birds to arrive more than 12 hours later than originally scheduled,

the carrier must contact the consignor or the consignee for food and water needs.

- Revising proposed § 3.161(g) to require that carriers and intermediate handlers not accept unweaned birds for transport unless instructions for conditions of transport to ensure the health and well-being of the birds are specified and written by the attending veterinarian, and signed within 10 days of shipment, and removing the requirement that the plan be part of the written program of veterinary care.

- Revising proposed § 3.162(b)(1) by removing restrictive ventilation requirements that prevented use of shipping enclosures that would otherwise meet APHIS standards.

- Revising proposed § 3.164(a) to waive the requirement to offer weaned birds food and potable water within 4 hours before being transported in commerce if the attending veterinarian approves a delay or in accordance with professionally accepted standards.

Substantive comments are discussed below under the sections within 9 CFR parts 1, 2 and 3 they address.

#### General Comments

Many commenters asked that we prohibit trade of all captive birds. Some commenters asked that we require the release of all captive birds into their natural habitats.

APHIS does not have the authority to prohibit the legal trade of birds or to require the release of captive birds into their natural habitats.

Some commenters stated that we have not demonstrated that the current welfare of birds in breeding facilities are deficient.

We disagree with the commenters. As we noted in the proposed rule, APHIS has received complaints from the public about inhumane conditions for birds, including many comments submitted for this rulemaking. While APHIS does not currently inspect facilities engaged exclusively in avian breeding and exhibition, we do inspect mammals at mixed animal facilities that also house birds. During these inspections, if inspectors encounter birds kept in inhumane conditions they are instructed to report what they see to the appropriate local or State authority. Lastly, Congress’ amendment to the AWA, along with the court opinion noted above, are both acknowledgements that welfare standards for birds are necessary, and APHIS is promulgating such standards accordingly.

A commenter asked how the rule can be applied to a large, newly regulated community given the agency’s limited resources. One commenter suggested

that the rule be delayed from implementation until the necessary agency resources are available.

APHIS has sufficient resources to fulfill the mandates of the Act and successfully employs a risk-based process to determine frequency of facility inspections and enforce the regulations fairly. We intend to use this approach in our regulation and enforcement of standards for birds. As to delay of implementation, we are establishing a delayed applicability of the regulations, which we address below, in order to give persons additional time to comply with the regulations. The delay is not associated with the availability of agency resources.

A commenter asked that APHIS consider giving all licensed facilities one provisional inspection cycle to fix, modify, or challenge noncompliance issues, noting that many of the “untested” requirements in the proposal may prove to be unwarranted and possibly harmful to bird welfare. Another commenter stated that a 5-year implementation period must be established to allow time to disseminate regulatory information to aviculturists and for facilities to perform retrofitting to comply with the regulations. The commenter added that facilities existing at the time of implementation should be “grandfathered” if their primary enclosures are sound and healthful, until structural improvements are required.

An implementation period will be provided for all facilities conducting covered activities to ensure compliance with these standards. During this period, we intend to confer with facilities and offer guidance to help them identify and correct any noncompliances prior to the date that the rule becomes applicable. While the regulations will be effective 30 days after issuance of this final rule, they will not immediately be applicable to regulated persons and businesses. For current AWA licensees and registrants, the rule will become applicable 180 days after date of publication. For new licensees and registrants, the applicable date will begin 365 days after date of publication. As new licensees may be unfamiliar with AWA licensing and inspection practices or lack the resources required to comply with the regulations, we have provided them with additional time to attain compliance. Based on our own prior knowledge of the industry, the comments that we received, and the nature of the compliance standards in this final rule, we consider this sufficient time for entities to come into

full compliance with the standards. With respect to other commenter recommendations, we do not consider a 5-year implementation period or a “grandfather” clause for some facilities to be necessary or conducive to animal welfare. We also note that the AWA itself sets forth minimum standards for care of covered animals, which legally precludes a “grandfather” clause for facilities that are not in compliance with those particular standards.

A commenter proposed that we have an additional comment period so that stakeholders can address all their concerns with the proposal.

In response to commenter requests, we extended the comment period for 30 days to May 25, 2022.

Several commenters stated that APHIS has not accurately estimated the number of people who will be impacted by the proposal and that the actual number is much larger than what is cited in the economic analysis.

In the economic analysis that accompanied the proposed rule, we acknowledged that a great deal of uncertainty surrounds the number of facilities affected by this rule, and we requested data from the public that may indicate a number of facilities different from what we estimated in the analysis. We explain in more detail in the economic analysis our estimate of the number of facilities affected.

We received several comments indicating higher numbers of affected entities, one of which provided a detailed discussion of what the commenter considered to be the number of potential new licensees. Based on information the commenter provided, we adjusted our estimate of potential new facilities breeding or distributing birds that could require an AWA license from 1,625 to a range between 1,625 and 3,563.<sup>5</sup> Including new registrants, we estimate that there will be between 5,975 and 7,913 newly regulated entities in total. Of the facilities that we estimate may be covered under the regulations, we continue to believe many are already maintaining their facilities at or above the minimum standards of the proposal and would not need to make significant changes in order to come into compliance with the standards.

A commenter asked that APHIS include a regulatory provision allowing for the emergency transfer or sale of breeding groups of birds belonging to deceased breeders, or for persons with birds affected by natural disasters. The commenter added that it is critical to

transfer birds before they are lost for lack of care.

Under § 2.1(b)(1), licenses are issued to specific persons, and are issued for specific activities, types and numbers of animals, and approved sites. Although a new license must be obtained upon a change of ownership resulting from an owner’s death, APHIS can grant a one-time exemption in such situations to allow for sale or transfer of animals. In addition, every AWA licensee is required under § 2.38(l) to have a contingency plan in place for the humane handling, treatment, transportation, housing, and care of their covered animals. The plan is required to address emergencies such as natural disasters and animals at risk of neglect from disruption of care, including death of the breeder or responsible person, and allows for the sale and transfer of such animals. Given these provisions, we do not consider a new regulation to cover such contingencies to be necessary.

A commenter suggested that the Animal Care Inspection Guide should be applicable to all birds in captivity.

The Animal Care Inspection Guide serves as an aid for APHIS Animal Care personnel when inspecting USDA licensed and registered facilities. As is currently the practice with other covered animals, APHIS inspectors will use the guide, updated for avian facilities, to ensure consistency and accuracy when inspecting facilities that conduct activities involving birds not bred for use in research and therefore covered under the AWA regulations.

A coalition of three national avicultural organizations submitted a survey<sup>6</sup> of aviculturalists, of which 282 provided responses. The survey asked respondents to provide information about topics of concern to them in the proposed rule, including exemption thresholds, recordkeeping requirements, inspection procedures, environmental enhancement, and access to veterinarians with avian expertise. The commenter reviewed the responses in light of how the respondents, many of them home-based businesses, might be affected by the proposed regulations.

APHIS appreciates the commenter providing us with the survey and notes that we have addressed many of the concerns it expresses about compliance, privacy, and recordkeeping. The commenter noted that over 70 percent of respondents kept more than four breeding females, and that many small aviculturalists are uncertain about

counting breeding females for the purposes of determining exemption status. Under “Licensing Exemptions” below, we indicate that we have adjusted how the de minimis exemption threshold is determined by basing it on number of birds sold annually, rather than on number of breeding females. This change will exempt from inspection and licensing many more facilities as a result. For home-based facilities that will require licensing and inspections, we emphasize that APHIS only inspects for compliance within the areas of a domicile where business is conducted. Finally, as survey respondents use many means of inventorying and identifying their birds, from cage cards to software, the standards we are finalizing accommodate each of them. We intend to provide ongoing guidance on these topics as needed to help current and newly licensed entities with birds achieve compliance.

A commenter stated that a Federal-level database collecting data about the birds inspected would allow for accuracy of breeding numbers. Another commenter stated that all inspection and annual reports, as well as actual cases, assessments, and penalty discounts should be published on the APHIS website to increase public transparency.

As is currently the case with inspection of other species, APHIS will maintain inspection information for birds and use it to determine compliance. In addition, the USDA-Animal Care Public Search Tool<sup>7</sup> is a publicly searchable database that includes persons licensed and registered under the AWA, as well as inspection reports, enforcement actions, and research facility annual reports of animal use. We are unclear as to what assessments or discounts the commenter refers to, but we do support public transparency of APHIS animal welfare activities even as we respect the personal information and privacy of persons subject to AWA regulations.

A commenter stated that regulations should be imposed for all “commercial reseller/pet stores” to have a basic course on proper care of species and sanitation.

While businesses defined as *retail pet stores* in § 1.1 are exempt from licensing and regulation, we support efforts to educate such businesses on humane avian care and sanitation practices.

<sup>5</sup> Details of how APHIS arrived at this revised estimate are explained in the Regulatory Impact Analysis that accompanies this rule.

<sup>6</sup> See comment and survey at <https://www.regulations.gov/comment/APHIS-2020-0068-27043>.

<sup>7</sup> The USDA Animal Care Public Search Tool is available at <https://aphis-efile.force.com/PublicSearchTool/s/>.

A commenter urged APHIS to prohibit the capture of wild and exotic birds, including their eggs, for any reason.

Within the United States, the capture and possession of most birds from the wild, including eggs, is regulated by the U.S. Fish and Wildlife Service (USFWS) regulations under the Migratory Bird Treaty Act (MBTA). USDA has neither the authority to enforce provisions of the MBTA nor the authority under any other statute delegated to the Agency to enforce such a general prohibition.

A commenter stated that the proposed regulations fall short of the “Five Freedoms” of animal welfare that have been adopted worldwide.

Our statutory obligation for this rulemaking is to enforce the provisions of the AWA regarding standards for birds other than birds bred for use in research. The “Five Freedoms,” in contrast, are a set of internationally recognized animal welfare standards that advocate freedom from hunger and thirst; freedom from discomfort; freedom from pain, injury, and disease; freedom to express normal behaviors; and freedom from fear and distress. While APHIS does not derive our statutory authority with regard to animal welfare from the “Five Freedoms,” we respectfully disagree with the commenter, as the standards for birds that we have established under the provisions of the AWA address all five freedoms.

A commenter noted that quarantine practices for birds are not mentioned in the proposed rule and that a section on quarantining should be included.

While we do not use the term “quarantine” in the proposed standards for birds, we did include a provision in paragraph (c) of § 3.160, “Compatibility and separation,” stating that “[b]irds that have or are suspected of having a contagious disease or communicable condition must be separated from healthy animals that are susceptible to the disease as directed by the attending veterinarian.” We consider this requirement to constitute a quarantine under normal conditions. Furthermore, the attending veterinarian has the authority to require quarantine practices if necessary for bird health or welfare.

A commenter asked whether our estimated number of respondents under the Paperwork Reduction Act referred to respondents to the proposed rule or the estimate of licensees.

The estimated number of respondents refers to the number of licensees and registrants affected by the rule.

The same commenter stated that most activities requiring forms also require original signatures, so aviculturists must fill out the form, sign it, and store it on

paper or scan again and store electronically. The commenter added that this is onerous for small breeders and exhibitors.

Few covered activities, such as acquisition and disposition of animals, require a licensee or registrant to complete forms, and the time required to do so is minimal. Only the license application requires a signature, and those can be completed and signed electronically. Information provided on forms is important to establishing a record of animal welfare at the facility.

#### 9 CFR Part 1: Definition of Terms

In § 1.1, we proposed to revise the definitions of *carrier*, *exhibitor*, *farm animal*, *intermediate handler*, *pet animal*, *retail pet store*, and *weaned*. We also proposed adding new definitions of *bird*, *bred for use in research*, and *poultry*. These changes were intended to incorporate birds that are newly subject to licensing and regulatory standards under the AWA. The comments for each of the revisions and additions to § 1.1 are addressed below. Other terms currently defined in 9 CFR part 1 that pertain to AWA licensees or registrants in general will also pertain to persons newly licensed or registered as bird dealers, exhibitors, operators of auction sales, or carriers and intermediate handlers. For example, the term *inspector*, defined as “any person employed by the Department who is authorized to perform a function under the Act and the regulations in 9 CFR parts 1, 2, and 3,” will also pertain to inspectors performing functions related to verifying compliance with the regulations applicable to birds.

A few commenters proposed that we include additional terms to define. One commenter proposed that we add the terms “bird breeder,” “bird dealer,” and “bird exhibitor” to the regulations in order to differentiate them from mammal breeders, dealers, and exhibitors.

We are making no changes in response to the commenter, as we see no benefit for the purposes of animal welfare to create standalone definitions that differentiate breeders, dealers, and exhibitors based on species. We note, moreover, that this has not been APHIS’ practice to date with the many species of mammals that are subject to the AWA.

#### Animal

We noted in the proposed rule that, in 2002, Congress amended the definition of *animal* in the Act to specifically exclude birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, and that APHIS amended

the definition of *animal* in the regulations to be consistent with this change. The amendment means that birds bred for use in research are not covered under the AWA or its regulations.

A commenter stated that “they would like to see all official wording changed that states birds are excluded from the AWA once this regulation is passed.”

When this final rule becomes effective, we intend to make the necessary changes in APHIS guidance, such as in the Animal Care Inspection Guide, that does not currently reflect that birds not bred for use in research are regulated under the Act.

Several commenters asked if raptors would be exempt from licensing or excluded from coverage under the Act, while other commenters remarked positively upon their inclusion.

We are not excluding or exempting raptors from licensing, although we have included an exhibition exemption threshold for persons with four or fewer raptors in exhibition for any purpose and is not otherwise required to be licensed, which we discuss below. However, we have amended the definition of *animal* to exclude from coverage all activities involving falconry, which is the practice of training and using certain raptors to hunt wild animals. We made this change in response to the many commenters noting the cultural and historical agrarian roots of falconry, and because falconry falls outside of the regulated uses specified in the definition of *animal* in the Act: “[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.”

Moreover, USFWS regulations require a permit to possess raptors according to use, none of which include use as a pet. Many commenters also noted that falconers are required to serve an apprenticeship under a master falconer and undergo extensive training in caring for and handling birds as prerequisites to acquiring State and Federal falconry permits. This extensive degree of oversight further supports our interpretation of the AWA not to regulate falconry.

Along with the practice of falconry, exhibitions of birds that solely promote the art of falconry will also be excluded from regulation, much in the same way that exhibitions of animals that promote the agricultural arts are not regulated. APHIS will determine whether an exhibition qualifies as promoting falconry on a case-by-case basis.

#### Bird

We proposed to add a definition for the term *bird* as being any member of

the class Aves, excluding eggs. This definition implies that a bird is no longer an egg when the bird is fully separated from the eggshell. As we noted in the proposed rule, we considered regulating the welfare of live avian eggs but there was not enough scientific data available for each species of bird to determine the stages of egg development at which human management can cause an animal welfare concern.

One commenter stated that the proposed definition of *bird* should not require that the bird be entirely separated from the shell. The commenter explained that while it is necessary to maintain humane care of the bird after it has separated from its eggshell, there should be care in place for birds in the process of hatching but not yet separated from the shell.

We agree with the commenter that a bird in the process of hatching should be defined as a bird. For this reason, we are revising the definition of *bird* to mean “any member of the class Aves, excluding eggs, but including birds once the hatching process commences.”

Another commenter asked that if eggs are excluded from the definition, whether an egg collected from the wild and brought into captivity would not be regulated, but a bird hatched from that egg would be regulated. The commenter also asked what happens if the location of breeding of the dam and sire are unknown to the individual that obtains the unregulated egg, adding that the definition makes tracking dam and sire information for an egg a requirement, thus regulating the egg in some capacity.

An egg collected from the wild, regardless of whether it hatches, is likely to be from a migratory bird and therefore regulated under the MBTA by USFWS. We do not intend to regulate eggs, but if the egg hatches and the bird is not bred for use in research, it may be regulated under the AWA depending on its use. Information about the dam and sire of the egg is not a consideration in whether the egg is regulated.

Another commenter asked that the proposed definition of *bird* be clarified. The commenter stated that the rule does not define what birds are included in the definition and asked if it includes poultry and waterfowl or only domesticated birds.

All species of Aves are included under the definition of *bird*, although under § 2.1(a)(3) several uses of poultry and domestic waterfowl are exempt from AWA licensing requirements. Wild waterfowl are regulated under the MBTA by USFWS.

#### Bred for Use in Research

The definition of “animal” in section 2132 of the AWA means “any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or other such warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . .”. The definition in the Act excludes “birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research.” Birds *not* bred for use in research,<sup>8</sup> unless excluded for agricultural or other uses listed in the definition of “animal,” are considered to be animals under the Act.

We proposed to define the term *bred for use in research* so that the regulations are consistent with the Act and to make clear what birds are included under the term and therefore not covered under the Act or regulations. The term as we proposed it means “an animal<sup>9</sup> that is bred in captivity and is being used or is intended for use for research, teaching, testing, or experimentation purposes.” Along with “research,” we added “teaching, testing, or experimentation” to our proposed definition because the Act includes these uses as elements of research under its definition of “research facility.”

Research facilities under the AWA are required to register with APHIS and comply with the regulations, including those specific to research facilities in part 2, subpart C. Research facilities must keep records and report regularly on animal use activities, including common names and numbers of animals actually used in experiments and other research, and names and numbers of animals that the research facility is holding for use in teaching, testing, experiments, research, or surgery but has not yet used for those purposes.

A substantial number of persons commenting on our proposed definition of *bred for use in research* indicated that the definition does not clearly delineate which uses of birds would be considered bred for use in research and which would not be, and many asked how APHIS would regulate based on a facility’s intended use versus actual use of animals.

The commenters’ questions on this subject highlight an important point, in that the use of the term in the AWA

itself is ambiguous: “Bred for use in research” could be construed to mean bred with the intended use at the time of breeding being future use in research, or bred and used in research at a research facility. Several commenters pointed out that the intended use for the bird at the time of breeding may not be its ultimate use: A bird could be bred intending to be used in research and later sold or exhibited if determined to be ill-suited for research, or, alternatively, bred for purposes other than use in research and later determined to be suitable for research and used in a study or experiment.

The fact that intended use of animals can differ from actual use later on poses two areas for revision for our rule and specifically our proposed definition of *bred for use in research*.

First, the definition leaves open a broad path for breeders to evade regulation: If APHIS regulated based on intended use of a bird, a breeder could simply state that the bird is intended for research and subsequently divert it to another, regulated use, thus circumventing the regulations entirely. Second, it creates a compliance challenge for registered research facilities, which are required to follow AWA regulations specific to research facilities: At what point does a bird in their possession stop being an AWA-covered, regulated animal and begin being a bird used in research? Could a stated intent to use all birds in research serve to exclude all birds in their possession from regulation, even those not being used in research? In other words, when do the regulations apply to a particular bird?

For these reasons, we decided that the most defensible interpretation of “bred for use in research” in the AWA is that the bird is bred in captivity and used for research at a research facility. “Used for research” applies to testing, experimentation, teaching, and research, including activities such as holding, conditioning, acclimating, and preparing animals for procedures.

“Used for research” is unambiguous and makes it easier for the regulated community and APHIS to determine which birds are to be regulated and which are not, and eliminates the challenges of regulating for intended use. Accordingly, we are amending our definition of *bred for use in research* to mean “an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.” We address the comments below in light of the revised definition.

One commenter stated that the definition of *bred for use in research* in the proposed rule is unclear as to whose

<sup>8</sup> Unless otherwise excluded from the definition, birds are implicitly defined as animals in the Act and regulations by being “warm-blooded.”

<sup>9</sup> The apparent irony of referring to a bird bred for use in research as an animal excluded from the definition of “animal” is noted.

intent is at issue—the owner of the bird at the time it is bred or the ultimate user of the bird. The commenter asked us to clarify the meaning of “intended for use,” including how intent is determined and whose intent is at issue, and that we affirm that a change in intended use will not by itself result in being regulated.

We acknowledge above that intended use would be difficult for inspectors to externally verify and could expose an impermissible exception in the regulations, as breeders excluded from regulation based on their intention to breed birds for use in research could later divert the birds to a different use such as pets or exhibition. Under the revised definition, only bred and used for research, not a change in intended use, would dictate a bird’s regulatory status.

As we have noted, a bird may be intended for regulated purposes such as for exhibition, only later to be determined to be suitable for and used in research. On this point, a commenter asked if the proposed definition would include birds ultimately acquired by a laboratory for research, but that had been bred for the pet trade, such as a parrot, finch, or other bird bred as a companion animal. Another commenter asked if zebra finches bred for the pet trade but purchased by a research institution would be covered by the proposed amendment. Another commenter asked whether birds for which the intent of use has changed over their lifetime, for example, birds raised as poultry to provide eggs, but later given to a biomedical research institution for teaching or research, are to be regulated.

In keeping with our revised definition, birds that are bred in captivity and used by a research facility for research, education, or product testing, would be considered “bred for use in research.” Such birds would not be covered under the AWA or its regulations at the time that they are so used. Their intended use prior to being used for research would be immaterial for the purposes of meeting the definition.

A commenter using wild and captive-bred birds in research asked us to address their concerns as to which birds used for research would be covered under the proposed regulations: Offspring of wild birds brought into captivity and bred; birds used in research that are obtained from wholesalers who breed birds for the pet trade; offspring of birds obtained from wholesalers, and birds not bred for research but raised in captivity. The commenter added that knowing the

status of each is important as it impacts the specific standards by which birds are maintained and used with respect to identification, housing, and other points on which compliance will be determined.

Birds obtained from their natural habitat (*i.e.*, “the wild”), are covered under the AWA and do not meet the definition of *bred for use in research* because the Act requires that such birds be “bred,” which we interpret to mean hatched and raised in captivity. Moreover, possession of wild birds is likely subject to USFWS regulations. Offspring of wild birds, if hatched and bred in captivity, would not be covered under the regulations if used for research, nor would birds obtained from wholesalers and used for research. Birds not bred and used for research but raised in captivity would be regulated if used for any covered activity, but would not be regulated if used for research or exempted under other provisions.

Several commenters stated that when a wild bird is bred in captivity and intended to be used for more than one purpose, it should not be covered under the regulations so long as the primary purpose is research, teaching, testing or experimentation.

Under the revised definition of *bred for use in research*, a bird hatched and bred in captivity and used for research would not be covered. If the bird is used for any covered purpose prior to being used for research, it would be covered under the regulations until used in research.

A commenter stated that APHIS should provide guidance as to how research institutions should document which birds in their possession meet the definition of *bred for use in research*.

The revised definition of the term, described above, simplifies determining whether birds meet the definition: if they have been bred in captivity and used for research, they meet the definition.

A commenter asked whether APHIS has considered the challenges to the supply of birds used for research that this proposed regulation likely will cause, if enacted.

As birds bred for use in research are excluded under the definition of *animal* in the Act and regulations and not covered under the proposed regulations, we do not expect this rulemaking to impose regulatory pressures on the supply of birds used for research.

A commenter stated that the phrase “bred in captivity” is not species-specific, as both domesticated and wild species may be bred in captivity, and noted that wild birds bred in captivity for use in research fall under the

definition of *bred for use in research*. The commenter stated that footnote 12 in the proposal, which indicates that research facilities using wild-caught birds to conduct investigations into animal propagation activities are subject to the rule’s provisions, should be revised by removing “investigations into animal propagation” as a regulated research activity.

While offspring of wild birds hatched in captivity and bred for use in research would be excluded from regulation, birds that are captured in the wild and held for use in research would be subject to regulation, as those birds have not been bred in captivity but were taken from the wild.

A commenter asked that we consider changing wording in the proposed definition from “bred in captivity” to “born or hatched in captivity” since the breeding activity may occur at a location outside of the current owner’s knowledge.

“Bred in captivity” encompasses the act of being born or hatched in captivity under the direction of a breeder, regardless of the location where it occurs. It differentiates bred birds from wild, caught birds.

A commenter suggested that we simply delete the definition of *bred for use in research* because it includes birds bred for purposes other than research, such as teaching and testing. Another commenter agreed, stating that the definition, as worded, impermissibly broadens the scope of excluded birds beyond those simply bred for research.

We are not removing the term or its definition, which we have revised above. Under the definition of *animal* in the Act, regulated uses include the use of birds in “research, testing, and experimentation,” all of which are activities integral to research conducted at research facilities. For this reason, we consider “use in research” to be inclusive of teaching, testing, and experimentation, and their supporting activities when these activities are conducted at research facilities.

Finally, during the implementation period for this final rule, we will respond to any research facilities having questions about the regulatory status of their birds.

#### Carrier

In the regulations, *carrier* is defined as “the operator of any airline, railroad, motor carrier, shipping line, or other enterprise which is engaged in the business of transporting any animals for hire.”

We proposed to revise the definition of *carrier* to include an exemption from AWA registration for anyone

transporting a migratory bird covered under the MBTA from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities. As transport of such migratory birds is regulated by USFWS, any person transporting or otherwise possessing a migratory bird is required to obtain authorization to do so from that agency. We added this exception because APHIS and USFWS agree that the continued transport of MBTA-covered birds for rehabilitation without additional regulation is beneficial for species preservation and outweighs any potential risk to animal welfare.

One commenter expressed concern that exempting transporters of wild birds for rehabilitation purposes or release into the wild creates a loophole through which such birds may be brought into captivity. The commenter added that the exemption, as stated here and elsewhere in the regulations, must be amended to indicate that the exemption is effective only if the bird is released from human guardianship upon completion of medical care or rehabilitation.

We disagree with the commenter, as not all wild birds that are transported for rehabilitation purposes under the exemption are released into the wild. Some may need to be euthanized, and others may no longer be able to survive in the wild and must remain captive, at which point they would be regulated and covered under transportation and care standards.

Another commenter asked that the phrase “and eventual release in the wild” should be omitted from this proposed revision and from that of *intermediate handler*, as not all migratory birds requiring rehabilitation are suitable for release.

We are making no changes in response to the comment as removing the reference to release also removes the exemption for any transporter moving a bird to a location where it is to be released.

A commenter recommended that if APHIS retains the wild bird rehabilitation exemption, it should clarify in the rule and regulatory text that “rehabilitation” is a regulated term and should also provide definitions and guidelines consistent with or stricter than USFWS guidelines for rehabilitation permits.

We are taking no action in response to the commenter’s request. The AWA does not regulate rehabilitation activity or issue rehabilitation permits, and our use of the term “rehabilitation” is a reference to USFWS’s issuance of rehabilitation permits. The conditions

under which USFWS issues such permits are found in 50 CFR 21.76. The definitions of *carrier* and *intermediate handler* thus refer to rehabilitation only in the context of transporting wild birds covered under MBTA regulations and under the USFWS’s understanding of that term.

#### Dealer

Although we proposed no changes to the current definition of *dealer* in § 1.1 of the AWA regulations, a commenter requested that APHIS expressly exclude breeders and purchasers of racing pigeons from the definition.

We see no need to provide such an exclusion from the definition, as in the *exhibitor* definition below we already exempt this activity from regulation on grounds of being historically associated with the agricultural arts and sciences.

#### Exhibitor

We proposed to revise the definition of *exhibitor* to include persons who exhibit birds not bred for use in research. An *exhibitor* is currently defined as any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. Excluded from the term, and therefore not regulated under the AWA regulations, are organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

As with horse and dog races, and purebred dog and cat shows, we noted in the proposal that we consider pigeon races and bird fancier shows to be exhibitions rooted historically in the advancement of agricultural arts and sciences. Animals exhibited or intended for exhibit in agricultural exhibitions that USDA has determined are intended to advance agricultural arts and sciences are not covered under the AWA. Therefore, we proposed amending the definition of *exhibitor* by adding pigeon races and bird fancier shows to the list of exhibitions excluded from coverage. In addition, for clarity, we added free-flighted bird shows as an illustrative example of an animal exhibition that is included under the definition of *exhibitor*, although persons who free-fly

their birds solely for their own use or enjoyment, without compensation, are not required to obtain a license for that activity.

A few commenters asked that we not exclude pigeon races and bird fancier shows as protected exhibitions, with one stating that pigeon racing is an exhibition activity with animal welfare and disease risks and should be regulated, and adding that it is difficult to think of pigeon races as advancing agricultural arts and sciences. Similarly, another commenter disagreed with our position that pigeon racing has agricultural origins, noting that the sport is instead rooted in “the use of homing pigeons for non-agricultural activities since ancient times,” and added that homing pigeons used in racing are not farm-type animals. The commenter also disagreed with our reference to horse and dog shows as examples of other activities similar to pigeon racing based in agriculture, noting that horse and dog racing comprise a separate exclusion under the definition of *exhibitor* and should not necessarily be used as a basis for an agriculture-based exclusion.

We are making no changes in response to the commenters’ request. Under the definition of *exhibitor* in the AWA, the USDA Secretary has the authority to determine whether exhibitions are intended to advance agricultural arts and sciences and to exclude them from regulation on that basis. While pigeons are not typically kept on farms as a food animal, the exemption in the AWA’s definition of *exhibitor* is thus broader than mere use of an animal on the farm. We also disagree that pigeon racing should be considered aligned with the use of homing pigeons, and maintain that the act of racing pigeons has a distinct agricultural heritage. Staged agricultural exhibitions of racing pigeons have occurred since the 1800s. Moreover, these have occurred without a demonstrated history of spread of disease or lapses in animal welfare.

Because we are excluding falconry from the definition of *animal* in § 1.1, we are also amending the proposed definition of *exhibitor* to also exclude falconry, as we received many comments noting that falconry birds are not typically used under any of the uses under the definition of *animal* in the Act: “[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.” Several commenters noted that falconers rarely exhibit their birds for purposes outside the practice of falconry. Commenters also cited the historical and agrarian roots of falconry, and the fact that falconers are already regulated, required

to be sponsored under a master falconer, undergo extensive training, and demonstrate competence with controlling their birds. They must also hold both State and Federal permits, and Tribal permits as applicable.

A commenter stated that APHIS should clarify the proposed regulations with regard to the scope of exhibitor facilities to be regulated, as it is unclear whether they apply to wildlife sanctuaries, which also exhibit birds for commercial and fund-raising purposes. The commenter added that if APHIS is unable to implement new regulations for all such facilities, then it should withdraw any new regulations until it can do so.

Captive birds in a wildlife sanctuary that are exhibited for the purposes described by the commenter would be regulated. Birds undergoing rehabilitation would be exempt from regulation provided they are not exhibited and physically separated at the facility from exhibited birds. Without separation, the birds undergoing rehabilitation could affect the health or well-being of the exhibited birds. APHIS intends to implement and enforce the regulations for all such facilities covered under the AWA.

A commenter noted that educational exhibits developed for a primary purpose other than animal exhibition may “incidentally” include birds, *e.g.*, an indoor arboretum in which wild birds are present, or in which a few birds are kept, and the birds themselves are not being exhibited but are in an exhibit of an entirely different nature. The commenter encouraged APHIS to consider revising the definition of *exhibitor* by adding an exclusion for such incidental exhibits with birds.

We are making no exclusions from the definition of *exhibitor* as requested by the commenter because one is not necessary. If wild birds inadvertently enter an exhibit, they are not exhibited birds and efforts should be made to remove them if they pose a threat to the welfare of covered animals in the exhibit.

A commenter asked us to clarify whether the definition of *exhibitor* includes individuals on social media, or “influencers,” who present their birds to the public through social media platforms and receive compensation. The commenter opined that influencers are covered under the proposed standards but is unclear if APHIS intends to apply the regulations to these persons.

Birds that would be covered under the Act if exhibited live would also be covered if exhibited via social media. Any exemptions for online exhibitors

would be the same ones available to persons exhibiting animals live.

A commenter objected to the inclusion of free-flighted bird shows under the definition of *exhibitor* and requested that APHIS exempt individuals who free-fly personal pet birds and members of free-flying clubs who fly their birds in public. Similarly, another commenter asked us to provide examples of free-flighted shows covered under the regulations and stated that free-flighted birds should not be subject to licensing unless someone has more than eight birds that fly at one time. Another commenter asked that the definition of *exhibitor* be amended to exempt the use of raptors protected under the MBTA for educational uses, particularly free-flighted bird shows.

Falconers and others who free-fly birds for their personal use and enjoyment and not for exhibition purposes are not covered under the regulations. Persons who exhibit birds to the public for any purpose and who are not otherwise exempted are subject to AWA licensing.

#### Pet Animal

Under the current regulations, *pet animal* is defined as “any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, and hamsters. This term excludes exotic animals and wild animals.” We proposed including birds under the definition of *pet animal* and amending the illustrative list of animals contained in the definition by adding examples of pet birds. We proposed that such birds include, but are not limited to parrots, canaries, cockatiels, lovebirds, and budgerigar parakeets. We listed these particular birds because they constitute the majority of birds bought and sold as pets in the United States and are thus a good illustrative example of what constitutes a pet bird.

A few commenters asked that we amend the list of birds in the definition because cockatiels, lovebirds, and budgerigar parakeets are all types of parrots. One commenter suggested that parrots, canaries, finches, and doves would serve as better examples of pet birds.

The list we provided of pet birds is intended for illustrative purposes, and we do not intend it to be exhaustive. We acknowledge that birds listed by the commenter can be kept as pets but see no need to add them to the definition.

Numerous commenters disagreed with our proposed inclusion of birds under the definition of *pet animal*. Many commenters expressed concern that if such birds are defined as pet

animals, they would not receive protection, as retail pet stores could confine and sell them without obtaining a license and that, for this reason, parrots and other bird species should never be kept or sold as pets.

The inclusion of birds in the definition of *pet animal* will only improve the welfare status of birds sold as pets at retail, as many currently unlicensed outlets already selling birds as pets will need to become licensed. Although a retail outlet that sells birds meeting the definition of *pet animal* may meet the definition of a *retail pet store* in § 1.1 and thus be exempt from licensing, that outlet can only remain exempt if all such animals are sold in face-to-face transactions in which the seller, buyer, and animal are physically present at the place of business or residence, which affords a measure of protective public oversight. Retail outlets selling any animal via remote or online transactions and not otherwise eligible for *de minimis* or other exemptions are subject to APHIS licensing and inspection. Moreover, outlets selling wild or exotic animals as defined in § 1.1 are not eligible for the retail pet store licensing exemption.

Several commenters asked that we define *pet animal* such that all bird species are protected as wild and exotic animals. A commenter stated that no explanation is given for why non-native, non-domesticated birds are considered exotic or wild, and another asked that we make a clearer distinction between wild birds and various domestic species. Another commenter who disagreed with the definition of *pet animal* stated that animals commonly kept on display or traded as pets are often indistinguishable from their wild counterparts—they are native species of other countries, and, in some cases, of the United States, and meet the definition of *exotic animal*, or *wild animal*, under the Act.

We note that many mammals that meet the definition of *pet animal*, such as hamsters, were once considered exotic and wild, and that parakeets and several other species of pet birds were similarly regarded. Accordingly, the fact that a bird species that was once wild or non-native is now sold as a pet should not preclude it from being considered a *pet animal*. While we proposed amending the definition of *pet animal* by adding “birds” and listing examples of birds commonly kept as pets, we emphasize that birds meeting the definition of *exotic animal* or *wild animal* as currently defined in § 1.1 will continue to be excluded from the definition of *pet animal* and would thus be subject to regulation. Any retail

outlets selling exotic or wild birds will require APHIS licensing and inspections. Furthermore, trade in native migratory wild birds is prohibited under the MBTA without prior authorization from the USFWS. Pet stores that are uncertain whether they sell pet birds or wild or exotic birds may contact APHIS during the implementation period after this rule becomes effective but before it is applied to regulated entities for guidance.

One commenter noted that a parrot is an exotic species and not a pet, and that genetically and behaviorally they cannot be considered to be a domesticated species.

A distinction exists between birds that have historically been used as pets, including some species of parrots, and birds that are wild or exotic animals as defined under those terms. On this point, we acknowledge that some types of parrots are not commonly kept as pets in family households in the United States and may fall under the definition of *exotic animal*. Accordingly, we are removing “parrots” from the illustrative list in the definition, although some parrots will still be defined as a *pet animal* if they meet the definition of *pet animal*. In short, while not all parrots are *pet animals*, some are.

A commenter stated that USDA has failed to provide an illustrative list of exotic birds, despite having historically done so for other species.

We do not intend to develop a list of exotic species of birds. However, we are drafting a list of birds commonly kept as pets that we intend to make available prior to the implementation period for this rule. We will offer guidance to new and current licensees as to the regulatory status of their bird species if they have questions during that time.

A commenter stated that raptors as classified by APHIS are either “wild animals” or “exotic animals” depending on the raptor’s native origin and do not fall under the *pet animal* definition, noting there is no raptor pet trade. Similarly, a commenter asked that we revise the definition of *pet animal* to explicitly state that it does not include birds protected under the MBTA, whether of wild or captive origin.

We agree that raptors and other birds protected under the MBTA do not meet the definition of *pet animal*. However we do not find it necessary to revise the definition to exclude them because the absence of a raptor pet trade suggests that they are not being sold as pets. Furthermore, as we discuss in this document, falconry is not a use of birds that is covered under the AWA.

A commenter requested that APHIS specifically exclude racing pigeons from the definition of *pet animal*.

We are making no change to the definition in response to the commenter’s request, as racing pigeons do not meet the definition of *pet animal* for reasons previously articulated.

#### Exotic Animal

*Exotic animal* in the current regulations is defined in part as an animal that is “native to a foreign country or of foreign origin or character, is not native to the United States, or was introduced from abroad.” While some birds that were introduced from abroad meet the definition of *pet animal*, as discussed above, exotic and wild animals are excluded from the definition of *pet animal*.

In proposing to regulate birds not bred for use in research, we noted that such birds would be subject to all applicable regulations in 9 CFR parts 1 and 2. Accordingly, birds meeting the definition of *exotic animal* would be defined and regulated as such.

A commenter opined that this definition would consider as “exotic” certain species of birds such as parakeets, canaries, and zebra finches that were not initially native to the United States, but are now commonly kept as pets or used in research and no longer exotic in the normal sense of the word. The commenter encouraged APHIS to review the definition of *exotic animal* and exclude species of birds that were introduced into the United States long ago and are now commonly kept in captivity.

The commenter is correct in indicating that the definition of *exotic animal* applies to many animals that were introduced into the United States long ago and now kept in captivity or as pets. However, the types of birds that the commenter asked that we exclude from the definition of *exotic animal* are already excluded from that definition by virtue of their being included under the revised *pet animal* definition. The terms *pet animal* and *exotic animal* are thus used in a mutually exclusive sense within the regulations: A *pet animal* cannot be an *exotic animal* and vice versa. For this reason, we are making no changes to the definition of *exotic animal* as requested by the commenter. However, the commenter does raise a significant point. As with parakeets and cockatiels, other birds now considered to be exotic could, over time, be routinely sold as pets and meet the definition of *pet animal*. We will monitor the pet market in birds to identify exotic species that are being marketed as pet birds and after notice is

provided, ensure that they are included under the proper definition.

#### Farm Animal; Poultry

Currently, § 1.1 defines a *farm animal* as “any domestic species of cattle, sheep, swine, goats, llamas, or horses, which are normally and have historically, been kept and raised on farms in the United States, and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, and chinchilla, when they are used solely for purposes of meat or fur, and animals such as horses and llamas when used solely as work and pack animals.” *Poultry* is not currently defined in the AWA regulations.

We proposed several changes to the definition of *farm animal* to ensure appropriate coverage for birds. Domestic species of poultry have historically been kept and raised on farms in the United States and used for food or fiber or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. Therefore, we proposed amending this definition to include such poultry. This would make the definition of *farm animal* consistent with the definition of *animal*, which lists poultry as a kind of farm animal that is exempt from coverage when used or intended for use as food or fiber, for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber.

A commenter stated that in order to eliminate any misinterpretations we should revise the definition of *farm animal* to specifically identify chickens, as well as chicken breeder flocks and parent flocks used in broiler chicken production. The commenter recommended adding “or breeding of food-producing animals or their progenitors” as one of the listed uses that qualifies animals as *farm animals* in the definition.

We see no need to revise the proposed definition of *farm animal* to include chickens, as they are specifically listed under *poultry* and poultry are included under the definition of *farm animal*. Moreover, the use of broiler chickens as poultry used or intended for use as food already excludes them from coverage by virtue of their being excluded from the definition of *animal* in § 1.1.

We also proposed to revise *farm animal* to include animals when used solely for their feathers or skins. Our proposed addition of feathers accounted for morphological differences between

birds and other animals and is the avian equivalent of farm animals excluded from regulation when used solely for the purposes of fur. The addition of skins to the list reflects the common practice of using ostrich and other skins of birds for leathers. We also proposed adding ratites (e.g., ostrich, rhea, and emu) to the illustrative list of animals that are included in this term when used solely for purposes of meat, fur, feathers, or skins.

In addition to these changes to the definition of *farm animal*, we proposed adding a separate definition of the term *poultry* to the AWA regulations to clarify what birds are considered poultry. This term is defined as any species of chickens, turkeys, swans, partridges, guinea fowl, and pea fowl; ducks, geese, pigeons, and doves; grouse, pheasants, and quail.

A commenter stated that poultry obtained from commercial production for research, teaching, and education fall outside the scope of this proposed rule and asked that we confirm that these poultry are not covered.

Such poultry would be considered bred for use in research and not subject to the regulations.

A commenter requested that we specifically clarify that racing pigeons meet the definition of *farm animal*.

Pigeons used for food or feathers are poultry and would be considered farm animals not covered under the regulations. As discussed above, racing pigeons are not covered under the regulations because we consider them to be used in an agricultural context, and animals used in such a manner are excluded from regulation.

Another commenter asked that feral pigeons receive protection under the AWA regulations.

Feral pigeons by definition live in a wild state and are not covered under the AWA.

A commenter asked if farmed ostrich, rhea, and emu will be considered domestic poultry under the proposed regulations.

We do not consider ratites to be poultry, but under the definition of *animal* in § 1.1, farm animals used or intended for use as food or fiber, including farmed ratites, are excluded from AWA regulation.

Another commenter stated that gamefowl farms should be exempt from regulation as such birds cannot be housed or transported together in a social environment, noting that the spurs of roosters contain a bacteria that can cause a septic infection.

Provided that the farmed gamefowl are used or intended for use as food or feathers, or for improving animal

nutrition, breeding, management, or production efficiency, or for improving the quality of food or feathers, the birds are excluded from coverage under the Act.

A commenter asked if poultry are exempt from regulation under the “food and fiber” provision if they are used as feeder animals for other species.

If poultry are being bred and used as food for other animals, they are exempt under this provision.

The commenter also asked if a group of grouse not meant for exhibition and being managed as a breeding colony would be exempt from regulation, as one of the exempted activities listed under *farm animal* (in which poultry will be included) is breeding.

If the grouse breeding colony and offspring are used or intended for use as food or feathers, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or feathers, the colony and offspring are exempt from regulation.

#### Intermediate Handler

In the regulations, an *intermediate handler* means any person, including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction sale, or a carrier), who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce.

We proposed amending the definition of *intermediate handler* to include an exemption from AWA licensing for anyone transporting a migratory bird from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities. Any person intending to transport or otherwise possess a migratory bird covered under the MBTA is currently required to obtain authorization from USFWS.

As we proposed the same amendment to *carrier*, the comments on this provision addressed both terms and thus are discussed above under the definition of *carrier*.

#### Retail Pet Store

Currently, a *retail pet store* is defined as “a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the

following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species.”

The current definition also excludes establishments or persons conducting certain activities, meaning that these establishments do not meet the *retail pet store* definition and are therefore not exempt from licensing. These exclusions from the definition are as follows:

- Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;
- Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals (except birds), such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;
- Any establishment or person selling warmblooded animals (except birds, and laboratory rats and mice) for research or exhibition purposes;
- Any establishment wholesaling any animals (except birds, rats, and mice); and
- Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

We proposed to revise the definition of *retail pet store* by removing the parenthetical exceptions for birds from this list of exclusions. As we noted in the proposal, these parenthetical exceptions exist as a result of the historical exclusion of all birds from the definition of *animal* in § 1.1 of the regulations, but they are now inconsistent with the current definition of *animal* (under which birds not bred for use in research are included).

A substantial number of commenters requested that we revise the definition of *retail pet store* to ensure that all wild and exotic bird species receive protection. In support of this request, commenters stated that many bird species are wild and exotic and have not been domesticated like dogs and cats, and that pet shops that sell birds should be licensed.

We disagree with the commenters that pet stores should need to be licensed simply because they sell birds. As we noted above in our response to comments on our proposed changes to the *pet animal* definition, several species of birds have historically been used as household pets, including some species of parrots. While these birds were initially exotic when introduced

into the pet trade, they have become widely regarded as pet animals today, and we see no reason to consider them distinct from other pet animals. Conversely, we agree with the commenters that many species of birds are wild or exotic animals, and should not be considered pets. In this regard, we believe that our proposed definition of *retail pet store* actually provides additional oversight protection for such birds, as businesses selling any bird meeting the definition of *exotic animal* or *wild animal*<sup>10</sup> as currently defined in § 1.1 would not be eligible for the *retail pet store* exemption and require licensing. The definition we proposed also excludes businesses that sell pets in transactions without the buyer being physically present to purchase or take custody of the animal. Currently unregulated businesses already selling wild or exotic birds, or birds as pets online without the buyer being physically present at sale, will need to become licensed or seek an exemption.

A commenter stated that because of their longevity, many parrots are abandoned by their owners and end up in rescue organizations and sanctuaries. The commenter asked that we revise the definition of *retail pet store* to explicitly include protections for long-lived exotic birds such as parrots that are being bred and sold at retail pet stores.

As the definition of *retail pet store* is intended for persons or businesses physically having pet animals for sale, revising the definition of *retail pet store* would not address the commenter's concern about abandoned parrots because they would no longer be in the retail pet store's possession. We note that birds at rescue organizations and sanctuaries that are exhibited or sold receive protection as they are covered under the AWA.

#### Weaned

Currently, § 1.1 defines *weaned* to mean that "an animal has become accustomed to take solid food and has so done, without nursing, for a period of at least 5 days." We proposed to amend this definition to make it applicable to birds by adding that a bird is weaned if it has become accustomed to take food and has so done, without supplemental feeding from a parent or human caretaker. Signs that a bird or other animal has become accustomed to take food include the animal's ability to maintain a constant body weight during weaning.

A commenter stated that many falconers choose to train imprinted

birds that they have raised themselves from a young age and that 5 days is a long time in the development of an imprint. The commenter noted that approximately a fifth of falconers in their organization have received young birds from breeders via commercial shipment that did not meet this 5-day test, and that a more reasonable definition for raptors would be eating unassisted for 2 days.

Practices associated with the sport of falconry, including the activity described by the commenter, are not among the uses covered under the AWA.

Another commenter disagreed with the definition of *weaned*, noting that some species feed their young well after they are able to feed and fend for themselves. The commenter added that "constant body weight" implies unchanging weight, which is unreasonable, and suggested that "stable" be used instead. Similarly, a commenter asked that APHIS amend the definition to remove the requirement that a bird maintains its weight during this period.

Although some species may continue to feed their young well after the young can feed and fend for themselves, we consider the offspring as being weaned. In the proposed definition, we indicated that maintaining a constant body weight is only included among other possible signs that a bird has become accustomed to take food during weaning. We agree with commenters that "weaned" does not necessarily mean that the bird has stopped growing or that its body weight is constant and are removing the last sentence referring to signs of weaning.

#### Other Applicable Terms and Definitions in § 1.1

Finally, persons affected by this rule would be subject to other terms and definitions in § 1.1 that we did not add to the regulations or revise, as applicable. Those terms, which include *commerce*, *transporting vehicle*, and *zoo*, are germane to many or all AWA-related activities.

#### Regulations for AWA Licensees and Registrants in 9 CFR Part 2

In addition to the amendments we proposed making to the regulations, all applicable licensing, registration, research, and inspection requirements currently in 9 CFR part 2 for licensees and registrants will apply to all persons newly regulated as a result of this rulemaking.

#### 9 CFR Part 2, Subpart A: Licensing

Under § 2.1(a)(1) in subpart A, Licensing, persons who plan to

maintain and use animals covered under the AWA regulations and who are not otherwise exempt from licensing are required to submit a license application provided by APHIS. Information requested by the application includes the address of each facility or facilities; maximum number of animals on hand at any one time during the period of licensure; types of animals maintained; and disclosure of any no contest plea or finding of violation of Federal, State, or local laws or regulations pertaining to animal cruelty or the transportation, ownership, neglect, or welfare of animals. The application must be submitted to APHIS-Animal Care, along with a \$120 licensing fee as indicated in § 2.1(a)(2). Licenses are valid for 3 years. Persons seeking a license must also agree to a prelicensing inspection demonstrating that his or her location(s) and any animals, facilities, vehicles, equipment, or other locations used or intended for use in the business comply with the Act and the regulations and standards.

A commenter stated that license fees should be adjusted by the Secretary in accordance with § 2153 of the Act such that the value of the fees also supports bird inspection and rehabilitation processes.

Section 2153 states that "[T]he Secretary shall charge, assess, and cause to be collected reasonable fees for licenses issued. Such fees shall be adjusted on an equitable basis taking into consideration the type and nature of the operations to be licensed. . . ." These fees are not user fees and are not linked to recovering the cost of licensing, inspection, enforcement, or other APHIS services, but rather set at a level by APHIS to ensure that the fees are reasonable based on the classes of persons and businesses regulated. As to rehabilitation processes, we note that APHIS does not regulate animal rehabilitation activities.

We received numerous comments in which persons expressed concerns about the prelicensing inspection requirement. These comments, discussed below, include concerns about APHIS having the resources to adequately conduct inspections, as well as concerns about the inspection disrupting facility activities and violating privacy.

Some commenters questioned APHIS' ability to conduct equitable, comprehensive inspections and enforce the proposed regulations without additional human or financial resources.

We estimate in the revised economic analysis prepared for this final rule that there will be between 5,975 to 7,913 newly regulated entities maintaining

<sup>10</sup> Moreover, nearly all wild birds in the United States are regulated by USFWS under the MBTA.

birds for covered uses. While APHIS will need to allocate resources to conducting prelicensing inspections for new licensees, we are confident based on our long experience with inspections that we can perform these activities effectively. Moreover, our adoption of a 1-year delayed implementation of the rule's provisions allows us to better manage prelicensing inspections. APHIS also uses a risk-based inspection system<sup>11</sup> that uses several objective criteria, including but not limited to past compliance history, to determine the minimum inspection frequency at each licensed and registered facility. Facilities meeting the criteria for low-frequency intervals are subject to inspection once every year, or every 2–3 years, or in some cases only when we receive a complaint. Facilities determined to require high-frequency inspections are subject to inspection as often as every 3 months. Those in the middle are inspected about once per year. Registered research facilities are inspected at least once per year, as required by the AWA.

Some commenters stated that the inspection of home-based businesses was an unconstitutional invasion of privacy, and that APHIS is not authorized to conduct such inspections.

While the U.S. Constitution affords rights to persons against unlawful search and seizure in their homes, § 2146 of the AWA explicitly authorizes inspections of licensees to determine compliance with the regulations. However, such inspections are limited to only those areas that impact the well-being of the animals, such as areas where food and medicine for the animals are stored. In other words, only the “business” part of a residence would be inspected for compliance with animal welfare standards, and APHIS inspectors are trained to observe and respect this distinction.

Some commenters raised biosecurity concerns about inspectors carrying pathogens into the facility. A few commenters stated that weekly PCR testing and vaccination requirements for COVID-19 should be considered for APHIS inspectors. Some stated that inspectors should be required to wear protective clothing to reduce the risk of disease transmission.

As is currently the practice, APHIS inspectors will take all biosecurity precautions sufficient to minimize introduction of human- or bird-based pathogens into facilities.

Several commenters stated that their birds are sensitive to strangers during breeding and nesting periods and that the presence of an inspector could cause birds to injure themselves or their nestlings. One such commenter stated that minor stresses, like strangers walking into the aviary and being seen or heard by the birds, can lead to the death of the female and offspring.

Another commenter stated that psittaculture, the captive breeding and conservation of rare parrots, would be harmed by inspectors disrupting nesting and breeding activities. Some commenters called for all breeding facilities to be exempt from regulation, as disruption of breeding resulting from inspections could cause substantial costs to the breeder. On the other hand, some commenters stated that nesting and breeding concerns should not impede compliance inspections, and others noted that remote camera technology can allow inspectors to view birds without entering the nesting area.

We acknowledge commenter concerns regarding the presence of strangers during periods of breeding while affirming the importance of determining compliance through visual inspection. APHIS will not impose any requirements that will interfere with a species' natural behavior when it comes to nesting and breeding. APHIS will work with facilities to find approaches that accommodate these concerns while ensuring that inspections can occur at appropriate times and possibly with the assistance of technology, if appropriate. As we note above, inspections in such situations would not be random but would be based on the facility's record of compliance and other objective criteria we use to determine inspection frequency.

One commenter stated that, in addition to demonstrating compliance through a prelicensing inspection, license applicants should also have to demonstrate experience with the taxa they are caring for as measured by the number of years they have been working with the taxa, by working with a mentor or outside expert who is able to provide knowledge-based skills, or by an industry certification. Similarly, another commenter stated that some form of experience or knowledge-based skills should be expected, as no level of experience is required to acquire the USDA license.

We agree that an applicant having the ability to adequately care for their particular types of birds is a prerequisite for obtaining a license. However, APHIS has other ways of gauging this ability through the inspection without requiring a certain number of years of

experience or an industry certification. During the prelicensing inspection, inspectors can see that a well-maintained facility indicates knowledge and application of professional standards on the part of the applicant. Inspectors also ask questions and engage in dialogue to gauge an applicant's ability to ensure adequate care for its animals.

A commenter asked if there will be a compliance period for newly regulated entities, and what will happen to birds of persons not in compliance.

APHIS will establish an implementation period of 180 days after date of publication for persons already licensed for mammals and using birds, and a period of 365 days for newly licensed persons using birds for regulated purposes. During these periods, APHIS will provide guidance to facilities to help them come into compliance with the regulations to ensure the birds' health and well-being. If inspectors discover conditions or records that are not in compliance with the regulations, APHIS-Animal Care establishes a deadline for correcting these items and provides it in the inspection report. If the noncompliance is a repeat noncompliance for which the original correction deadline has already passed, no additional time is given for corrections. Inspectors are required to reinspect any facilities where areas of noncompliance were found that have, or are likely to have, a serious impact on the well-being of the animals. In cases of unrelieved suffering, APHIS may confiscate the animals or arrange for their placement elsewhere.

Some commenters raised questions about the qualifications of APHIS inspectors and whether such inspectors would have the avian expertise needed to evaluate facilities housing birds. One stated that APHIS inspectors lack the skills necessary for assessing avian health and husbandry, such as knowledge of caging, flocking birds, and housing different bird species for compatibility. Some recommended that only veterinarians with avian expertise should conduct inspections of facilities, as they have the education and experience necessary to inspect birds. Another commenter suggested that we require veterinary oversight in lieu of inspections, adding that if a qualified veterinarian is not available, entities could use an avian-specific regulatory agency such as the Model Avicultural Program to assist in qualifying facilities.

All APHIS officials conducting compliance inspections will have the knowledge and resources needed to determine whether facilities are meeting the standards, with regular trainings to

<sup>11</sup> See more about the risk-based inspection process at [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct\\_awa\\_risk\\_based\\_inspection\\_system](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/awa/ct_awa_risk_based_inspection_system).

inform them of emerging developments in aviculture. This can be accomplished without a specific prior background in avian health. Veterinary oversight and the Model Avicultural Program alone would provide some level of humane care, but are not sufficient surrogates for Federal inspection of the facilities. For example, as we mentioned in the proposed rule, the Program addressed some, but not all, of our proposed standards.

A commenter asked us to include a provision to have care for birds be a point of evaluation, and not just a category investigated on the basis of a complaint.

Inspections are not conducted only in response to complaints, although we do investigate complaints as they are received. APHIS requires a prelicensing inspection as a condition of licensing as well as subsequent compliance inspections of facilities based on level of risk, with more frequent and in-depth inspections at facilities posing a higher risk of animal welfare concerns.

#### *AWA Licensing Requirements and Birds Covered Under the Migratory Bird Treaty Act*

The MBTA (16 U.S.C. 703–712), passed by Congress in 1918, implements a series of treaties between the United States and Canada, Mexico, Japan, and Russia intended to protect and sustain populations of migratory birds. Under regulations developed and enforced by USFWS, the MBTA prohibits the take (including killing, capturing, selling, trading, and transport) of protected migratory bird species without prior authorization.<sup>12</sup> With some exceptions,<sup>13</sup> any activity involving the use, possession, or transport of a migratory bird, or the parts, nests, or eggs of such birds, requires a USFWS permit specific to the activity. Types of migratory bird permits and their provisions, listed in 50 CFR part 21, subpart C, include but are not limited to those intended for import or export, scientific collecting, falconry, raptor propagation, and rehabilitation.<sup>14</sup>

As we noted in the proposal, the 2002 amendments Congress made to the Act subjected birds not bred for use in research to regulation, and did so without distinguishing migratory birds

from other birds. While migratory birds are currently covered under the MBTA and its regulations, the MBTA's primary objective is to sustain and protect native populations of such birds rather than to establish specific standards of care and humane treatment for birds in captivity. In other words, the MBTA was drafted with the intention of preventing poaching and overhunting of migratory birds and does not include specific animal welfare requirements.

In the proposal, we invited comments on ways that we may reduce regulatory burden on persons who could be potentially regulated by both APHIS and USFWS.

One commenter asked us to interpret all migratory birds as wild animals to be consistent with a “plain reading” interpretation of the definition of *wild animal* in 9 CFR 1.1.

We are taking no action in response to the commenter's request. The regulations define *wild animal* as “any animal which is now or historically has been found in the wild, or in the wild state, within the boundaries of the United States, its territories, or possessions,” whereas some migratory birds travel beyond those boundaries. Moreover, certain birds sold in the pet trade (*e.g.*, cockatiels) are migratory, and the commenter's suggestion would lead to confusion about whether such animals, when sold as pets, are or are not regulated.

The same commenter also requested that we interpret migratory birds to not qualify as “small,” so that migratory birds would not be excepted from licensing requirements under 9 CFR 2.1(a)(3)(iii). The commenter added that while the term “small” implies a meaning of size, in USDA practice it is used to indicate the need for specialized care in captivity.

Contextually, the word “small” is used in § 2.1(a)(3)(iii) to refer only to mammals. Birds are not mammals.

One commenter stated that while Federal authority over migratory birds remains under the MBTA, it does not replace or prohibit welfare-based regulations for migratory birds in captivity. The commenter added that the MBTA was specifically enacted to address hunting of migratory birds, not their care and conditions in captivity, and covers conduct that is not addressed by the AWA, just as the AWA covers conduct not covered by the MBTA. The commenter reasoned from this that there is no conflict in having both the USFWS and APHIS regulate the treatment of migratory birds. Another commenter stated that rather than drafting regulations with the intent to “minimize dual regulation” and

potentially carve out migratory birds from AWA protections, USDA should maximize animal welfare. The commenter noted that the AWA and MBTA have distinct missions and that other Federal regulatory overlaps have not prevented USDA from promulgating robust standards for the care and use of animals—the commenter cited the interplay between the AWA and Endangered Species Act as one such example.

We agree with the commenters that both agencies may regulate migratory birds with minimal regulatory overlap, although we have no intention of exercising duplicative oversight of handlers and transporters. Unlike the MBTA, which addresses the protection of free and captive migratory birds, the focus of the AWA is on the standards of care, use, and welfare of regulated birds. As the commenter noted, many mammals currently regulated under the AWA are also regulated, for different purposes, under the Endangered Species Act and statutes of other Federal Agencies.

One commenter requested that APHIS communicate not only with USFWS but also the U.S. Geological Survey's (USGS) Bird Banding Laboratory and work with both agencies to reduce the amount of regulatory overlap. The commenter noted that the USGS issues bird banding permits and data needs to be submitted to USGS, State agencies, and the relevant Institutional Animal Care and Use Committee (IACUC) in fulfillment of each of those units' permits, which is a heavy administrative burden for bird banders and researchers. The commenter suggested that APHIS rely on USGS oversight for marking and tagging, and on USFWS oversight for waterfowl and endangered birds.

We appreciate the commenter's suggestion to work with USGS and USFWS in identifying birds. We will consider the suggestion and, if working with USGS allows us to continue meeting our requirements for individual identification while reducing burden on bird banders and researchers, we will consider developing a strategy to do so.

A commenter stated that it is unclear how birds that are part of a cooperative Endangered Species Act recovery and reintroduction program will be regulated under the proposed regulations.

Wild birds used strictly for the purpose described by the commenter are not regulated under the AWA.

A commenter recommended that USFWS continue to regulate migratory birds taken from or returned to the wild so that USFWS authorization would be

<sup>12</sup> A list of migratory birds protected under the MBTA can be found at <https://ecfr.federalregister.gov/current/title-50/chapter-I/subchapter-B/part-10/subpart-B/section-10.13>.

<sup>13</sup> See 50 CFR 21.12, “General exceptions to permit requirements.” Exceptions address handling and transport of migratory birds by certain persons and institutions for the purpose of ensuring their health and safety.

<sup>14</sup> Regulations and permits specific to bald and golden eagles are located in 50 CFR part 22.

required to authorize the use of MBTA-protected birds that are wild-bred (*e.g.*, not captive-bred).

USFWS will continue to regulate such species as is currently the case, and APHIS will enforce AWA regulations as applicable.

#### *AWA Licensing and Raptors*

Raptors that are native to the United States or its territories are protected and regulated as migratory birds under the MBTA, with bald and golden eagles receiving additional protections under the Bald and Golden Eagle Protection Act (16 U.S.C. 668–668c). The MBTA prohibits taking, possessing, purchasing, bartering, selling, or offering to purchase, barter, or sell raptors unless allowed by a permit issued by the USFWS.<sup>15</sup> The MBTA regulations in 50 CFR part 21 contain specific permit provisions for raptors used for falconry, education, abatement, propagation, banding, scientific collection, and those in rehabilitation. Facilities and care requirements are listed in § 21.82(d), and include general provisions for shelter from environmental conditions, predators, and domestic animals, as well as requirements for watering, perches, tethering, and indoor and outdoor enclosures. As we have noted, the MBTA includes no specific animal welfare requirements.

We received a large number of comments from persons concerned about the status of raptors under the proposed standards. The comments were consistent with those received during the listening sessions, in which many falconers and other interested persons stated that USFWS care, training, and handling standards for raptors meet or exceed those proposed by APHIS, and that many States already regulate falconry and raptor enterprises. Some commenters expressed uncertainty about which situations would require raptors to be subject to AWA regulations, and how the proposed standards would align with current standards of care and best practices. Many commenters expressed concerns that any new standards and regulations for captive raptor breeders would be burdensome and duplicative, noting that persons who enter captive-bred raptors in commerce, as well as those who rehabilitate and keep captive

birds used in exhibition for education, are already highly regulated through both USFWS and State agencies. In addition, many noted a long history of successful self-regulation among falconers. Accordingly, most persons submitting comments specifically on this topic stated that no additional Federal regulations on them are necessary.

We are amending the definition of *animal* under § 1.1 to exclude falconry, for reasons discussed above under 9 CFR part 1: Definition of Terms. This amendment excludes falconry from coverage under the AWA. Other comments pertaining to the regulatory status of raptor use are addressed below.

One commenter noted that housing and care requirements for a USFWS special purpose permit come from the University of Minnesota Raptor Center guidelines, and that facilities housing raptors must meet or exceed these guidelines and be inspected to ensure compliance prior to the issuance of a permit. The commenter stated that these guidelines exceed those of the AWA and proposed regulations. Another commenter similarly stated that USFWS regulations already address the same standards for humane care listed in § 2143 of the Act for “handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and, when warranted, separation by species,” and another declared false our point in the proposal that the primary purpose of the MBTA is to sustain native populations of such birds rather than to establish specific standards of care and humane treatment. On the other hand, a commenter noted that neither the MBTA nor any other conservation-oriented law ensures humane care and treatment, and that regulation under State or other Federal laws does not disqualify birds from protection under the AWA.

We acknowledge that falconers, rehabilitators, and other raptor owners are regulated both by USFWS and at the State level, and that many such owners maintain high standards of care for their birds using industry guidelines and best practices. However, as the last commenter points out, neither the MBTA nor any other Federal law focuses on the protection of raptors and other migratory birds from lapses in animal welfare, meaning that applying AWA regulations to certain raptors would not duplicate requirements. We note that in many States, many species of mammals that are regulated under the Endangered Species Act are also subject to AWA regulations.

Some commenters stated that APHIS did not seek advice from raptor specialists before drafting the proposed rule, nor did the proposal appear to reflect input they provided during the listening sessions.

We typically conduct informal stakeholder outreach prior to drafting proposals, as well as formal outreach in the form of listening sessions and advance notices of public rulemakings. In drafting the proposal, we considered all input we received during the three virtual listening sessions that were held, during which we received numerous comments from raptor exhibitors, persons engaged in raptor conservation and research, and falconers.

A commenter stated that the Congressional statement of policy in § 2131 of the Act appears to impact only birds that are purchased in interstate or international commerce. The commenter added that, as most exhibitors of raptors have obtained their birds from the wild and not through interstate or international commerce, it seems reasonable that wild birds held for exhibition or breeding would be exempt from AWA regulations. Another commenter stated that raptors obtained from the wild are prohibited from use as a commercial commodity by USFWS regulations, and as such would not be regulated under this proposal because such birds do not touch or concern commerce.

The animals and activities referred to by the first commenter are either in interstate commerce or foreign commerce (not necessarily “obtained”). *Commerce* is defined in the AWA as trade, traffic, transportation, or other commerce,<sup>16</sup> so as it is defined, any animals obtained from the wild and then used for commerce (including exhibition, and breeding for sales) would not be exempt from AWA regulation.

Several commenters expressed the view that falconry should be regulated under the AWA and that the only exemption for birds with any connection to commerce are those that are specifically bred for use in research. On the other hand, a commenter representing a national raptor organization stated that the possession, propagation, and sale of raptors for falconry and falconry-related activities

<sup>16</sup> The term *commerce* means trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia;

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

<sup>15</sup> In addition to MBTA requirements, regulations under the Bald and Golden Eagle Protection Act (50 CFR part 22) place further restrictions on the uses of bald and golden eagles. Among these restrictions, no person may sell, purchase, barter, trade, import, or export, or offer for sale, purchase, barter, or trade, at any time or in any manner, any bald eagle or any golden eagle or the parts, nests, or eggs of these birds.

should not be covered by the AWA or the regulations proposed by APHIS, as they are not pets under any generally accepted definition, including the definition in the AWA. The commenter also noted that raptors may not be sold as pets under the MBTA and existing USFWS regulations, and raptors are not known to be sold for experimental research. Accordingly, this commenter and others assumed that the AWA and proposed regulations would apply only to the exhibition of raptors, and propagation and sale for exhibition.

As we have noted above, we agree with commenters that raptors are not included under the definition of *pet animal*. While persons exhibiting raptors, or propagating and selling raptors for exhibition purposes, would be subject to AWA regulation unless otherwise exempt under amended § 2.1(a)(3), falconry is excluded under the AWA as it is not covered under the uses listed under the definition of *animal* in the Act: “[R]esearch, testing, experimentation, or exhibition purposes, or as a pet.”

Another commenter expressed the view that the captive breeding and sale of falconry raptors does not meet the definition of either a *dealer* or *exhibitor*, and that the closest analogy to a captive breeding operation is a *retail pet store* because a captive raptor breeder sells to licensed falconers at retail, without intermediaries, but that the captive-bred raptor is not sold for “research, teaching, testing, experimentation, exhibition, or for use as a pet.”

Persons under USFWS permit practicing falconry are not covered under the AWA and excluded from coverage under the regulations, and as such their inclusion under these terms does not apply, unless they are engaged in activities outside of falconry that would be covered under the AWA. Such persons would not be eligible for the *retail pet store* exemption, as raptors are not defined in the proposed regulations as pet animals.

Several commenters asked if raptor rehabilitation and rescue facilities are exempted under the *exhibitor* exemption.

In the proposed rule, we did not provide an exhibitor exemption for raptors, as the current exhibitor exemption in § 2.1(a)(3)(vii) applies primarily to pet animals. In the comments we received on the proposed rule, several persons asked that we provide an exhibitor exemption for raptors, such as those displayed in rehabilitation facilities or for educational purposes. Conversely, other commenters stated that no exhibitor exemptions should exist for raptors

because of concerns about animal welfare as well as safety risks to the public.

We determined, based on commenter input and our experience from regulating exhibitors, that applying the existing *de minimis* exemption of eight or fewer animals to raptors would pose a heightened level of risk to both raptors and persons participating in or watching the exhibition, clearly higher than the exhibition of small mammals. On the other hand, raptor rehabilitators and educators noted that raptors are already regulated by other Federal and State agencies, particularly USFWS, and underscored the value of their work to educate the public about conservation and species preservation. These comments suggest the need for some *de minimis* threshold for exhibition of raptors, if at a lower number than eight. Considering these factors, and in light of the comments that we received, we have determined that four or fewer raptors would be a reasonable *de minimis* exhibition threshold that ensures animal welfare by requiring licensing and inspection at facilities with many raptors while also minimizing burden on smaller facilities. This is consistent with previously articulated APHIS policy: APHIS considers entities that possess four or fewer animals that would otherwise be subject to regulation to provide sufficient care and oversight to their animals so as to eliminate the need for our regulatory oversight. This is particularly true of raptor exhibitors, who, as commenters noted, must already possess a permit from USFWS that provides a degree of Federal oversight. We are therefore amending the proposal by adding a raptor exhibition exemption to § 2.1(a)(3). We intend to monitor this exemption and its implications on animal welfare, public safety, and business needs, and will make adjustments if needed.

We emphasize, lastly, that raptors at rehabilitation and rescue facilities that are not being exhibited are not covered under the regulations, provided that they are maintained separately from the exhibited birds. Without separation, the birds undergoing rehabilitation could affect the health or well-being of the exhibited birds. This is consistent with our current policy for determining the status of mammals at facilities which only exhibit some of their animals.

A commenter stated that the requirement for “a program of preventative veterinary healthcare for regulated birds, with annual physical exams for each bird and health records maintained for each regulated bird [to be made] available for review by APHIS” constituted excessive oversight,

adding that, in addition to the cost, an annual physical exam can cause disruption and harm in a breeding facility.

We note that, to ensure adequate animal welfare, the current regulations in § 2.40 require licensed dealers and exhibitors to have an attending veterinarian under a formal arrangement, as well as a program of veterinary care. Veterinary oversight requirements are addressed in detail under Standards for Birds in 9 CFR part 3. While persons maintaining covered birds are required to comply with the veterinary requirement, birds are not required to undergo a hands-on physical examination.

A commenter stated that any new regulations or permits imposed on breeders should be issued to each individual that has qualified for a USFWS permit and should not be issued per facility, as it will create an unnecessary burden to report individually to some agencies and together for another in the case where two permitted propagators share a facility. The commenter asked for an exclusion for USFWS raptor propagation permit-holders, or if they are to be included, to have the exclusion limit for licensing set at \$250,000 net income after expenses, or to exclude anyone for whom breeding raptors is not their primary source of income.

USFWS propagation permittees that do not exhibit their birds are not defined as *exhibitors* under § 2132(h) of the AWA and therefore are not subject to its provisions or to these regulations, which have been issued pursuant to the AWA.

Several persons commented that birds exhibited for conservation education and already permitted by USFWS should fall under the standards of that agency only.

As we have noted, USFWS does not regulate for animal welfare.

A commenter asked APHIS to provide supplemental documentation that explains the standards as they apply to groups of similar birds, noting that raptors have requirements for perch shapes, food types, and social interactions that differ from those of other birds.

We intend to engage in dialogue with current and new licensees to help them attain and maintain compliance with the standards, both during and after the implementation period.

Several commenters stated that falconers and caretakers who work closely with raptors are more experienced and qualified than an attending veterinarian to make housing and equipment decisions regarding their

birds, with one commenter noting that the unique housing and equipment needs of falconry birds are not areas commonly addressed in general veterinary school curricula. On this point, several commenters stated that the level of expertise a veterinarian might possess in these areas would not match that of staff who have spent decades caring for raptors. Another commenter stated that the proposal's excessive reliance upon veterinarian oversight of simple procedures is unnecessary. One commenter stated that most veterinarians do not possess the skills necessary to adequately cope (trim and shape) the beaks of different varieties of raptors. Many commenters noted that falconers serve an apprenticeship and undergo extensive training in caring for and handling birds as prerequisites to acquiring a falconry license, and one such commenter added that a network of falconer-veterinarians are embedded within the U.S. falconry community.

While we acknowledge that raptor caretakers have a great deal of experience in husbandry and caring for their birds, we emphasize that only a licensed veterinarian in good standing has the training and medical knowledge to diagnose and treat many conditions, which is why persons using raptors for purposes covered under the AWA require licensing that includes a program of veterinary care and regular visits by an attending veterinarian.

A few commenters stated that pest bird abatement companies should be regulated. One such commenter noted that sport falconry is an entirely different activity than commercial falconry bird abatement, with abatement businesses sometimes employing dozens of birds for compensated work. The commenter expressed the view that commercial abatement practitioners should pay the cost of inspections according to the number of birds used in commercial activities and the practitioner's level of annual compensation. On the other hand, a commenter stated that abatement companies should be excluded from AWA coverage because the use of falconry for pest bird abatement provides a nonlethal approach to abatement without the need to poison or shoot nuisance birds at airfields and other locations for public safety.

Falconry activities, including pest bird abatement, are not included under the AWA and therefore are excluded from coverage.

A commenter emphasized the importance of USDA officials who inspect Native American eagle aviaries to meet with the leaders of those

facilities and learn the Tribal perspective.

In accordance with Executive Order 13175, "Consultation and Coordination With Indian Tribal Governments" we informed Tribal leaders of the proposal, and held a Tribal consultation on November 4, 2021. No Tribal leaders raised significant questions or concerns during the consultation, and we received no subsequent comments from Tribes during the comment period for the proposed rule. We do, however, acknowledge and respect the importance of eagles and other raptors to many Tribes and will continue to actively engage Tribal nations and communities on this rule.

As we noted under Definitions, we are revising the definitions of *carrier* and *intermediate handler* in § 1.1 to include an exemption from AWA registration for anyone transporting a migratory bird covered under the MBTA from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities.

A commenter stated that it is unclear if birds undergoing rehabilitation for release back into the wild will be regulated under this proposal.

Migratory birds undergoing rehabilitation for intended release back into the wild would be subject to AWA regulations if they are exhibited, bearing in mind that raptors are eligible for a *de minimis* exemption if four or fewer are exhibited. If birds are no longer able to survive in the wild and must remain captive, they would be covered under the AWA only if used for exhibition or another covered purpose.

#### Licensing Exemptions—§ 2.1(a)(3)

The current regulations in § 2.1(a)(3) include licensing exemptions based on criteria such as types of animals and how they are used, whether and how they are sold, and size of business based on gross income, or the number of covered animals bred or exhibited.

We received numerous comments regarding exemption criteria and which species and uses of birds should be exempted from licensing. Many commenters stated there should be no *de minimis* exemption based on revenue, the number of animals, or activity (such as pigeon racing or bird fancier shows). One commenter stated that we should require licensing and inspections in response to any complaint for facilities that house birds, regardless of the number of birds.

APHIS is authorized under § 2132 of the Act to exempt from regulation certain uses of animals, including animals used in agriculture and birds bred for use in research. Under § 2133

of the Act, which states, "a dealer or exhibitor shall not be required to obtain a license as a dealer or exhibitor under this chapter if the size of the business is determined by the Secretary to be *de minimis*," APHIS is also authorized to exempt from licensing and inspection small businesses that pose a minimal risk of animal welfare problems. We have determined that certain facilities that keep birds are *de minimis* in size, and/or present a minimal risk of animal welfare problems, and we consider exempting them from regulation to be appropriate in light of our statutory authority. By exempting *de minimis* businesses, we are able to focus inspection and enforcement efforts on those businesses at greater risk of animal welfare concerns.

Many commenters stated that there should be no species-based exemptions from licensing.

We have not included in this rule exemptions from licensing or exclusion from regulation based on species.

A commenter stated that APHIS should consider additional exemptions for entities who are already heavily monitored, including non-profits, bird sanctuaries, and zoos, as many of these facilities are subject to other Federal and State requirements and additional administrative requirements are unlikely to improve conditions for the animals in their care. The commenter suggested that where such entities are required to undergo State inspections and receive certification, perhaps APHIS could accept submission of those inspection reports and certificates in place of another inspection or form. One commenter stated that facilities formally accredited by the Association of Zoos and Aquariums should be exempt from the proposed regulations, and another commenter requested that we include a licensing exemption for any bird breeder, bird dealer, or bird exhibitor certified under an inspection and certification program available to all within the bird industry.

We are making no changes in response to these commenters. We acknowledge that facilities with birds may already be subject to other Federal and State requirements and industry-based standards. While they are beneficial, as we noted in the proposed rule, industry certification programs and existing government requirements are not necessarily equivalent to the proposed standards, nor are they structured to be consistent with the Act and its animal welfare requirements.

Several commenters stated that rescues and shelters should never be exempt from APHIS inspections or licensing, and many cited concerns

about animal welfare, overcrowding, and poor sanitation. Other commenters noted that some entities calling themselves rescues are actually commercial operators breeding and selling birds with little regard for animal welfare. On the other hand, some commenters asked that we exempt all rescues and shelters from licensing requirements, noting that such facilities are not run for profit and that regulations will cut into their financial capability to assist birds in need. Another commenter stated that rescues that do not exhibit should be exempt from licensing.

If bird shelters or rescues act as dealers or exhibitors, they are covered under the AWA and may require licensing unless they meet one or more of the exemptions set forth in § 2.1(a)(3). Rescues and shelters that do not exhibit or engage in any other covered activity are exempt from licensing.

Some commenters asked APHIS to consider an exemption for organizations and persons that breed birds strictly for conservation and restoration purposes with the intent of releasing birds produced into the wild, retaining into the captive flock for genetic purposes, or enhancing the captive population to maintain a restoration program.

Conservation and restoration entities that release birds into the wild or maintain bird restoration programs will not be required to be licensed, provided that they do not act as dealers or exhibitors. If they do act in such a manner, they may still be exempt from licensing if they meet one or more of the exemptions from licensing set forth in the regulations.

A commenter requested that we exclude holders of a USFWS “Special Purpose-Abatement Using Raptors Permit” from regulation, adding that without a specific exemption, it could cause confusion for inspectors when they inspect someone that holds multiple migratory bird permits.

Pest abatement falconry activities are not covered under AWA regulations. APHIS inspectors only inspect for compliance with AWA regulations, not USFWS regulations or those of any other agency. For this reason, we are making no changes in response to the commenter’s request as we see no need to include a specific exclusion.

The same commenter also stated that the exemption limit for raptor exhibitors is too low, noting that for educational programs with raptors that free fly, it is necessary to rotate through different teams or have understudies when some birds are unavailable. The commenter asked us to exclude from AWA regulations USFWS Special Purpose

Possession-Live Migratory Birds for Educational Use permit-holders, or if they will be regulated, to have the exclusion limit set at 25 birds to minimize burden on educators. Additionally, the commenter asked that we exclude from regulation falconry schools holding USFWS Special Purpose-Falconry Education permits, as the sport of falconry is not included within the AWA.

The commenter erroneously read the proposed rule to include provisions for exempting raptor exhibitors from licensing. As discussed previously, the proposed rule contained no such provisions; however, several commenters asked us to add a *de minimis* threshold. Based on those comments, we have added such an exemption, but consider the 25-raptor threshold proposed by the commenter too high in light of possible health and welfare considerations. Persons using more than four raptors for exhibition will be required to apply to APHIS for a license regardless of whether all the raptors are being exhibited at one time. Persons under USFWS permit using raptors for falconry are not covered under the AWA and its regulations.

One commenter encouraged APHIS to consider a *de minimis* exception that would permit research facilities registered under the AWA to engage in a small number of transactions involving birds that fall outside of the *bred for use in research* definition without having to become licensed as a dealer.

If the research facility adopts a business model that exempts them from licensing by only conducting face-to-face transactions and meeting the other elements of the definition of “retail pet store,” the research facility could sell birds and not require licensing as a dealer.

Currently exempted in § 2.1(a)(3)(i) are retail pet stores as the term is defined in § 1.1. A *retail pet store* is a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species. The exemption allows persons to sell any number of animals as pets, at retail, and without a license provided that all animals are sold at the business or residence with the buyer physically

present to see the animal before purchase.

We proposed to revise the definition of *retail pet store* by making it consistent with the definition of *animal*, which includes birds not bred for use in research.

A commenter stated that the proposed definition of a *retail pet store* could include a bird rescue because many are maintained in a residence at which the bird is present, the adopters come and pick up the bird, and pay an adoption fee. The commenter added that because parrot and other bird rescues are typically 501(c)(3) nonprofits, their tax status could be adversely affected by being regulated. The commenter proposed including language in the standards specifically for rescue and sanctuaries.

We agree that a rescue operating as the commenter describes can be defined as a *retail pet store* and exempt from regulation, provided that each adoptee is physically present at the rescue to pay an adoption fee if applicable and pick up the bird. We do not see a need to include language in the rule specific to rescues and sanctuaries on this topic. We consider private rescues and shelters that perform any of the activities listed in the definition of *dealer*, including transporting or offering animals for compensation, to be dealers. We consider acts of compensation to include any remuneration for the animal, regardless of whether it is for profit or not for profit. Remuneration includes, but is not limited to, sales, adoption fees, and donations.

A substantial number of commenters stated that birds have not been long domesticated like dogs and cats and thus pose a greater welfare risk, and for this reason asked that we require the licensing of retail pet stores that sell birds.

We disagree that birds pose a greater welfare risk than other animals sold in retail pet stores merely because they may not have been domesticated as long.

One such commenter cited low standards of care at retail outlets, adding that not requiring licensure of pet stores allows them to overfill cage space with more birds than can be properly housed.

We assume the commenter is referring to the current exemption for retail pet stores, which are defined in part as “a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase.” The exemption, as

currently applied to dogs, cats, and other animals, does not require that the buyer observe anything other than the animal, although a concerned buyer could always request to view additional information from the seller as to the animal's housing and care. Retail outlets that sell any pets online or in any situation where the buyer, seller, or animal is not physically present would require licensing and regular inspections. It is APHIS' long-standing contention that the AWA exempted retail pet stores from regulation because the buyer may observe the health and welfare of an animal prior to purchase, and this observation constitutes sufficient monitoring of the health and welfare of the animal. In this regard, we note that overcrowding can cause visible stress in birds, affecting their physical appearance and behavior.

Another commenter recommended that licensing and inspection be required for retail pet stores that sell any wild-caught birds, or any captive-bred birds other than doves and pigeons, finches, canaries, lovebirds, cockatiels, or budgerigars.

Businesses selling wild-caught animals are excluded from the *retail pet store* definition and are thus subject to regulation. In addition, wild-caught birds likely fall under authority of the MBTA and are regulated by USFWS. Captive-bred birds may be pet animals if they meet that definition as listed in § 1.1. The list of pet birds we provided in that proposed definition is intended to be for illustrative purposes and is not exhaustive.

A commenter stated that the *retail pet store* exemption should not remain in place for long-lived bird species such as parrots. The commenter added that pet owners should obtain a license in order to purchase such long-lived exotic avian species.

The length of a bird's life span is not germane to determining whether or not it is intended as a pet animal, and the act of owning a pet is not subject to licensing under the AWA.

A commenter asked if meeting people at a neutral meeting point to conduct a sale, such as a parking lot, would fulfill what is required for the *retail pet store* exemption.

As long as the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and the sale is not otherwise covered under the regulations, a meeting point could be eligible for the *retail pet store* exemption.

Under § 2.1(a)(3)(ii), an income threshold exemption applies to any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than \$500 gross income from the sale of such animals during any calendar year.

A commenter suggested that for the purposes of the \$500 exemption we include all migratory birds under the definition of *wild animal*, as well as populations of free parrots living in the southern United States.

We are taking no action in response to the commenter. The sale of migratory birds is an activity covered under the authority of the USFWS and a migratory bird cannot be sold without a permit from that agency. Depending on the species, free parrots living in the United States are subject to some State and Federal regulations, but we do not see the relevance of an income exemption to populations of parrots living in the wild.

A few commenters stated that we underestimated the costs for attending veterinarians to develop and monitor a veterinary care program and it would be difficult for small facilities to qualify for the \$500 *de minimis* exemption. The commenters recommended that we increase the *de minimis* amount to reflect the realistic cost for veterinarians to conduct site visits.

The income *de minimis* threshold is tied to the income derived from the sale of animals and not to expenditures such as veterinary costs.

Several other commenters recognized that the \$500 gross income exemption was linked to income and not facility costs. Most noted that few, if any, aviculturists would be eligible for this licensing exemption, as nearly all earn more than \$500 and even a single pair of birds could cause a hobbyist to go over that amount from selling the offspring. A few commenters stated that the gross income exemption threshold should be \$30,000, and others suggested thresholds between \$1,000 and \$20,000. One commenter stated that a dollar value for *de minimis* exemptions is "nonsensical" as some birds have very little value while others have a very high value. One commenter stated that the threshold should be increased to \$250,000 net profit if raptor propagators are to be subjected to APHIS regulations, or that only commercial breeders who rely on breeding as their primary income should be covered. Another commenter representing raptor owners stated that a *de minimis* exemption threshold based on the number, rather than the value, of birds sold for exhibition is more meaningful

and aligned with the AWA, but that otherwise a monetary threshold of \$50,000 for birds sold for exhibition should be established.

We acknowledge that many, if not most, facilities selling birds earn more than \$500 in annual gross income for that activity and would not be eligible for the exemption. We considered other ways of exempting businesses that pose a *de minimis*, or minimal, risk to animal welfare based on the size of the business. Drawing on our experience with small facilities and on comments we received from persons supporting a sales threshold, we determined that a threshold based on numbers of birds sold annually would be most equitable with respect to balancing regulatory burden with animal welfare.

As explained below, we replaced number of breeding females with number of birds sold annually as the threshold for determining a *de minimis* exemption from licensing. Generally, any person is exempt from the licensing requirements who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually. This change will exempt from inspection and licensing many more facilities as a result. We believe that the revised *de minimis* exemption from licensing will apply to most small breeders, while very few businesses selling birds would qualify for the \$500 dollar or less gross income exemption in § 2.1(a)(3)(ii).

Under § 2.1(a)(3)(iii), a licensing exemption is also provided for any person who maintains four or fewer breeding females of pet animals, small exotic or wild animals, and/or domesticated farm type animals and sells only the offspring of these animals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. We proposed for this exemption threshold to also apply to AWA-covered birds.

Several commenters expressed support for an exemption threshold of four or fewer breeding female birds. A comment co-signed by several animal welfare advocacy organizations stated that, as both dogs and birds are bred for sale, and as the AWA is focused on ensuring humane treatment, no variation in licensing thresholds between the species in terms of numbers of animals is supportable. The commenter added that a species' physical size or commercial profitability is no more adequate justification for altering the *de minimis* rule than it would be for altering the rule for any other covered species, and that focusing on financial rather than welfare

considerations runs counter to the AWA.

On the other hand, numerous commenters disagreed with the proposed licensing *de minimis* exemption of persons maintaining four or fewer breeding female birds on grounds that the threshold is too small.

Several commenters proposed a licensing *de minimis* threshold higher than four. One commenter stated that APHIS has not considered the vast number and variety of species of birds in captivity, adding that keeping four zebra finches is very different than keeping four macaws. A few commenters stated that four or fewer breeding females is far too low to allow for the maintenance of genetic diversity among many species. Some commenters asked why the *de minimis* threshold for four breeding female mammals is applied arbitrarily to an entirely different class of animals, with no consideration of the different breeding characteristics between and within the two classes. A few commenters noted that many species of birds are sexually dimorphic only in size, and only a person with advanced knowledge of a species or laboratory tests can determine if an individual is female or male. Several commenters noted that most bird breeders maintain more than four breeding females and sell the offspring, and another commenter stated that a more detailed analysis by avicultural organizations suggests that the subset of persons who would be exempt under the proposed licensing threshold is smaller than APHIS anticipates. Several commenters asked for more explanation of circumstances where a female bird would be considered a “breeding female” for the purposes of the threshold—for instance, whether a “retired” breeding female would be counted.

As these and many other commenters noted, the breeding habits and number of offspring produced by different species of birds, or birds within a species, can range dramatically, much more so than mammals such as dogs, cats, and other AWA-covered mammals widely kept in the United States. As the current *de minimis* thresholds for breeding females were originally developed to address these animals, the comments we have received on this topic have caused us to reevaluate the current *de minimis* threshold measured by number of breeding female animals maintained as applied to birds. As we noted above, several commenters requested that a new *de minimis* exemption for bird breeders be established that is based on the number of birds sold instead of the number of

breeding females maintained, with some commenters further recommending exemptions contingent on weight of birds sold.

For these reasons, in § 2.1(a)(3) we would establish a new *de minimis* exemption specific to birds, in which any person is exempt from the licensing requirements who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells more than 200 pet birds 250 grams or less annually, and/or sells more than 8 pet birds more than 250 grams annually, regardless of ownership. Pet birds at or below 250 grams typically include cockatiels, budgies, finches, lovebirds, and parakeets, while pet birds over 250 grams may include cockatoos, macaws, and African gray parrots.

We chose the above annual sales thresholds for pet birds after reviewing many comments that proposed licensing exemption thresholds ranging from dozens of birds to thousands. We also sought a threshold that does not unduly burden small pet bird businesses while ensuring animal welfare for AWA-covered birds at these facilities. In deciding upon 200 or fewer birds 250 grams or less as the exemption threshold, we noted that smaller birds reproduce more quickly, can be bred in colonies, and have fewer behavioral welfare concerns. While no commenters specifically suggested 250 grams as the cutoff limit for the 200 sales threshold, some suggested weights between 100 and 200 grams. We consider 250 or more grams (using adult average weight) to generally distinguish larger pet birds such as cockatoos, macaws, and African grey parrots from canaries, budgies, and other small birds. We also consider eight or fewer large pet birds sold annually to constitute a small facility that poses a *de minimis*, or minimal, risk to animal welfare and would therefore be exempt from licensing.

Some commenters stated that the thresholds for exemption are arbitrary and inappropriate for raptor breeding and education. One commenter representing raptor owners stated that the *de minimis* thresholds for licensing should be raised for birds of prey because their possession and sale are already regulated and subject to animal welfare standards enforced by each State under USFWS guidelines, they cannot be sold as pets, and falconers

and other raptor owners have a strong motivation to ensure the welfare of their birds. The commenter requested that a *de minimis* exemption for raptor breeders be established based on the number of birds the breeder sells or transfers for exhibition purposes and recommended that this number be 24, based on an estimate of the average number of young produced by 12 breeding pairs of raptors. Another stated that the licensing threshold on raptor breeding pairs should be no lower than 25 to ensure genetic diversity for wild raptors.

We note that in the proposed rule, we did not apply the breeding exemption in § 2.1(a)(3)(iii) to raptors, as it only applies to persons breeding and selling pet animals (which includes pet birds), small exotic or wild mammals, or domesticated farm-type animals for pets or for exhibition. As the sales per year exemption we have included in this final rule only applies to pet birds, the exemption does not apply to persons breeding and selling raptors. We have, however, excluded falconry from the definition of *animal* and *exhibitor* in the AWA regulations.

A commenter requested exempted status for any bird dealer who does not place birds into wholesale trade in interstate commerce.

Persons dealing in birds are covered under the AWA regulations. The commenter did not provide a rationale for exempting wholesale trade.

A commenter recommended that the regulations should state that the only MBTA species that may be bred are those authorized under 50 CFR part 21 and that there be no *de minimis* exemption for MBTA-protected species.

The AWA covers animal welfare for certain animals, including birds not bred for use in research. Its provisions are not contingent on what is covered and not covered under the MBTA. The MBTA does not include specific protections for animal welfare. That being said, APHIS has no statutory authority to prescribe what birds may or may not be bred.

An exemption is also provided in § 2.1(a)(3)(vi) for any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber (including fur). To accommodate birds under this exemption, we proposed to add “feathers” to the list of purposes for maintaining animals.

A commenter asked that we include “skin” in the list.

As we added “skins” as one of the products under *farm animal*, we agree with the commenter and will add

“skin” to the list of uses for which farmed animals may be exempted.

One commenter recommended a plain English reading of the exemption, where only birds of the family *Anatidae* may be included for food and fiber purposes. Another commenter stated that the propagation of game birds should fall under the “agriculture exemption.”

We are making no change in response to these comments. With regard to the first commenter, we note that commercial poultry bred for food or fiber purposes include birds not in the family *Anatidae*. For this reason, we believe it is more appropriate to add the term “poultry” to the definition of *farm animal*, and add a separate definition of *poultry* that lists doves, pheasants, grouse, and quail as among the birds included. The term *poultry* also includes ducks, geese, and swans in the family *Anatidae*. With regard to the second commenter, under the definition of *animal*, poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber would be exempted from licensing. Propagation of gamebirds would fall under this agricultural exemption.

In addition, § 2.1(a)(3) includes an exemption for any person who maintains a total of eight or fewer pet animals as defined in § 1.1, small exotic or wild mammals (such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, jerboas, domesticated ferrets, chinchillas, and gerbils), and/or domesticated farm-type animals (such as cows, goats, pigs, sheep, llamas, and alpacas) for exhibition, and is not otherwise required to obtain a license. We proposed for this exemption to apply to pet birds also, and note that under our proposed revision to the term *pet animal*, we added that the term also includes but is not limited to such birds as parrots, canaries, cockatiels, lovebirds, and budgerigar parakeets.

Some commenters requested that persons using poultry for exhibition be exempted from the licensing requirement.

The current definition of *exhibitor* excludes persons exhibiting animals at shows, fairs, and other events intended to advance agricultural arts and sciences. In addition, we proposed to amend *exhibitor* to also exclude bird fancier shows, as we note above that these are rooted historically in the advancement of agricultural arts and sciences. Within these contexts, we consider poultry exhibition to be an activity exempted from the licensing requirement.

Paragraph § 2.1(b)(1) states that licenses are issued to specific persons, and are issued for specific activities, types and numbers of animals, and approved sites. As each license specifies the numbers and types of animals that a licensee can maintain, under paragraph (b)(2)(ii) a licensee is required to obtain a new license before acquiring or using any covered animal beyond those types or numbers of animals specifically authorized under the existing license.

A commenter expressed concern with the requirement for obtaining a new license before acquiring additional types or numbers of animals. The commenter noted that zoos and other members of its organization frequently accept confiscated birds at the request of Federal or State law enforcement agencies, with little control over the species or numbers of birds in need of protection, and asked that we modify the license requirement to allow for more flexibility for such situations.

If acquiring confiscated birds is a possibility, facilities completing a new license application before acquiring additional types or numbers of animals are encouraged to put the highest total number of animals they expect to have. We also note that licenses only require specific authorization for type of animal if the animal is subject to subparts D or F of 9 CFR part 3 and in a group listed in § 2.1(b)(2)(ii). As this list does not include birds, licensees acquiring new species of birds would not be required to obtain a new license as a result of their acquisition of such birds unless the licensee exceeds their authorized number of overall animals.

A few commenters recommended that licensing options should be available for both individuals and organizations, explaining that organizations can ensure, execute and enforce standards of care (presumably for each of its members). One commenter opposed to the rule noted that an organization-wide license limits the number of licenses needed when there are multiple rehabilitation caregivers within a given agency.

The agency considers and issues licenses to a *person*. Under § 1.1, *person* means any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity.

APHIS is aware that a number of currently licensed facilities, in addition to maintaining mammals of various types, also maintain birds that might be newly covered under these changes to the regulations. These birds are not currently listed on the license. However, in order to minimize redundant

administrative burden on these facilities, we would not require that they apply for a new license only for the purpose of meeting the effective date of these regulations. Therefore, we proposed to add a sentence to § 2.1(b)(2)(ii) stating that a licensee in possession of birds on the effective date of the rule may continue to operate under that license until its scheduled expiration date. APHIS encourages such persons to apply for a new license at least 90 days before expiration of the current one. As we note above, licenses are valid for 3 years.

A commenter contrasted this license deferment with current § 2.30(c) (Notification of Change), in which research facilities are expected to provide APHIS with notification of any change in operations, including a change in activities or location stemming from birds in their possession, within 10 days from the date of such change. The commenter asked APHIS to establish an effective date for the final rule that affords research institutions at least 6 months to analyze the final rule’s impact on their operations, and stated that APHIS should provide research facilities with at least 6 months to notify it of changes resulting from compliance with the final rule. The commenter added that APHIS should ensure that the rule’s effective date provides institutions with at least 6 months before Annual Reports are due to conduct their analyses.

We agree with the commenter’s request to afford additional time for research facilities to understand and comply with the regulation. An implementation period will be provided for all facilities conducting covered activities to ensure compliance with these standards and we intend to provide facilities during this time with guidance to help them comply with the regulations. For new licensees and registrants, the rule will be applied 365 days after the date of publication. For current AWA licensees and registrants, the rule will be applied 180 days after date of publication. To the commenter’s question about research facilities needing to report changes stemming from this rule within 10 days from the date of that change, this requirement will not be enforced until after the end of the implementation period. Insofar as annual reports cover activities beyond those solely involving birds, we cannot grant the commenters request for a 6-month delay in filing Annual Reports, which are due by December 1 each year and report on activities for the previous Federal fiscal year. However, we will not require that information concerning birds be included in the annual report

until the one prepared for fiscal year 2024.

*9 CFR Part 2, Subpart B: Registration*

Under subpart B, Registration, carriers and intermediate handlers newly regulated under this proposal would not require a license to transport birds, but would be required to register by completing and filing a form provided by APHIS. Registrations, unlike licenses, do not have an expiration date.

One commenter asked whether wildlife rehabilitators who are not conducting educational or research activities need to register with APHIS.

Wildlife rehabilitators not conducting covered activities would not be subject to AWA regulations.

*Requirements and Procedures—§ 2.25*

Section 2.25 provides in part that each carrier and intermediate handler is required to register with the Secretary by completing a form furnished, upon request, by the Deputy Administrator. This requirement typically applies to persons who transport AWA-covered animals. Persons already registered to transport other animals will not be required to update their registration to transport birds. APHIS proposed no changes to this section and received no comments on it.

*9 CFR Part 2, Subpart C: Research Facilities—§ 2.30*

Under Subpart C, Research facilities, a newly regulated research facility under this proposal must register by completing a registration application form available from APHIS. The chief executive officer of the newly registered research facility is required to appoint an IACUC consisting of qualified persons to assess the research facility's animal program, facilities, and procedures. Each research facility also needs to have an attending veterinarian and maintain a program of veterinary care. Registered research facilities are required to maintain records of IACUC meetings, activities involving animals, and animals purchased or acquired by the facility.

Several commenters stated that birds bred for use in research should also be regulated under the proposed standards. One such commenter stated that, assuming the proposed standards will form the baseline defining the minimum care for birds, there is no reason for experimental facilities to be exempt from coverage. On the other hand, some commenters expressed the view that current regulation of Federal and non-Federal research facilities is already sufficient and that applying the proposed standards to facilities using

birds bred for research would be unduly redundant and costly, without a commensurate increase in humane protection for birds. The commenter added that another inspection as required under the standards would be unlikely to uncover deficiencies that IACUC inspections did not detect, and recommended that APHIS reduce redundancy by aligning its review policies with those of the U.S. Public Health Service (PHS).

Birds bred for use in research are excluded as “animals” from the AWA regulations as that term is defined in the Act, so the use of such birds at research facilities is therefore not regulated. However, while the birds themselves are not subject to regulation if bred for use in research, research facilities using such birds are required to register with APHIS<sup>17</sup> and adhere to standards under the Act and regulations in § 2.30, provided that they also conduct research on other live “animals” as this term is defined in § 1.1 of the regulations. The regulations in § 2.30 include monitoring by the IACUC of animal facilities and uses of animals to ensure that they receive humane care, and that the facility follows professional standards governing the care, treatment, and use of animals, including appropriate use of anesthetic, analgesic, and tranquilizing drugs, prior to, during, and following actual research, teaching, testing, surgery, or experimentation. Regulation by other Federal agencies does not necessarily address animal welfare considerations covered under the AWA.

Moreover, as another commenter explained, Federal agencies<sup>18</sup> either voluntarily or by law follow PHS regulation and oversight policies for their animal research facilities, which include requirements for compliance with the AWA. As the commenter noted, Federal researchers who use birds in research also submit proposals for IACUC review, and facilities where birds are housed or studied are subject to semiannual IACUC inspections. Finally, we note that in a recent rulemaking<sup>19</sup> APHIS aligned several IACUC review provisions in subpart C with PHS policies.

A commenter noted that wild birds or birds that are otherwise not exempt

from regulation and that are studied in captivity may reproduce while in captivity and asked that any such birds be considered “bred for research” and therefore exempt from regulations under the AWA. The commenter noted that the proposal's definition of *bred for use in research* does not explicitly exempt unintentional offspring of wild birds or birds that are otherwise not exempt from regulation which are born in captivity, and asked that we exempt them from regulation by including them under the definition of *bred for use in research*. Similarly, a commenter asked whether offspring of wild birds brought into captivity and bred for research purposes would be regulated.

Offspring of wild birds that reproduce in captivity and are used for research are considered to be bred for use in research and not covered under the regulations. We did not intend to mean the definition to apply to any birds bred in captivity, but rather those bred in captivity and used in research. We note that in an earlier section of this rule we indicated that we have amended the definition of *bred for use in research* to mean “an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.”

Another commenter noted that the proposal is silent on how it would apply to ornithological research done in the field that does not qualify as a field study as defined in 9 CFR part 1. The commenter added that most ornithological research involves birds in the wild and much of it would not be exempt under the specific field studies provision. The commenter asked APHIS to clarify that the regulations do not apply to this type of research.

Field studies that do not materially alter the birds, such as observational studies, are not covered under the AWA regulations. Any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study is not considered a field study under the definition of that term and is covered by the regulations.

A commenter noted that although the USDA has not proposed regulations for maintaining acquisition and disposition records for birds by research facilities, the agency should implement such regulations in order to ensure bird health and welfare and preserve the integrity of research.

Acquisition and disposition records, which are required at research facilities for dogs and cats, allow APHIS to determine whether animals are being acquired or disposed of in accordance with the regulations. However, we have no evidence that birds are being

<sup>17</sup> Although only non-Federal research facilities are required to register with APHIS, Federal facilities must still maintain an IACUC and maintain the same standards of humane care and treatment as indicated in § 2.37.

<sup>18</sup> Under § 2.30(a)(1), Federal research facilities are not required to register with APHIS.

<sup>19</sup> “AWA Research Facility Registration Updates, Reviews, and Reports” (86 FR 66919–66926, Docket No. APHIS–2019–0001), November 24, 2021.

acquired or disposed of illegally by research facilities. If such evidence emerges, we will investigate accordingly.

The same commenter stated that APHIS must include regulatory considerations for birds used in laboratories to minimize excessive or unwarranted pain and distress, among them a limit on the number of invasive surgeries, analgesic plans for painful procedures, and limits on anesthetic episodes, restraint, and injections.

Birds used by the laboratories would be considered “bred for use in research” provided that they were bred in captivity and thus exempt from regulations under the Act. With respect to research conducted on birds that were not bred in captivity, § 2.31(d) of subpart C, Research facilities, includes several requirements for ensuring IACUC review of all activities involving animals with respect to avoiding or minimizing discomfort, distress, and pain. These include use of analgesics and limits on numbers of operative procedures performed.

A commenter asked if a “newly registered site” means it is newly registered for birds, or newly registered through the USDA.

Contextually within the proposed rule, “newly registered research facility” meant a research facility that is not currently registered with APHIS but that would need to be registered with APHIS as a result of the rule, for example, a research facility that solely conducts research on wild-caught birds. A currently registered facility would not need to re-register just for birds, but would need to follow the bird-specific requirements of this rule following the implementation period afforded by this rule.

#### *IACUC Review of Activities Involving Animals—§ 2.31(d)*

Under § 2.31 of the regulations, each registered research facility must establish an IACUC to assess its animal program, facilities, and procedures. The IACUC must have at least three members, one of whom must be a Doctor of Veterinary Medicine, with training or experience in laboratory animal science and medicine, who has direct or delegated program responsibility for activities involving animals at the research facility. Another member must not be affiliated with the facility at all, and is intended to provide representation for general community interests.

In order to approve proposed activities or proposed significant changes in ongoing activities, paragraph (d) of § 2.31 requires that the IACUC

conduct a review of those components of the activities related to the care and use of animals and determine that the proposed activities are in accordance with the regulations, unless acceptable justification for a departure is presented in writing.<sup>20</sup> The IACUC is also required to determine that the proposed activities or significant changes in ongoing activities meet a number of requirements, including ones related to activities that involve surgery. If they wish, facilities that use birds not bred for use in research may choose to enlist additional IACUC members with avian expertise.

A commenter recommended that we require at least one member of each IACUC at facilities using birds to have avian training, expertise, and experience in avian medicine, behavior, and husbandry.

We are making no changes in response to the recommendation, as we consider the IACUC to possess or have access to expertise sufficient to care for birds adequately. One member of the IACUC is required to be a veterinarian, and the Committee may invite consultants to assist in reviewing complex avian-related issues as needed. Under § 2.32, the research facility is responsible for ensuring that all scientists, research technicians, animal technicians, and other personnel are qualified to perform their duties.

Under current § 2.31(d)(1)(ix), activities that involve surgery must include appropriate provision for pre-operative and post-operative care of animals in accordance with established veterinary medical and nursing practices, meaning that survival surgery must be performed using aseptic procedures, including surgical gloves, masks, and sterile instruments. Major operative procedures on non-rodents must be conducted only in facilities intended for that purpose and must be operated and maintained under aseptic conditions. Non-major operative procedures and all surgery on rodents do not require a dedicated facility but also must be performed using aseptic procedures. Operative procedures conducted at field sites need not be performed in dedicated facilities but must be performed using aseptic procedures.

<sup>20</sup> APHIS has issued guidance exempting field studies, defined by APHIS as studies conducted on free-living wild animals in their natural habitat, from this requirement. However, this term excludes any study that involves an invasive procedure, harms, or materially alters the behavior of an animal under study. For more detail, see the APHIS Tech Note, “Research Involving Free-living Wild Animals in Their Natural Habitat,” at [https://www.aphis.usda.gov/animal\\_welfare/downloads/tech-note-free-living-wild-animals.pdf](https://www.aphis.usda.gov/animal_welfare/downloads/tech-note-free-living-wild-animals.pdf).

We proposed to apply the same requirements for operative procedures for birds as we do for rodents in § 2.31(d)(1)(ix). Our determination for this decision is twofold. First, as we explained in the proposed rule, we are aligning our requirements with PHS policy for the humane care and use of laboratory animals, which does not require a separate, dedicated surgical area for rodents, but does require a surgical area used solely for survival surgeries involving higher vertebrate species.<sup>21</sup>

Second, we have considered the operative conditions and practices for rodents and concluded that they will be humane and consistent with the AWA if applied to birds. As we noted above, the surgical standards currently listed in § 2.31(d)(1)(ix) include appropriate provisions for aseptic surgery and pre-operative and post-operative care of the animals in accordance with established veterinary medical and nursing practices, which apply regardless of whether the surgery is performed in a dedicated facility used wholly for that purpose. Moreover, under current § 2.31(d)(1)(ix), medical care for all AWA-covered animals at a registered research facility is required to be available and provided as necessary by a qualified veterinarian.

A commenter asked that we include a reference to analgesia in this section.

Paragraph § 2.31(d) includes provisions for the use of analgesics for procedures that may cause pain or distress, and § 2.32(c) provides for training and instruction in the proper use of analgesics by facility personnel.

A commenter requested that we add a statement clarifying the exemption of wildlife management agencies, including wild bird capture, translocation, temporary holding, and field procedures. Another commenter asked that we clarify the definitions of “research” versus *field study*, and which procedures might be considered invasive or altering animal behavior that require review by an IACUC. As examples, they asked if accessing a wild bird nest to evaluate nestlings or applying bands as part of a research

<sup>21</sup> *Guide for the Care and Use of Laboratory Animals*, 8th Edition, National Research Council: <https://grants.nih.gov/grants/olaw/guide-for-the-care-and-use-of-laboratory-animals.pdf>. Page 144 of the *Guide* states that, “for most survival surgery performed on rodents and other small species such as aquatics and birds, an animal procedure laboratory is recommended; the space should be dedicated to surgery and related activities *when used for this purpose, and managed to minimize contamination from other activities conducted in the room at other times.*” [Our emphasis.] In other words, a surgical area for rodents and birds is not exclusively intended for that purpose as it is for higher vertebrate species.

project could be considered altering behavior, requiring a review.

Animal, pest, and population management programs (e.g., culling, relocation, and nonsurgical sterilization) for the purposes of limiting wildlife damage and human interaction are exempted from licensing. In addition, APHIS has issued guidance<sup>22</sup> on studies conducted on free-living wild animals in their natural habitat to help clarify the distinctions between research studies and field studies. We believe this existing guidance is responsive to the commenters' questions. However, specific questions about wild bird studies may also be addressed to APHIS at [animalcare@usda.gov](mailto:animalcare@usda.gov).

Another commenter asked that we consider an exemption to the proposed requirement that aseptic conditions be used for operative procedures in field studies, noting that preparing aseptic conditions for non-major surgical procedures confers far less benefit to the bird than returning it as quickly as possible to its natural habitat. Another commenter stated that aseptic techniques may not always be practical or safe for the bird or the researcher to implement in the field and asked us to revise this requirement to require aseptic techniques only as conditions allow. Similarly, one commenter stated that APHIS should consider including language that introduces a harm-benefit analysis to the use of anesthetics in field studies involving birds, as withholding anesthetics may be justified when the bird's welfare or survival may otherwise be compromised.

In order for field research to be considered a field study rather than regulated research under the regulations, it must not involve invasive procedures, and such procedures would be considered regulated research and subject to the regulations governing research facilities, including the requirement for aseptic surgery and pre-operative and post-operative care of the animals under current § 2.31(d)(1)(ix). However, the regulations do make allowances for deviations from this requirement for just cause and with proper documentation. Under § 2.36, the IACUC may approve exemptions to operative conditions, provided that the IACUC documents these exemptions in the Annual Report submitted to the Deputy Administrator on or before December 1 of each calendar year for the previous Federal fiscal year. The Annual Report assures that professionally acceptable standards are

being used, that all standards and regulations are being followed, and other information attesting to the animal welfare status of the facility. Under § 2.36(b)(3), the report must assure that the facility is adhering to the standards and regulations under the Act, and that it has required that exceptions to the standards and regulations be specified and explained by the principal investigator and approved by the IACUC. A summary and explanation of all such exceptions must be attached to the facility's Annual Report.

A commenter recommended that the proposed language on bird identification and counting by research institutions in § 2.36(b)(8) include an exemption in cases where identification of newly hatched or juvenile birds would disrupt nesting or rearing activities as determined by the attending veterinarian.

We are making no changes in response to the commenter's recommendations. The commenter is referring to the Annual Report requirement for research facilities, which includes the reporting of common names and the numbers of animals being bred or held for use in teaching, testing, experiments, research, or surgery but not yet used for such purposes. As the report is submitted to APHIS by December 1st annually and counts animals used during the previous fiscal year, a 2-month window exists to count animals born at the end of the fiscal year. We consider this to be a sufficient amount of time for identifying newly hatched and juvenile birds without disrupting rearing activities.

#### *9 CFR Part 2, Subpart D: Attending Veterinarian and Adequate Veterinary Care*

Under § 2.40, newly licensed dealers and exhibitors are required to have an attending veterinarian under a formal arrangement, as well as a program of veterinary care. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements must include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor. Each dealer and exhibitor is also required to assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

One commenter stated that the term "attending veterinarian" is confusing because in situations where there are multiple veterinarians, the attending veterinarian of record can delegate

authority to other members of the staff. The commenter suggested that the proposed standards for birds should use the term "attending veterinarian" when referring to oversight for the program of veterinary care. Another commenter with the same suggestion requested replacing "attending veterinarian" with "full-time veterinarian" in the standards.

Even at facilities with multiple veterinarians, there is only one attending veterinarian. When we refer to the "attending veterinarian" in the proposed standards, the term can refer to the actual attending veterinarian or his or her delegation of responsibilities to other veterinarians. We do not believe that replacing "attending veterinarian" with "full-time veterinarian" makes reference to roles more accurate.

A commenter observed that the degree of veterinarian engagement required throughout the proposed standards may not be appropriate for smaller facilities or individual exhibitors, and that veterinarians may not have sufficient knowledge to provide the necessary information on housing, diet, and suitability for exhibition use. The commenter recommended that APHIS develop or incorporate by reference existing taxa-specific standards on enclosures, handler experience, diet, and evaluation for exhibition use.

We acknowledge that the expertise of staff at many avian facilities makes them well-suited to make housing and husbandry decisions affecting their birds, and we attempted to accommodate that fact in the standards. We do not plan to develop taxa-specific standards for birds, but we intend to work with newly licensed facilities to provide them with the knowledge they need to attain and maintain compliance both during and following the implementation period for this rule.

Some commenters disagreed with the requirement to arrange for an attending veterinarian to make regularly scheduled visits, stating that their birds are tested for diseases, quarantined, and seen by a veterinarian on an as-needed basis.

Regularly scheduled, routine examinations are key in preventative medicine and in ensuring the health, care, and welfare of the animal in question. In addition, an attending veterinarian must be available to respond to emergency health or other situations that arise.

Another commenter stated that APHIS should consider whether an on-site veterinarian is necessary and feasible in all instances, and whether there may be other mechanisms for ensuring the welfare of the animals such as through

<sup>22</sup> Please see the APHIS Tech Note referenced in footnote 20, "Research Involving Free-living Wild Animals in Their Natural Habitat."

self-certifications and ensuring compliance with existing state licensing requirements. Another commenter proposed identifying a qualified caretaker at each facility who would ultimately be the responsible party for the welfare of the birds under their care. Many experienced veterinarians would then be available for occasional consultations without being responsible for creating and executing husbandry plans.

An attending veterinarian need not be on site; we discuss this at greater length below. APHIS has no plans to approve self-certification programs for birds or any other species regulated under the AWA. In order to best ensure the health, care, and welfare of regulated species, the involvement of an attending veterinarian under a documented program of veterinary care is necessary.

Under the program of veterinary care in § 2.40(b), each dealer and exhibitor must establish a program that includes availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of the subchapter A, Animal Welfare; appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care; daily observation of all animals to assess their health and well-being, although daily observation of animals may be accomplished by someone other than the attending veterinarian; and a mechanism of direct and frequent communication so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian. The veterinary program must also include adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

A commenter asked us to clarify the definition of “program of veterinary care,” particularly as it relates to the requirement for species-specific care.

Minimum requirements for a program of adequate veterinary care are included in § 2.40(b). We note that, under the definition of *attending veterinarian* in § 1.1, he or she must have received training and/or experience in the care and management of the species being attended. Furthermore, an attending veterinarian may create a written program and work with facilities to ensure that the program includes details

pertinent to the species being maintained.

A few commenters asked what the proposed regulations mean by a “qualified” veterinarian.

We consider a qualified veterinarian as one meeting the definition of *attending veterinarian*, which means a person who has graduated from a veterinary school accredited by the American Veterinary Medical Association’s Council on Education, or has a certificate issued by the American Veterinary Medical Association’s Education Commission for Foreign Veterinary Graduates, or has received equivalent formal education as determined by the Administrator; has received training and/or experience in the care and management of the species being attended; and who has direct or delegated authority for activities involving animals at a facility subject to the jurisdiction of the Secretary.

One commenter noted that veterinarians approving husbandry and construction requirements as indicated in the proposed rule is not standard practice in most zoological facilities. Another commenter from an association representing zoos and aquariums noted that much of the recordkeeping and decision making that veterinarians are tasked with in the proposal, such as signing off on programs and determining elements such as environmental conditions, enclosure construction, normal postural and social adjustments, and environmental enhancement, should be part of a consultative process among the leadership of larger facilities and institutions. On this topic, another commenter added that it is often the husbandry and curatorial staff and managers that are the decision makers and recordkeepers (in consultation with the institution’s veterinary staff). The commenters asked that APHIS revisit some of these proposed tasks in light of their organization’s own veterinary care standards, which include provisions for preventative medicine and disease outbreaks, 24-hour availability of veterinary services, and procedures for handling pharmaceuticals.

We agree with the assertion made by commenters that many avian facilities of every size have staff that are able to apply professional standards to make significant decisions on questions of care and husbandry. For many of these decisions, it is sufficient that the attending veterinarian play a consultative role rather than to develop and impose what should be done, and allow other knowledgeable persons to make and execute care and husbandry decisions. We discuss revisions we are

making to the proposal on this subject under “Standards for Birds in 9 CFR part 3” below.

A commenter stated that if veterinarians are involved in husbandry decisions, they might have some liability if they make recommendations which have a detrimental impact on production, or are simply unaffordable. The commenter asked what appeals or mediation processes will be available in such cases.

As we note above, it is adequate that attending veterinarians play a consultative role in husbandry decisions that have historically been made by facility personnel. There are no such veterinarian liability processes provided for in the AWA or regulations, although State veterinary boards may have recourse for such actions.

A commenter asked that we establish requirements for veterinarian training in avian topics and have only veterinarians conduct inspections of facilities. One commenter suggested that there be avian veterinarian involvement in training the inspectors, clauses for the transparency of how inspectors are chosen, and continuing education in avian welfare. The commenter added that inspectors should be members of the Association of Avian Veterinarians as a show of commitment to avian welfare and medicine, or, in the case of small animal veterinarians, have proof of substantial avian knowledge and experience. Other commenters asked how APHIS plans to train inspection staff on different avian species and their unique welfare needs, particularly given the Agency’s limited human and fiscal resources.

We acknowledge commenter concerns about APHIS’ ability to conduct inspections of avian facilities, but we emphasize that APHIS has the resources, access to specialized knowledge and training, and personnel to ensure that inspectors will meet all requirements and will have received the training necessary to conduct fair and accurate inspections of avian facilities. Trained inspectors will not require veterinary credentials in order to conduct such inspections successfully.

A number of commenters disagreed with the proposed veterinary requirement on grounds that few veterinarians are experienced in avian medicine and that those who are experienced would need to travel long distances to conduct visits, as many areas lack qualified avian veterinary care. One commenter stated there is a shortage of veterinarians in rural areas and requiring veterinary involvement for simple procedures is not a viable option. Another such commenter recommended that veterinarian visits be

required only once a year. A commenter noted that there are only 79 board-certified avian veterinarians in the United States and that they are not always located where bird owners operate, and another stated that few avian veterinarians specialize in or have significant experience with doves, finches, canaries, and waxbills.

Given the challenges cited above, a number of commenters asked whether the veterinary visit requirement could be met through telemedicine, *i.e.*, virtual visits by the attending veterinarian. A few commenters suggested that telemedicine with avian specialists could be integrated with local non-avian veterinarians, with the latter conducting the physical inspection. One commenter called for onsite inspections every 3 to 5 years with a "Zoom type" meeting annually. Another commenter asked whether the attending veterinarian would need to hold a license in the State where the virtual visit occurs and whether an initial in-person inspection of the facility would be required. One commenter stated that APHIS should support a veterinary care model that does not require transporting birds and has easy access to remote laboratory services for diagnoses. Finally, a commenter asked whether an attending veterinarian could work remotely with aviculturists in other States if needed.

We acknowledge the challenges faced by some facilities to secure an attending veterinarian with avian expertise within their geographical area. To that end, we wish to clarify that the attending veterinarian need not be physically present at the facility in order to conduct visits, but could use a local veterinarian without specialized training and/or experience in the care and management of birds as a proxy if the attending veterinarian is comfortable with such an arrangement and provides direction to the local veterinarian. This is provided for in the regulations in § 2.40(a)(1), which allows for "consultant arrangements" in which another local veterinarian other than the attending veterinarian serves as a proxy for the attending veterinarian and conducts the visit. To that end, we encourage facilities and veterinarians needing to confer remotely with experts in avian medicine or aviculture that may be located in other States to do so. We do, however, maintain that the facility inspection must be done in person because virtual inspections may provide an incomplete picture of conditions at a facility. A veterinarian at the facility can acquire detailed sensory and visual information to assess

compliance in ways that a camera cannot.

In addition, we wish to highlight additional flexibilities in the regulations in § 2.40 that will allow facilities with birds to minimize the frequency of veterinary visits and manage the costs of specialized care while maintaining the health of their birds as the AWA requires. Current § 2.40(a)(1) includes the requirement that each dealer and exhibitor employing a part-time attending veterinarian include, as part of formal arrangements in the program of veterinary care, regularly scheduled visits to the premises. APHIS recommends that the regular visit be once a year, but the regulations do not require a set frequency of visits. As the frequency and types of examinations are determined by the attending veterinarian, he or she may reason that a facility with staff knowledgeable and attentive to the medical needs of its birds requires less frequent visits to that facility. Moreover, the regulations do not specify that routine examinations of birds for signs or symptoms of disease or injury must be conducted in person; we acknowledge that these can often be conducted adequately through telehealth visits, should the attending veterinarian agree to such an arrangement given the circumstances in question.

Finally, we wish to emphasize that one of the purposes of the implementation period referenced earlier in this document is to afford facilities an opportunity to present to APHIS any logistical challenges to compliance so that both parties are aware of the challenges and can work collaboratively to remediate them within that implementation period, and that APHIS has experience working with facilities who have difficulty finding an attending veterinarian for a particular species maintained at the facility.

A few commenters stated that because wild-caught birds are fragile and easily stressed, it is unclear if mandating annual physical exams by a veterinarian would benefit the bird or further stress them. Similarly, another commenter stated that netting and grabbing birds every year for an arbitrary and unnecessary health check is dangerous and stressful to certain birds, particularly birds in aviaries with water elements. Another commenter noted that raptors have robust immune systems and that annual exams are unnecessary, and that hands-on exams are particularly stressful and potentially fatal for these birds.

APHIS will ensure that inspections of birds in large enclosures and enclosures

with water elements are conducted in a manner that will not harm the birds. A physical, hands-on annual examination for birds is not a requirement under the AWA regulations, nor do we propose to require one. The attending veterinarian will monitor the health of birds through regular visits and consultation with facilities and will only conduct a physical examination on a bird if he or she considers it safe and necessary to its health and well-being.

In the proposed rule, within the context of our discussion of veterinary care, we asked for specific comment on pinioning (disabling wings) and other deflighting procedures, toenail clipping, devoicing, and beak alterations. We noted that some comments that we received during the listening sessions requested that we prohibit some of these procedures on grounds that they are mutilations, while some comments suggested that there could sometimes be valid health-based reasons for performing them.

We received numerous comments regarding physical alterations to birds that, the commenters stated, could adversely affect their health and well-being. One commenter suggested that APHIS phase out the practice of deflighting birds through physical alterations in regulated facilities within the next 10 years with the provision that veterinarians may grant exemptions for individual birds. Several commenters stated that the attending veterinarian must be involved in every decision regarding whether or not to deflight an individual bird.

While APHIS did not propose to prohibit the practice of deflighting birds in the proposed standards, we agree that any decision to permanently deprive a bird of flight through surgical interventions would have to be made in consultation with, and either by or under the supervision of, the attending veterinarian. Involvement of the attending veterinarian in such decisions is consistent with the requirement in § 2.40(a) that each dealer and exhibitor have an attending veterinarian to provide adequate veterinary care, and § 2.40(b) requires the use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries under the program of veterinary care. Moreover, an attending veterinarian has the medical training to suggest other interventions and remediations, if available, as alternatives to surgical interventions that permanently physically alter the bird in question. The attending veterinarian ultimately determines whether pinioning would be detrimental to a bird's health and well-being and therefore would not be in

compliance with the Act and regulations.

One commenter cited evidence that wing-trimmed birds suffer from detrimental levels of stress and behavioral deprivation, and suggested that APHIS ban wing trimming prior to and during fledging, as learning to fly is critical to normal brain development. Another commenter acknowledged that when done properly, the trimming of a bird's wings to temporarily affect flight should not cause pain, permanent disfigurement, or complete impairment of flight. The commenter advised that wing trimming must only be permitted when medically necessary, as determined by the attending veterinarian, and must not be used to make up for poor housing facilities.

While we acknowledge the commenters' concerns, we do not consider wing trimming to be an activity requiring consultation with or supervision by the attending veterinarian. As the second commenter indicated, wing trimming performed by qualified personnel in accordance with professionally accepted standards does not permanently deprive a bird of flight, nor does it cause pain or disfigurement.

A substantial number of commenters stated that APHIS should prohibit non-therapeutic pinioning (the surgical removal of the outermost bones in a bird's wing, resulting in an inability to fly), as well as brailing, feather-pulling, and patagiectomy, or the surgical removal of the skin between the humerus and radius. One commenter noted that pinioning, which is frequently performed without anesthesia, causes operative and post-operative pain to birds and can permanently affect balance. Accordingly, the commenter encouraged APHIS to prohibit all forms of permanent deflighting unless medically necessary. Several commenters stated that APHIS should require licensees to use the least invasive alternatives to mutilations wherever possible. Some commenters not opposed to pinioning asked that appropriate use of pain management be required for all surgical methods of deflighting.

On the other hand, one commenter stated that pinioning is an important tool in zoological management of species such as flamingoes and waterfowl as it allows for more spacious housing as opposed to large, covered ponds, which are costly to construct and cannot provide the largest possible space. The commenter added that if pinioning is performed in the first week of life, the nervous system is not mature and discomfort is minimal. Another commenter stated that banning

pinioning would be wrong because it can make birds calmer.

We acknowledge that pinioning can cause pain and lead to the permanent physical alteration of the bird, and accordingly we strongly discourage its practice for non-therapeutic purposes. However, it is sometimes necessary to remove a severely injured or self-mutilated wing to preserve the health of the bird. For that reason, we are not prohibiting its practice but requiring that the procedure be considered and performed in consultation with, and either by or under the supervision of, the attending veterinarian in accordance with the requirement to provide adequate veterinary care in § 2.40. The attending veterinarian ultimately determines whether pinioning would be detrimental to a bird's health and well-being. With respect to pain management when such a procedure is necessary, we note that § 2.40(b)(4) requires that the program of veterinary care include adequate guidance to personnel involved in the humane care and use of animals regarding anesthesia and analgesia.

Some commenters stated that APHIS should encourage changes in housing and management that permit flight rather than using surgical alterations to prevent flight and noted that this idea is supported by numerous zoological associations.

We agree, and strongly encourage facilities to consider changes in bird management practices before considering and performing non-therapeutic surgical interventions in consultation with, and either by or under the supervision of, the attending veterinarian in accordance with the veterinary care requirements in § 2.40.

A number of commenters also asked that we prohibit other physical alterations for non-therapeutic purposes such as devoicing and beak alterations, noting that such alterations constitute mutilation and cause pain. One such commenter stated that regular beak trimming is not necessary in a healthy bird with no predisposing beak abnormalities and proposed that it must not be performed without medical necessity as determined by the attending veterinarian. Another commenter opposed to the practice noted that several countries prohibit beak trimming. Regarding the practice of devoicing birds, a commenter stated that the procedure can significantly harm birds physically and behaviorally.

We strongly discourage beak trimming and devoicing for non-therapeutic purposes. Such procedures must be considered and performed only in consultation with, and either by or

under the direct supervision of, the attending veterinarian in accordance with veterinary care requirements in § 2.40. The attending veterinarian will determine whether the procedure is detrimental to a bird's health and well-being.

Several commenters also asked that we include standards that prohibit public contact with birds, including public handling of exhibition birds. One commenter stated that the current regulations on handling animals are inadequate to ensure the welfare of captive birds and that the proposed rule fails to acknowledge that allowing the public to handle them poses risks to the animals as well as the public. The commenter stated that the USDA must address these risks by promulgating regulations that strictly prohibit public contact. Other commenters similarly asked that we restrict or prohibit public interaction programs (handfeeding, photos, touching, swimming with penguins), noting that physical contact with birds can result in injuries and spread psittacosis and other diseases to humans. Several commenters stated that requiring a sufficient distance or barriers between animals and the viewing public is important to ensure the safety of both animals and people. One commenter noted that public interaction stresses birds and that public feeding can result in improper nutrition. The commenter added that for the same reasons, the public should never be permitted to enter a primary enclosure where birds are housed.

Requirements for public contact are included under § 2.131, Handling of Animals, and are intended to protect animals being exhibited as well as the public. All licensees who maintain wild or exotic animals must demonstrate the ability to adequately care for the species they maintain. Under paragraph (c)(1), during public exhibition, animals must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public. A responsible, knowledgeable, and readily identifiable employee or attendant must also be present at all times during periods of public contact. If public feeding of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet. Additionally, APHIS is currently evaluating the conditions under which the public should be allowed to come in contact with various species of regulated animals more broadly and we will evaluate these issues as they

pertain to birds in the context of that larger evaluation.<sup>23</sup>

A commenter provided several examples of the animal welfare and zoonotic disease risks associated with “budgie barns,” in which the public enters an enclosure with birds on exhibit. The commenter stated that USDA should either ban such exhibits or prescribe strict standards for how facilities should maintain them, including supervision of public feeding, limiting the number of birds and persons allowed in the enclosure at any one time, and providing for the needs of geriatric birds.

Persons exhibiting large numbers of birds to the public in “budgie barns” will typically be required to be licensed. These facilities will be required to comply with all applicable AWA regulations and standards, which include specific requirements in § 2.131 for handling of animals and provisions for the concerns expressed by the commenter. As we note above, we are also undertaking an initiative to evaluate the conditions under which the public should be around or in contact with various species of regulated animals, and we intend to examine budgie barns in the context of that larger initiative.

Many commenters asked us to specifically prohibit riding birds such as ostriches, as it stresses the animals, causes pain to their limbs, and puts them at risk of injury. One such commenter stated that ostrich racing activities are not consistent with animal well-being. The commenter recommended that the USDA strictly prohibit all activities involving the wrangling, mounting, and riding of birds.

Again, our current initiative to examine the risks of public contact with animals covered under the AWA, to animals as well as persons, will evaluate activities in which the public has unmediated physical contact with a regulated animal, such as ostrich riding. That being said, the regulations in § 2.131, Handling of Animals, currently contain provisions for restricting such activities. Under paragraph (b)(1), handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort. Under paragraph (a)(2)(i), physical abuse shall

not be used to train, work, or otherwise handle animals.

A commenter noted that the proposed rule fails to include any suggested regulations or commentary on the practice of euthanasia. The commenter listed many current agricultural practices used for killing birds, noting that most do not qualify as euthanasia because they fail to prevent pain and distress or are not applied reliably and consistently. The commenter stated that APHIS should prohibit such practices.

Under current 9 CFR part 2, subparts C and D, research facilities, dealers, and exhibitors are subject to several provisions regarding the humane application of euthanasia that will apply to AWA-covered bird facilities. Other methods of euthanasia raised by the commenter are used in an agricultural context and are outside the scope of this rule and the AWA.

#### *9 CFR Part 2, Subpart E: Identification of Animals*

Subpart E, § 2.50(e)(1), requires that dealers and exhibitors of all animals, except dogs and cats,<sup>24</sup> delivered for transportation, transported, purchased, sold, or otherwise acquired or disposed of by any dealer or exhibitor be identified by the dealer or exhibitor at the time of delivery for transportation, purchase, sale, acquisition or disposal, as provided in the subpart. Primary enclosures require a means for identifying each of the animals within the enclosure. Comments received on this subpart are discussed below.

#### *Time and Method of Identification— § 2.50*

We proposed to amend § 2.50 of the regulations, which addresses methods of identifying animals. Paragraph (e)(1) requires dealers and exhibitors to identify all animals, except for dogs and cats, delivered for transportation, transported, purchased, sold, or otherwise acquired or disposed of, at the time of delivery for transportation, purchase, sale, acquisition, or disposal. Paragraph (e)(2) requires such animals, when confined to a primary enclosure, to be identified using one of three methods: A label attached to the primary enclosure that bears a description of the animals in the primary enclosure; marking the primary enclosure with a painted or stenciled number which shall be recorded in the records of the dealer or exhibitor together with a description of the animals; or a tag or tattoo applied to each animal in the primary enclosure

that individually identifies each animal by description or number. When such an animal is not confined to a primary enclosure, paragraph (e)(3) provides that the animal be identified on a record that must accompany the animal and be kept and maintained by a dealer or exhibitor as part of his or her records.

Labels attached to primary enclosures, leg and wing bands, and transponders (also referred to as microchips) are preferred methods of identification for birds. These methods are commonly and safely used to identify birds in all segments of the avian industry that we would regulate. The ability to identify animals is a part of basic animal husbandry and allows for APHIS to track animals to monitor movement. Therefore, we proposed to add a new paragraph § 2.50(e)(2) to require dealers and exhibitors to identify birds confined to a primary enclosure with one of the following: A label attached to the primary enclosure that bears a description of the birds in the primary enclosure, including the number and species of birds and any distinctive physical features or identifying marks of the birds; a leg or wing band applied to each bird in the primary enclosure by the dealer or exhibitor that individually identifies each bird by description or number; or a transponder (microchip) placed in a standard anatomical location for the species in accordance with currently accepted professional standards, provided that the facility has a compatible transponder reader that is capable of reading the transponder and that the reader is readily available for use by an APHIS official and/or facility employee accompanying the APHIS official.

We proposed that birds that are not confined to a primary enclosure will be subject to the identification requirements contained in redesignated paragraph (e)(4). Under that paragraph, such birds would have to be identified on a record, as required by § 2.75 of the regulations, which would have to accompany the bird at the time it is delivered for transportation, transported, purchased, or sold, and would have to be kept and maintained by the dealer or exhibitor as part of his or her records.

Several persons commented on the methods we proposed for identifying birds. Some commenters recommended that any method of identification used should not affect a bird’s mobility, social life, behavior, and longevity, and that the least invasive identification method possible should be used. One commenter stated that many birds cannot be safely identified with bands or microchips because of the bird’s size,

<sup>23</sup> An advance notice of public rulemaking was published for public comment in the **Federal Register** on January 9, 2023 (88 FR 1151–1154, Docket No. APHIS 2022–0022).

<sup>24</sup> Identification for dogs and cats is covered in § 2.50(a) through (d).

citing hummingbirds as an example. Another commenter stated that bands should not be used for identification as they can get caught in the bird's toys or other enclosure items and cause harm. A few commenters noted a shortage of band suppliers.

We agree that if the least invasive identification method can be used to identify birds, it should be employed. We note that under § 2.50(e)(2)(i), persons can identify birds by use of a label affixed to the primary enclosure.

A commenter stated that leg bands or microchips should be required for all birds except those under 20 grams in weight, as it would be impractical to band entire flocks of smaller birds.

We are making no changes in response to the commenter's suggestion, as persons may also identify such birds using a label on the primary enclosure.

One commenter stated that identification is not required in dogs and cats and so should not be required in birds.

The commenter is incorrect. Identification requirements for dogs and cats are listed in § 2.50(a) through (d). Provisions for identification of other animals by dealers and exhibitors are included in § 2141 of the Act. The accurate identification of animals is a part of basic animal husbandry and allows for APHIS to track animals to monitor movement for purposes of assessing animal health and well-being.

Several commenters expressed concerns with the cost and logistics of attaching tags or tattooing every bird within a very large colony. Another stated that there are also labor costs in labeling enclosures with identifying information.

While we acknowledge that recordkeeping and labor may be involved in complying with the identification requirements, licensees can comply with the standards by attaching labels to primary enclosures to identify the birds within. Identification is important to ensure that birds are accounted for and maintained safely in accordance with the Act.

A commenter stated that the requirement that an enclosure must have a painted or stenciled number is excessive and asked if a handwritten number would suffice.

As long as the number is legibly stenciled, painted, or written by hand, with all required information included, it would comply with the requirement in § 2.50(e)(2)(ii).

A commenter requested that APHIS confirm that if a licensee complies with a label attached to the enclosure, they do not have to band, microchip, tattoo,

or apply any other individual identifier to covered birds.

We can confirm that the commenter is correct.

#### *9 CFR Part 2, Subpart F: Stolen Animals*

Subpart F, Stolen Animals, prohibits any person from buying, selling, exhibiting, using for research, transporting, or offering for transportation, any stolen animal.

APHIS proposed no changes to this subpart and received no specific comments on it.

#### *9 CFR Part 2, Subpart G: Records*

Subpart G, Records, would require dealers and exhibitors regulated under this proposal to make, keep, and maintain records or forms which fully and correctly disclose certain information, as indicated in the subpart, concerning animals purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which are transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. Operators of an auction sale or broker would need to make, keep, and maintain records or forms which disclose the information indicated in the subpart concerning each bird consigned for auction or sold, whether or not a fee or commission is charged. Carriers and intermediate handlers newly registered under this proposal would need to keep records concerning C.O.D. shipments of live birds. Comments received on this subpart are discussed below.

#### *Records: Dealers and Exhibitors—§ 2.75*

Currently, § 2.75(b)(1) of the regulations requires that dealers (other than operators of auction sales and brokers to whom animals are consigned) and exhibitors make, keep, and maintain records or forms which fully and correctly disclose certain identification and disposition information concerning animals other than dogs and cats that are purchased or otherwise acquired, owned, held, leased, or otherwise in their possession or under their control, or that they transport, sell, euthanize, or otherwise dispose of. Among other things, the records must include any offspring born of any animal while in the dealer's or exhibitor's possession or under his or her control.

A few commenters noted that time spent on administrative tasks may be at the expense of adequately caring for the birds and may not provide as much benefit to the birds as the agency anticipates. One commenter encouraged APHIS to explore other methods to

account for and ensure the welfare of each individual bird, such as keeping records on families of birds and starting records at the time the offspring is hatched rather than having breeders backtrack and account for adult birds. Another commenter recommended that instead of filling out forms, a simpler means of maintaining disposition and acquisitions records would be to keep invoices from purchases and sales, maintain a log of hatches or clutches, and maintain a mortality log. A commenter stated that it will be problematic to account for birds individually such as finches, weavers, and other flock-managed species that are regularly producing offspring. The commenter noted that many zoos and other facilities undertake group management of some bird species and have protocols to ensure their welfare. Similarly, a commenter recommended that "herd records" be allowed, with total numbers of births, acquisitions, and dispositions required, with birds over 100 grams requiring individual records, and another asked that we allow "flock care" for birds under 50 grams. Finally, commenters expressed concerns about the cost of recordkeeping for small bird breeders who maintain hundreds of birds, with one noting that the time required to capture, band, and write records for each bird would be six minutes with a helper.

While we consider keeping records of each covered animal important for the purposes of ensuring adequate welfare, we acknowledge the challenges of accounting for individual birds in large flocks. To this point, we note that § 2.75(b)(1) only requires that a record be kept of the species and numbers of animals on hand at the facility, and when animals are born, purchased or otherwise acquired, or when transported, sold, euthanized, or otherwise disposed of. Identifying information of persons engaged in such transactions with the licensee is also required. As stated in § 2.75(b)(2), dealers and exhibitors can record this information on forms provided by APHIS.

Another commenter stated that recordkeeping under the AWA should only be for ensuring there are no smuggling or welfare violations.

We disagree with the commenter, and consider the proposed recordkeeping requirements to be necessary to ensure adequate welfare for each animal. Moreover, under § 2151 of the Act, "the Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter."

Several commenters stated there is no need to document activities such as cleaning schedules, moving a bird to a new cage, or replacing a perch.

If facility cleaning and sanitation procedures are delayed for breeding and nesting or other reasons, a documented schedule provides inspectors with important information regarding the delays to ensure that a facility remains in compliance with the standards. A documented schedule is not required if cleaning and sanitation are not delayed. Moving a bird to a new cage or replacing a perch under the proposed regulations would not require documentation.

A commenter noted that § 2.75(b)(1) requires dealers and exhibitors to keep records of “any offspring born or hatched of any animal” while under the dealer or exhibitor’s possession or control. The commenter acknowledged that, while this section concerns records kept by dealers and exhibitors, research institutions must report to APHIS the number of animals “held for use in teaching, testing, experimentation, research, or surgery, but not yet used for such purposes.” The commenter noted that the requirement to keep records of wild birds at hatching may cause stress on the birds and interrupt nesting and rearing activities and so urged APHIS to amend the requirement in § 2.75(b)(1) by adding “to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.”

We agree with the commenter that observing birds during nesting and rearing can cause disruption and are amending § 2.75(b)(1) to read that “the records shall include any offspring born or hatched of any animal while in his or her possession or under his or her control, to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.”

We proposed in § 3.151(a)(2) that scheduled cleaning must be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors. As we have noted above, we will not impose any requirements that will interfere with a species’ natural behavior when it comes to nesting and breeding. APHIS will work with facilities to find approaches that accommodate these concerns while ensuring that inspections can occur at appropriate times and possibly with the assistance of technology.

A commenter stated that bird breeders should all maintain health records on all birds sold.

Health records are generally not necessary for birds insofar as a program

of veterinary care and veterinary visits are required. However, the attending veterinarian may require such records based on their professional judgment of need.

We also proposed amending the last sentence of § 2.75(b)(1) to reflect its applicability to dealers and exhibitors of birds by adding the words “or hatched” after the word “born” in the previously cited provision regarding records for offspring born to animals while they are under a dealer’s or exhibitor’s possession or control. We received no comments on this proposed amendment.

#### *Records: Operators of Auction Sales and Brokers—§ 2.76*

Section 2.76 requires that operators of auction sales and brokers maintain records for any animal consigned for auction or sold, whether or not a fee or commission is charged. Paragraph § 2.76(a) provides that those records must include such information as the name and address of the buyer or consignee who received the animal, the USDA license or registration number (if applicable) of the person selling, buying, or receiving the animals, the date of consignment, the band, microchip, or other durable individualized identification method assigned to the animal under § 2.50 or § 2.54, and a description of each animal. Currently, § 2.76(a)(7) requires a description of each animal that includes the species and breed or type of animal, the sex of the animal, the date of birth or approximate age, and the color and any distinctive markings.

Because the sex of some birds may not be readily determinable, we proposed to amend paragraph (a)(7)(ii) to require operators of auction sales and brokers to record the sex of a bird only if it is readily determinable.

The regulations allow operators of auction sales and brokers to provide an approximate age in lieu of an animal’s date of birth in those instances where the exact date of birth of the animal is unknown. We recognize that it is sometimes difficult to even estimate the approximate age of certain species of birds, so we will allow the approximate developmental stage of an animal to be provided if the date of birth or hatch date is unknown. We proposed to add this provision to (a)(7)(iii). For example, an operator of an auction sale or broker who does not know the hatch date or approximate age of a bird may disclose that the bird is a chick, juvenile, or adult on the records or forms maintained for that bird in accordance with § 2.76 of the regulations. In addition, to reflect the fact that birds lay

eggs rather than give birth to live young, we also proposed to add the words “or hatch date” after the words “date of birth” in paragraph (a)(7)(iii). We received no comments specifically on these proposed changes.

#### *9 CFR Part 2, Subpart H: Compliance With Standards and Holding Period*

Under § 2.100(a), each dealer, exhibitor, operator of an auction sale, and intermediate handler must comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

Under § 2.100(b), each carrier must comply in all respects with the regulations in part 2 and the standards in part 3 of this subchapter setting forth the conditions and requirements for the humane transportation of animals in commerce and their handling, care, and treatment. We received no comments specifically on this subpart.

#### *9 CFR Part 2, Subpart I: Miscellaneous*

Subpart I includes miscellaneous requirements for dealers, exhibitors, operators of auction sales, intermediate handlers, and carriers. Under § 2.125, newly regulated persons under this proposal must agree to provide any information concerning the business which APHIS may request in connection with the enforcement of the provisions of the Act, the regulations, and the standards. Also, under § 2.126(a), each dealer, exhibitor, intermediate handler, and carrier is required to provide APHIS officials with access to and inspection of property and records during business hours, as well as extend the use to APHIS officials of a room, table, or other facilities for proper examination of the records and inspection of the property or animals.

Under § 2.126(c), any regulated persons who intend to exhibit an animal at any location other than the person’s approved site (including, but not limited to, circuses, traveling educational exhibits, animal acts, and petting zoos), except for travel that does not extend overnight, is required to submit a written itinerary to APHIS. The regulations in subpart I also include provisions for missing animals, situations in which captive animals are determined to be suffering, and demonstration of ability to adequately care for the species maintained.

A commenter asked us to clarify the meaning of “travel itinerary” and the duration of travel requiring one.

Under § 2.126(c), traveling exhibitors of AWA-covered birds intending to exhibit animals at any location other

than the person's approved facility site, except for travel that does not extend overnight, are required to submit a written itinerary to the Deputy Administrator of Animal Care no fewer than 2 days in advance of any travel. The itinerary includes names, dates, locations and addresses where the animals will travel. However, under § 2.1(a)(3)(vii), persons meeting the *de minimis* threshold of eight or fewer covered pet birds in an exhibition, or four or fewer raptors in exhibition under the new exemption in § 2.1(a)(3), will be exempted from licensing and regulatory requirements, including submission of itineraries.

Several commenters using raptors for educational exhibition objected to the itinerary requirement, with one such commenter stating that the USFWS falconry license allows persons to go on overnight hunts without the need for an itinerary.

Falconry activities, including the activity described by the commenter, are not covered under the AWA and therefore excluded from regulation and licensing.

Section 2.127 states that APHIS will publish on its website lists of persons licensed or registered in accordance with the provisions of this part. The lists may also be obtained upon request by contacting the Deputy Administrator of Animal Care.

Several commenters, citing privacy and bird theft risk, expressed concern over the public disclosure of facility addresses by APHIS.

We note the address for business purposes does not necessarily need to be the facility address. An address that may be used for service of process suffices.

Under § 2.134 of subpart I, newly regulated dealers, exhibitors, intermediate handlers, and carriers are required to develop, document, and follow an appropriate contingency plan<sup>25</sup> to provide for the humane handling, treatment, transportation, housing, and care of their animals in the event of an emergency or disaster (one which could reasonably be anticipated and expected to be detrimental to the good health and well-being of the animals in their possession).

A commenter expressed uncertainty about what a contingency plan is and how long it may take to develop it, and asked us to clarify. Another commenter asked APHIS to ensure that facilities have sufficient time to prepare or revise

contingency plans prior to the effective date of the rule.

As we have noted above, APHIS intends to set an extended period of implementation so that facilities will have time available to come into compliance with the standards, which would include developing a contingency plan. Such a plan, required in § 2.134, provides for the humane handling, treatment, transportation, housing, and care of their animals in the event of an emergency or disaster (one which could reasonably be anticipated and expected to be detrimental to the good health and well-being of the animals in their possession). The contingency plan must be in place prior to conducting regulated activities. APHIS has made available a template for developing and documenting the contingency plan.<sup>26</sup>

### Standards for Birds in 9 CFR Part 3

As we have noted, the Act authorizes the Secretary of Agriculture to promulgate standards governing the humane handling, care, treatment, and transportation of covered animals by dealers, research facilities, exhibitors, operators of auction sales, and carriers and intermediate handlers. For dealers, research facilities, and exhibitors of animals covered by the Act, such standards must include minimum requirements for handling, housing, feeding, watering, sanitation, ventilation, shelter from extreme weather and temperatures, adequate veterinary care, and separation by species where necessary.

The standards are intended to ensure the humane handling, care, treatment, and transportation of birds not bred for use in research that are used, or intended for use, for research, teaching, testing, experimentation, or exhibition purposes, or as a pet. They accommodate the species-specific needs of birds and consider significant differences with respect to their biological and behavioral requirements. The standards are also designed to provide each individual bird with acceptable conditions consistent with ensuring its good health and well-being and meeting its physical and behavioral needs as required under the Act, which is the aim of the standards developed for all other animals covered under the Act.

Standards relating to the humane handling, care, treatment, and transportation of animals currently covered by the AWA are contained in 9

CFR part 3, subparts A through F. Subparts A through E contain specific standards for dogs and cats, guinea pigs and hamsters, rabbits, nonhuman primates, and marine mammals respectively, while subpart F sets forth general standards for warmblooded animals not otherwise specified in that part. We proposed to add a new subpart G to contain standards for birds.

The standards for birds that we proposed were divided into three broad areas: Facilities and operating standards; animal health and husbandry standards; and transportation standards. As a whole, these proposed standards would provide APHIS the means to effectively measure compliance and ensure animal welfare, while also affording breeders, dealers, exhibitors, researchers, and transporters the flexibility to use professionally accepted standards and the knowledge they have of their particular birds.

A commenter asked APHIS to acknowledge that all animal care professionals must focus on determining whether the care standards implemented by a facility provide sufficient welfare benefits to each individual animal. Accordingly, the commenter added, the standards and their implementation should be flexible enough to accommodate for variability in individual birds. This commenter and several others raised a concern about our use of the term "professionally accepted standards" throughout the proposal, noting that it seems too vague to be enforceable when applied to specific facility and husbandry requirements for each bird. The commenter added that it does not indicate which professional standard will be utilized and validated.

We agree that APHIS inspectors must focus on determining whether every covered animal at a facility is provided sufficient welfare benefits in compliance with the standards. To this end, we have developed the standards to be flexible enough to account for the great variability among birds that commenters have noted. As we stated in the proposal, we do not mandate a single, prescribed approach to meeting the standard, as the number of "professionally accepted standards" that facilities can use to comply with our standards are too numerous and species-specific to be listed. However, inspectors will receive training relevant to the inspections that they will conduct and we are confident that APHIS inspectors will be able to observe and determine compliance with each standard however a particular facility may choose to meet that standard. Additionally, we intend to provide

<sup>25</sup> An overview of the contingency planning requirement is available at <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/new-contingency-planning-rule/aphis-2020-0101>.

<sup>26</sup> The contingency planning template is available at <https://www.aphis.usda.gov/library/forms/pdf/aphis7093.pdf>.

guidance to facilities in terms of how to interpret the standard for their facility both during and following the implementation period. This will help to ensure that APHIS inspectors and facilities have the same understanding of what it means to be in compliance with a given standard, and what that compliance looks like in practice.

One commenter stated that the proposed standards are open to subjective interpretation, adding that many of the care standards explicitly state that APHIS will base their citations on published literature and apply them to compliance. The commenter expressed concern that licensees will not be privy to the literature that inspectors are interpreting to check for compliance with performance standards.

We disagree with the commenter, as the proposal makes no reference to interpretations of published literature in determining compliance with the standards. We do state that such determinations will be made in accordance with “professionally accepted” standards, which may vary based on the species in question. In some instances, they could be articulated in published literature and industry guidelines that would provide a “safe harbor” for the entities; in others, they may simply be based on widely accepted best practices applied in conjunction with the expertise of the facility’s employees. As noted above, we intend to provide guidance to facilities in terms of how to interpret the standard for their facility both during and following the implementation period.

Another commenter noted that none of the professionally accepted standards are identified and there is no explanation of where to go to find them. The commenter added that because APHIS proposes to make compliance with these standards mandatory without including the content of those standards in the rule, APHIS is engaging in incorporation by reference but fails to follow the laws that governs incorporation by reference of industry standards into agency rules. The commenter stated that if APHIS continues to desire to make compliance with professionally accepted standards a part of its bird care rules, APHIS should republish the proposed rule with the mandatory “professionally accepted standards” fully identified, with instructions on finding those standards and accept public comments on them, or simply forgo incorporation by reference by including the actual standard. The commenter also recommended that APHIS publish guidance assisting zoos and aquariums

in complying with the performance standards found in the proposed rule.

We are making no changes in response to the commenter’s recommendation to republish the proposal. The commenter’s assertion that “professionally accepted standards” constitutes incorporation by reference appears to be based on the assumption that there is a single, written set of standards within the professional aviculture community and that this set of standards is being obliquely referenced in the proposed rule. This is incorrect. As noted above, professionally accepted standards can vary from species to species. While for some species there may be published literature or industry guidelines, for others there may simply be widely accepted best practices applied in conjunction with the expertise of the facility’s employees. The purpose of our including “professionally accepted standards” in the rule is to provide facilities with the flexibility to use the knowledge they have of their particular birds and the ability to apply professional standards in order to meet our proposed standards. The means by which the standards may be met are too numerous and species-specific to include as prescriptive standards, and any attempt to do so directly or by incorporation by reference would eliminate the flexibility that newly licensed entities will need to ensure that their facilities are compliant. If facilities need guidance in how to meet any of the standards, APHIS will work with the licensee and assist them with ways of doing so both during and following the implementation period for this final rule before it becomes applicable to the licensee.

A commenter expressed the concern that performance-based standards are routinely interpreted and enforced in an inconsistent “anything goes” manner that undermines the welfare of regulated animals and the authority of the Act. The commenter stated that engineering standards for basic requirements will provide bright-line rules making compliance with and enforcement of the AWA easier.

We disagree with the commenter that performance-based standards are enforced capriciously and without consideration for animal welfare. While engineering standards evaluate compliance based on the manner in which an object is constructed or an action is performed, performance standards evaluate compliance based on the outcome of that construction or action, and specifically whether the outcome constitutes adequate animal welfare. Performance standards allow

facilities to use the knowledge they have of their particular birds and reference to professional best practices to meet the standards. The means by which the standards may be met are too numerous and species-specific to be practicable, and imposing engineering standards would eliminate the flexibility that newly licensed entities will need to ensure that their facilities are compliant for their particular birds and circumstances. As we noted in the proposed rule, performance standards appear throughout the existing regulations and have been implemented and enforced successfully for other covered species.

Many commenters expressed the view that the proposed standards apply a “one-size-fits-all” approach to stakeholders, subjecting hobbyists who breed just a few birds a year to the same costs and requirements as larger-scale commercial breeding operations.

APHIS inspectors determine compliance at each facility based on whether a standard is being met at that particular facility. Food, water, shelter, and other standards of animal welfare apply to covered animals at all facilities, regardless of size, and we have crafted the proposed standards such that there are multiple ways that facilities can meet them. If persons have questions about meeting the standards, APHIS will work with the licensee and assist them with ways of doing so both during and following the implementation period.

A commenter stated that APHIS should clarify in the final rule that so long as the welfare of the bird can be verified, the agency will not mandate any one performance-based standard over another. The commenter stated that the approach and method used to satisfy a particular requirement of the rule depends on the species of the bird in question, how and where the animal lives, and in some instances the particular use of the animal. The commenter added that APHIS should therefore focus on “best practices” to achieve the goals of the rule without prescribing unworkable requirements.

We agree with the commenter. As we have explained above, the proposed performance standards in 9 CFR part 3 may be met through a variety of approaches. We developed these standards with the flexibility to allow facilities to use the knowledge they have of their particular birds, as well as professional guidance and best practices, to meet each standard.

*Facilities and Operating Standards*

## Facilities, General

Facilities: Structure; Construction—  
§ 3.150(a)

Housing facilities must be safe and secure not only for birds but also for the persons attending to them and to the general public. As we noted in the proposal, the current regulations in part 3 for animals include requirements for housing that consider both animal and human safety. Therefore, we proposed in § 3.150(a) to require that housing facilities for birds be designed and constructed so that they are structurally and safely sound for the species of bird housed in them. We also required that they be kept in good repair, protect the birds from injury, and restrict other animals from entering. The facilities have to employ security measures that contain all the birds securely. Such measures may, as appropriate, include safety doors, entry/exit doors to the primary enclosure that are double-doored, or other equivalent systems designed to prevent escape of the birds. For birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof, we proposed to require that the birds have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at other times when their activities are not observed by staff.

A commenter asked for clarification as to the meaning of “housing facilities,” noting that it can include a piece of land or a building but appears to be intended as a building. The commenter asked that we clarify whether the regulations require that primary enclosures be located within housing facilities and whether housing facilities remain defined as land or a building. The commenter objected to a prohibition of free-standing primary enclosures, if this is APHIS’ intent, as such facilities constitute a large percent of the U.S. breeding facilities. Finally, the commenter also asked us to explain how § 3.150 (facility) and § 3.153 (primary enclosure) are intended to be read in conjunction.

As defined in § 1.1, a *housing facility* means any land, premises, shed, barn, building, trailer, or other structure or area housing or intended to house animals. An *indoor housing facility* has connected doors and walls and can be climate controlled, while an *outdoor housing facility* cannot be climate controlled. A *primary enclosure* restricts an animal to a limited amount of space, using a room, pen, run, or cage. We are uncertain as to the meaning of a “free-

standing primary enclosure,” but it would be evaluated as any primary enclosure with respect to whether it is in compliance with the standards for birds.

A commenter asked that whether, under § 3.150, a secondary enclosure would be required inside indoor, mobile, and traveling housing facilities. As an example, the commenter cited whether finches housed in a cage in an environmentally controlled room indoors would need another safety pen within their cage. The commenter recommended that we change “housing facility” in this context in § 3.150 to “outdoor housing facility.”

Based on the commenter’s description, a secondary enclosure would not be required inside a cage within an indoor housing facility, as the cage appears to be the primary enclosure. We do not see the reason for changing “housing facility” to “outdoor housing facility,” as “housing facility” encompasses both indoor and outdoor facilities.

A commenter asked whether this standard requires the construction of overhead caging and netting to keep out predators from above. The commenter also stated that § 3.150(a) is intended to separate ground-based predators from flightless and flight-restricted birds but in many instances perimeter fences already provide such protection. The commenter suggested we add language to § 3.150(a) that makes overhead netting unnecessary if there is no threat to the flightless or flight-restricted birds within, and ground barriers unnecessary if an existing perimeter fence already provides sufficient protection for the birds.

We note that § 3.150(a) contains only a general requirement to restrict other animals from entering the facility and makes no references to “ground barriers” or “overhead netting.” If such items, though not necessarily required, are among the means to ensure the standard is met, we do not see the utility of announcing they are unnecessary.

A few commenters disagreed with the requirement for “double doors” as a required security measure, noting that other enclosure configurations that can keep birds from escaping and that requiring such doors could cause financial burdens on breeders. The commenter asked that we remove the safety measure examples in § 3.150(a) or include other examples of acceptable safety configurations currently in use. Similarly, another commenter asked that we do not require double doors to contain some flightless or flight-restricted birds if a sufficiently tall outer

set of walls or nonpenetrable perimeter fence is in place to adequately prevent escape from the facility.

We note in the standard that while double doors may be one security measure, “as appropriate,” for containing birds safely, they are only one of many professionally accepted measures for securing birds under the standard.

A commenter asked us to define “protected” as used in “protection during overnight periods,” stating that birds at their facility that cannot fly can still move around an enclosure designed for their needs and do not need to be restricted to a smaller space overnight when staff is not there to observe them. Similarly, another commenter stated that for facilities that observe animals 24 hours a day, not all species need a protective safety pen or enclosure and suggested modifying the standard for protecting birds to be more flexible. One commenter noted that large flocks of birds, especially those with long legs, can be injured if herded into a shelter each night.

The commenters are referring to § 3.150(a), which requires that birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof must have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at times when their activities are not monitored. While the requirement does not require birds to be placed or herded into an enclosure, if an enclosure is not used there still must be an “area that offers protection” to birds overnight and when they are not being monitored. For example, protection from predators could be one defining feature of the “area.”

A commenter disagreed with the wording in § 3.150(a) to restrict other animals from entering the housing facility, noting that keeping out small animals such as sparrows and lizards would cause exhibitors to redo significant amounts of caging and netting with no welfare benefit. Another commenter noted that keeping out all animals would effectively ban the use of wire mesh for avian housing enclosures, as insects and other small animals could enter through the mesh. The commenter asked that this provision be reworded for more flexibility and to account for the avian species’ risk of predation. Similarly, a commenter asked that we incorporate a performance-based standard into this section of the regulation to reasonably restrict other harmful animals from entering the primary housing facility, as limiting

predation events to zero is difficult and costly.

We acknowledge the commenters' concerns as to restricting other animals from entering the housing facility and adhering to the standard. We are revising the second sentence of § 3.150(a) by adding the words "and restrict other animals from entering that may negatively affect the welfare of the birds within." It is meant to be a performance standard that allows persons to use generally accepted professional practices to restrict or prevent entry into the facility of harmful animals and to allow for incidental entry of benign animals.

One commenter asked that we reconsider defining standardized housing requirements, as species-specific housing does not allow for the flexibility required to address the individual needs of same-species birds. As an example, the commenter noted that some pairs of raptors will breed and rear young in an open breeding chamber, while others of the same species require enclosed chambers with only skylight openings and very little human contact.

We disagree with the commenter that § 3.150(a) is insufficiently flexible to accommodate the commenter's needs. The facility adjustments mentioned by the commenter, modified to accommodate the welfare needs of not only the species but individuals within that species, are the types of unique contingencies for which we developed the standards.

#### Facilities: Condition and Site— § 3.150(b)

We proposed that housing facilities for birds and areas used for storing animal food or bedding must be adequately free of any accumulation of trash, waste material, other discarded materials, junk, weeds, and brush. We also proposed to require that such areas be kept neat and free of clutter, including equipment, furniture, and stored material, except for materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices and research needs. We did not receive substantive comments specifically referring to § 3.150(b) and are finalizing it as proposed.

#### Facilities: Surfaces—§ 3.150(c)

We proposed that the surfaces of housing facilities need to be constructed in a manner and made of materials that allow them to be readily cleaned and/or sanitized, or removed and replaced when worn or soiled. Interior surfaces and surfaces that come in contact with

birds would also have to be nontoxic to the bird, free of rust or damage that affects the structural integrity of the surface or prevents cleaning, and free of jagged edges or sharp points that could injure the birds. This standard allows for thorough cleaning of the primary enclosure and ensures that the birds are contained securely and that the surfaces that come in contact with the birds do not cause harm.

A few commenters stated that the standard is overly prescriptive, in that the requirement to clean or sanitize surfaces of housing facilities does not work for outside birds in large enclosures, such as peacocks, ducks, and geese. More specifically, another commenter stated that APHIS has failed to consider or explain how § 3.150(c) would apply to a facility with aviaries suspended over grass, gravel, or dirt, which has no contact with the animal but nonetheless is maintained in a healthy state by biological processes or by washing the waste into the soil. The commenter asked whether the definition of "surface" includes grass, gravel, or dirt, and asked us to amend the regulation so that natural surfaces such as grass, gravel, sand, and dirt are permitted when maintained to neutralize waste through biological processes.

We acknowledge the concern of commenters with outdoor cages and other enclosures suspended over dirt, grass, or gravel. For geese and other birds in such enclosures, we note that we intended the term "surface" in the cleaning and sanitizing standards in § 3.150(c) to include dirt, grass, or gravel, or a similar surface that can be raked, shoveled, and hosed down, or where biological processes break down the waste. However for such natural surfaces beneath cages, accumulations of waste will need to be removed if composting or other biological processes fail to maintain a safe and healthy environment for the birds and facility personnel as required under the standards.

#### Facilities: Water and Electric Power— § 3.150(d)

We proposed that, for facilities maintaining birds, reliable sources of water and power must be available. The facility would have to have reliable electric power adequate for heating, cooling, ventilation, and lighting, and for carrying out other husbandry requirements in accordance with the standards. We also proposed that the facility provide adequate potable water for the birds' drinking needs and adequate water for cleaning and

carrying out other husbandry requirements.

A commenter expressed doubt that the requirement for electric power in a housing facility is performance based, noting that roughly half of all falconers house their birds in facilities without power and that for those who do have it, electric power is more a convenience and not an animal welfare need.

Practices associated with falconry are not covered under the AWA and are therefore excluded from regulation.

Another commenter asked us to clarify if each cage needs to have individual electrical power access or if the facility as a whole needs to have access to electricity.

The facility must have reliable electrical power adequate for heating, cooling, ventilation, and lighting if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. In this regard, we are revising this proposed provision so that reliable electric power is only required in a housing facility for heating, cooling, ventilation, and lighting if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. Accordingly, required access to power in a facility will depend on whether that access is necessary to comply with the regulations. If electric power is not necessary for compliance with other provisions and does not jeopardize animal welfare and proper husbandry, it is not a requirement.

A commenter stated that the term "potable water" is confusing as it is typically used to describe fresh water for consumption, noting that fresh water is not indicated for many birds kept in zoos and aquariums, for example penguins. The commenter asked that we explain the intended use of the term or clarify that the requirement to supply adequate potable water applies specifically to birds who get their water by drinking water. Another commenter stated that most of a raptor's water needs are met through their diet of meat, which greatly diminishes their requirement for drinking water. For this reason, the commenter asked that the regulations be clearly worded so they do not require continuous or daily access to water.

We acknowledge that some birds do not require fresh water and that some are hydrated primarily through diet, in which case they may not require availability of potable water. However, clean water is necessary for cleaning and carrying out other husbandry requirements, in accordance with § 3.150(d) as we proposed.

Another commenter asked that we include a performance-based amendment to the standard that affirms the use of wells, so long as the water provided is non-detrimental to the health of the animals. The commenter also asked APHIS to allow the presence of aesthetic nuisance contamination in well water affecting taste, smell, or sediment that does not affect the health of the animals.

If water from any source is safe and potable for birds that drink water, and does not otherwise affect the health of the animals, it can be used to address the standard. We see no need therefore to specifically affirm the use of wells as the commenter requested. APHIS will verify compliance with the standard as part of the facility prelicensing inspection and in subsequent visits.

#### Facilities: Storage—§ 3.150(e)

We proposed that supplies of food, including food supplements, bedding, and substrate must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation and that supplies be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies.

A commenter stated that “off the floor and away from the walls, to allow cleaning underneath and around the supplies” is language used in the regulations pertaining to dogs and non-human primates. The commenter asked us to consider removing this requirement and including a performance-based requirement in its place. Another commenter asked that we amend the proposal to permit storage of large pallets of feed bags on floors and against walls, so long as it is non-detrimental to the quality of the feed.

We are making no changes to proposed § 3.150(e) regarding keeping supplies off the floor and away from walls. As the commenter noted, these requirements are included for storage for other regulated animals, which we included to allow for cleaning and to prevent pest infestation of feed.

A commenter proposed that the regulation be amended to allow cleanings of the storage facility once the stored product has been expended and before a new supply is stored.

We disagree with the commenter on this point, as frequency of cleaning should not be based on the rate at which bedding or food products are consumed.

We also proposed that all food must be stored at appropriate temperatures and in a manner that prevents contamination and deterioration of its nutritive value, and that food would not

be allowed to be used beyond its shelf-life date or expiration date listed on the label.

A few commenters stated that the temperature storage and shelf-life requirement is not included for any other regulated species and will add unnecessary burden because owners would need to be aware of the temperature at which the bird food should be stored, and such information is usually not available on the label. One commenter noted that the standard requires an engineering control for a potential unknown variable (*i.e.*, storage temperature). Another commenter asked for flexibility in interpreting this standard, noting that nonprofit organizations sometimes receive donated food for birds that is near or past its expiration date and is used while the nutritional value is still acceptable. A commenter recommended that we replace “tightly fitting lids” to “tightly fitting lid, seal, or clip” to allow feed to be stored in the original container, as transferring feed to another container may make it difficult to determine its nutritional value, expiration date, and storage information. The same commenter proposed that placing bedding material such as straw and wood shavings in “waterproof containers” is impractical, and proposed that we amend the regulation to state that “bedding must be stored in a way that prevents it from being wetted and must not be used if it would be harmful to the health of the animals.”

We agree with the commenters that the temperature and storage standards for food and bedding could be more performance-based while still ensuring the health and well-being of the birds maintained. Accordingly, we are revising proposed § 3.150(e) to remove the temperature and shelf-life requirement and instead to provide that supplies of food and bedding must be stored in facilities that adequately protect such supplies from deterioration, spoilage (harmful microbial growth), and vermin or other contamination, and that all food must be stored in a manner that prevents deterioration of its nutritive value.

We also proposed in paragraph (e) that live food be maintained in a manner to ensure wholesomeness and that substances such as cleaning supplies and disinfectants that are harmful to birds but required for normal husbandry practices may not be stored in food storage and preparation areas but may be stored in cabinets in the animal areas, provided that they are stored in properly labeled containers that are adequately secured to prevent

potential harm to the birds. Finally, we proposed to prohibit animal waste and dead animals and animal parts not intended for food from being kept in food storage or food preparation areas, food freezers, food refrigerators, and animal areas.

A commenter asked us to consider revising this standard to be more performance-based. More specifically, another commenter was unsure how we intended to define “food storage and preparation areas” and “animal area,” and asked whether the term “area” allows one room to be divided into two areas: One for food storage and preparation and one for cleaning supply storage.

Activities involving animals and activities involving food storage and preparation must be performed in separate areas configured to prevent animal intrusion into supplies and food contamination. One room may be used provided that animals are kept in an area away from food storage and preparation.

Further, the same commenter asked why cleaning supplies and disinfectants cannot be stored in the food preparation area, which in many home-based businesses is the kitchen. Aside from stating that the proposal is unclear about what constitutes the “animal area,” the commenter asked us to amend the proposal to permit the storage of cleaning supplies and disinfectants in both areas, so long as they are properly labeled and in containers with tight-fitting lids.

As long as the cleaning supplies pose no risk of contaminating food or other items that the animal could come into contact with, cleaning supplies can be stored in a kitchen area provided they are adequately secured to prevent potential harm to the birds. The proposed standard allows for that flexibility.

Another commenter asked us to define “wholesomeness” in the context of the standard.

If live food is being provided to birds, we define “wholesomeness” to mean that the live food is maintained or kept in such a way that it is alive when fed to the birds and is free from spoilage and contamination, and protects against the deterioration of its nutritive value.

#### Facilities: Waste Disposal—§ 3.150(f)

We proposed to require that housing facility operators provide for regular and frequent collection, removal, and disposal of animal and food wastes, substrate, dead animals, debris, garbage, water, and any other fluids and wastes in a manner that minimizes contamination and disease.

Several commenters noted that it is critically important to limit intrusion into raptor breeding chambers for waste disposal. One commenter noted that most breeding chambers are large enough that food waste and feces do not accumulate excessively, and that a typical raptor breeding chamber today is no more unsanitary than a wild nest site that also accumulates food waste in the form of dead animal remains during the nesting season. The commenter stated that APHIS should not expect or require breeders to clean the chambers between February 1 and August 31 of each year. Another commenter asked that we provide an exception to “regular and frequent waste disposal” to accommodate birds that are destined for release into the wild. In requesting an accommodation to this requirement, the commenter, who works with endangered California condors, noted that the birds take 6 to 8 months to rear their young, during which time staff must limit entry into the enclosures to prevent unintended habituation. The commenter also stated it is important that juvenile California condors intended for release do not see staff handle food items and therefore cleaning around pre-release birds must be limited. In addition, disturbance of breeding pairs can result in aggression and injury between mates and damage to eggs or nestlings.

We acknowledge the importance of avoiding intrusion into breeding chambers for cleaning purposes. Under amended § 3.158(a)(2) we will allow for a delay in cleaning, as we will not impose any requirements that will interfere with a species’ natural behavior when it comes to nesting and breeding.

We also proposed that trash containers in housing facilities and in food storage and food preparation areas be leakproof and have tightly fitted lids.

A commenter asked us to consider removing this requirement, as “leakproof and tightly fitting lids” are engineering standards, and to make the standard more performance-based.

We agree with the commenter and are revising the requirement in proposed § 3.150(f) to require that the trash containers “be able to contain trash securely to minimize odors and be inaccessible to animals and pests.”

Facilities: Drainage—§ 3.150(g)

As proper drainage must be provided in order to maintain cleanliness and sanitary conditions, we proposed several standards.

We proposed that housing facilities be equipped with disposal and drainage systems that are constructed and

operated so that animal wastes and water, except for water located in pools or other aquatic areas (e.g., ponds, waterfalls, fountains, and other water features), are rapidly eliminated and the animals have the option of remaining dry. Any pool or other aquatic area would have to be maintained in accordance with the regulations in proposed § 3.157.

One commenter stated drainage systems are not necessary in some buildings used for breeding at their facility because the cages are suspended and the floors in those buildings never need washing. Another commenter stated that the term “drainage system” and the requirement that “all drains must be properly constructed, installed, and maintained so that they effectively drain water” seems to imply having a floor drain with plumbing to a wastewater system for indoor housing facilities. The commenter stated that installing drains may be challenging and expensive for individuals that have been successfully maintaining birds without a drainage system and recommended that we change the requirement to something akin to the performance-based drainage standard for rabbits.

As long as animal wastes and water are rapidly eliminated and the animals have the option of remaining dry, the standard in § 3.150(g) is met. We note that a “disposal and drainage system” does not need to be a constructed floor drainage system but can be a procedure that achieves this objective, such as shoveling or otherwise moving animal wastes, water, and wet bedding from an area.

We also proposed that disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards, and that all drains must be properly constructed, installed, and maintained so that they effectively drain water. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage. If the facility uses sump ponds, settlement ponds, or other similar systems for drainage and animal waste disposal, we proposed that the system must be located a sufficient distance from the bird area of the housing facility to prevent odors, diseases, insects, pests, and vermin infestation in the bird area.

In addition, we proposed that if drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters or pipes so that the animals have the option of remaining dry.

A commenter stated that the terms “gutters or pipes” is an engineering

control that may be expensive and unnecessary for some bird housing systems, and asked that we consider changing the “gutters or pipes” requirement to a performance standard that describes the same outcome, *i.e.*, that animals remain dry.

As the commenter notes, the performance standard is that animals have the option of remaining dry. Accordingly, if there are ways for meeting the standard other than gutters and pipes for rapidly draining excess water from animal areas, then the facility can use them to comply with this standard. For this reason, we are amending the requirement to read as follows: “If drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters, pipes, or other methods so that the animals have the option of remaining dry.”

Facilities: Toilets, Washrooms, and Sinks—§ 3.150(h)

We proposed that toilets and washing facilities, such as washrooms, basins, sinks, or showers, must be provided for and be readily accessible to animal caretakers.

A commenter asked that the regulation be amended to permit a facility to rely on a toilet facility that is nearby, but not on the same property, as some facilities have running water but no toilet on the property. Another commenter asked why showers and toilets are required and asked for clarification.

We see no need to amend the standard, as the regulation as written does not require a readily accessible toilet to be on the same property as the facility. As long as a working toilet is accessible somewhere within a reasonable distance to caretakers, it will meet the standard. As to why caretaker access to a toilet is required, it is a matter of basic hygiene. A shower is not a requirement, as long as basins, sinks, or other sources of water are readily available to caretakers.

Facilities, Indoor

Indoor Facilities: Temperature and Humidity—§ 3.151(a)

We noted in the proposed rule that maintaining appropriate air temperature and humidity levels and, if present, pool or other aquatic area (e.g., ponds, waterfalls, fountains, and other water features) temperature is vital to the health and well-being of birds. Therefore, we proposed that the air temperature and humidity levels and, if present, pool or other aquatic area

temperatures in indoor facilities be sufficiently regulated and appropriate to the bird species to protect them against detrimental temperature and humidity levels, to provide for their health and well-being, and to prevent discomfort or distress, in accordance with current professionally accepted standards. In addition, we proposed that prescribed temperature and humidity levels must be part of the written program of veterinary care or part of the full-time veterinarian's records.

A commenter noted that specificity in prescribed temperature and humidity levels may be difficult to determine for some avian species because no industry standard exists for humidity levels for adult birds. The commenter asked that we provide detail regarding what we expect for this requirement, which could include having institutional staff involved in such determinations. Similarly, a commenter stated that a search for "professionally accepted standards" for humidity levels yielded no results, making it impossible to determine what the professionally accepted standards for humidity for indoor bird exhibits might be. Another commenter asked how APHIS knows what the range of air temperature and humidity would be for a bird's health and comfort when there are 10,000 species from around the world.

We acknowledge that correct temperature and humidity levels are essential to a bird's health and well-being and that there are thousands of species of birds with widely varying needs, which is why we proposed a performance-based standard for birds that requires protection against detrimental temperature and humidity levels, supports health and well-being, and prevents discomfort or distress. We do not expect an exact temperature and humidity figure to be determined and maintained for every species kept. APHIS has ample knowledge of what constitutes appropriate temperature and humidity levels for most species, and persons with questions about what levels are appropriate can contact APHIS.

Another commenter suggested that temperature and humidity guidelines could be written by a qualified caretaker in consultation with peers or their veterinarian, as most veterinarians unfamiliar with birds already depend on a caretaker for husbandry care.

We agree that qualified caretakers in consultation with veterinarians or other experienced persons, along with reference to professionally accepted standards, are capable of determining and instituting temperature and humidity levels that comply with this

standard. Accordingly, we are amending § 3.151(a) to no longer require that prescribed temperature and humidity levels be part of the written program of veterinary care or part of the full-time veterinarian's records. However, if the attending veterinarian of a facility sees fit to prescribe such levels to ensure bird health and well-being, he or she can do so.

A commenter representing raptor owners stated that native raptor species kept for falconry can withstand the range of year-round temperatures across the United States when shade and shelter from wind are provided.

Practices associated with the sport of falconry are not covered under the AWA and are therefore excluded from regulation.

#### Indoor Facilities: Ventilation— § 3.151(b)

We proposed that indoor housing facilities must be sufficiently ventilated at all times when birds are present to provide for their health, to prevent their discomfort or distress, accumulations of moisture condensation, odors, and levels of ammonia, chlorine, and other noxious gases. The ventilation system must minimize any drafts.

A commenter asked to explain how the space must be ventilated while also minimizing drafts.

The facility can be ventilated in such a way that incoming fresh air is vented away from the birds and diffused throughout the space, such that the air in the facility is replenished without drafts hitting the birds directly.

A commenter asked that we broaden the list of noxious fumes to include cleaners and air fresheners.

We are making no changes in response to the commenter's request. As we allow certain substrates and surface coatings that are "safe and nontoxic to the birds" in other standards we have proposed, we would allow cleaners and air fresheners provided that their use is safe and nontoxic to people and birds in the facility. In such an instance they would not be considered to be "noxious" under the standard.

#### Indoor Facilities: Lighting—§ 3.151(c)

We proposed that indoor housing facilities must have lighting, by natural or artificial means, or both, of appropriate quality, distribution, and duration for the bird species. Lighting must be sufficient to permit routine inspection and cleaning and be designed to protect the birds from excessive illumination that may cause discomfort or distress.

A commenter asked that we consider a provision to account for light bulbs

with toxic coatings, recommending that we add "if coated bulbs are used, the coating must be nontoxic to prevent inhaled toxicities."

We are making no changes in response to the commenter's request. We allow certain substrates and surface coatings in other standards as long as they are "safe and nontoxic to the birds." If coated bulbs emit toxic fumes or gases into the facility, they would not be in compliance with § 3.151(b).

#### Indoor Facilities: Indoor Pool and Other Aquatic Areas—§ 3.151(d)

In the proposal, we indicated that indoor pools or other aquatic areas (*e.g.*, ponds, waterfalls, fountains, and other water features) would need to have sufficient vertical air space above the pool or other aquatic area to allow for behaviors typical to the species of bird under consideration. Such behaviors may include, but are not limited to, diving and swimming.

A commenter stated that in some cases, space constraints may allow for aquatic areas that permit some, but not all, of a species' behaviors (*e.g.*, swimming, but not diving), and presumed that inclusion of such an aquatic area is permitted when the area would continue to benefit birds using it, as determined by the attending veterinarian. The commenter stated that guidance clarifying this issue would be useful in assisting facilities in their compliance efforts.

Provided that the vertical space allows for behaviors typical to the species and conforms to the space requirement standard, it would be in compliance. Also, it is subject to the discretion of the attending veterinarian.

#### Facilities, Outdoor

##### Outdoor Facilities: Acclimation— § 3.152(a)

As we noted in the proposal, outdoor housing facilities are completely dependent on local environmental conditions. We proposed that birds must not be housed in outdoor facilities unless the air humidity and temperature ranges they experience do not adversely affect their health and comfort. This requirement also applies to the temperature of pools and other water features. We also proposed that birds must not be introduced to an outdoor housing facility until they are acclimated to the ambient temperature and humidity and, if applicable, pool or other aquatic area temperature ranges they will encounter.

A commenter noted that, although the standard states that the humidity and temperature ranges must not adversely

affect bird health and comfort, we did not indicate how this standard will be determined. The commenter added that cage modifications, such as shade cloths, can help keep the birds comfortable when the outside temperature is not in their normal range of health and comfort.

The standard is met if the cage modifications are in compliance with the standards in the proposed subpart and allow for ambient temperature and humidity ranges outdoors such that the health and comfort of the birds is not adversely affected.

A commenter asked us to clarify expectations regarding acclimating birds to outdoor enclosures, specifically whether outdoor acclimation would only be needed for birds already accustomed to indoor enclosures.

If birds are already acclimated to outdoor humidity and temperature ranges of the outdoor enclosure, they do not need to be acclimated again.

The commenter also asked if acclimation would be required for birds captured from environments of similar temperature or humidity, and how “similar” is defined in these scenarios (e.g., within a specified temperature or humidity range).

Environments of similar temperature or humidity are those in which a bird’s health and comfort would not be adversely affected if moved from one such environment to the other.

The commenter also asked what the guidelines for acclimation are for birds captured from outdoor climates that are considerably different from the outdoor enclosures where birds will be housed during research, testing, or teaching, and where APHIS expects birds to be housed until acclimation to the new outdoor enclosure is achieved.

Birds captured from outdoor climates that are considerably different from outdoor enclosures where they are to be housed will need to be acclimated in accordance with professionally accepted standards until the time that they may be introduced to the outdoor housing facility without adversely affecting their health and comfort.

Finally, this and another commenter stated support for adding a statement to the proposed section acknowledging that some birds may not require acclimatization, such as wild-caught birds being housed in outdoor facilities with conditions similar to their natural habitat.

As implied in the standard, birds that are acclimated to the ambient temperature and humidity in the outdoor housing facility do not need to be acclimated. Accordingly, we see no reason to revise the proposed standard.

A commenter asked that we reiterate in § 3.152(a) the requirements from § 3.151(a) for indoor facilities regarding temperature and humidity. The commenter also asked that § 3.152(a) be revised to include provisions for acclimating birds gradually to outdoor environments, including pools.

The requirements in § 3.151(a) are for an indoor regulated environment and those in § 3.152(a) are for acclimation in outdoor unregulated environment, and thus have two different purposes. The standard for acclimating birds to outdoor environments can be met by using professionally accepted standards.

A commenter stated that many species housed in zoos are maintained year-round or seasonally outdoors, are well-acclimated to the regional climate, and subsequently do not require supplemental heating, cooling, or ventilation.

Provided that the air humidity and temperature ranges experienced by such birds does not adversely affect their health and comfort, they may be housed outdoors. This requirement also applies to the temperature of pools and other water features they may also use.

#### Outdoor Facilities: Shelter From Inclement Weather—§ 3.152(b)

Under our proposed changes, outdoor housing facilities must provide adequate shelter, appropriate to the species and physical condition of the birds and for the local climatic conditions, in order to protect the birds from any adverse weather conditions. Such shelters must be adequately ventilated in hot weather and have one or more separate areas of shade or other effective protection large enough to contain all the birds at one time and prevent their discomfort from direct sunlight, precipitation, or wind.

A commenter stated that the requirement to provide adequate shelter to protect the birds from adverse weather conditions is vague, noting that many species of waterfowl and other bird species will not thrive in or use sheltered areas, and that species appropriateness and not local climatic conditions is more important to consider for this standard. The commenter also stated that in some large aviaries, there is insufficient shelter space for all birds in the exhibit to take refuge from adverse weather at the same time, should they choose. The commenter asked if vegetation would suffice as shelter for this particular requirement. Similarly, another commenter noted that constructing a shelter that all birds can access at any time would be costly and most likely be unused by many birds.

We agree with the commenter that shelter must be appropriate to the species and that some species will not use sheltered areas. Vegetation providing shade and other natural protection may be used as shelter if appropriate to the species, but under the standard there must be enough such protection to cover all the birds to protect from sun and weather extremes. In addition, we differ with the commenter on considering local climatic conditions, as some birds may require that alternative shelter be provided to them during certain seasons, for instance, when leaves fall in temperate climates and no longer provide cover.

A commenter asked that APHIS consider alternatives that better mimic the natural environment of the birds, as the proposed sheltering standards may be unnecessary and costly for some smaller businesses. Finally, one commenter noted that zoos strive to maintain natural habitats akin to what the birds would find in the wild, and that large shelters and climate-controlled bird houses may confuse and agitate the birds, rather than provide the intended protection.

Natural shade and shelter may be sufficient as an alternative to constructed shelters for meeting the standard, if appropriate to the species, but under the standard there must be enough such shelter to protect all the birds at once from sun and weather extremes as necessary. As we noted above, seasonal changes may require that alternative shelter be provided for all the birds during certain times of year when natural shelter may not be available.

We also proposed that the shelter must provide sufficient space to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. For birds that form dominance hierarchies and that are maintained in social groupings, we proposed that such shelter(s) must be constructed so as to provide sufficient space to comfortably hold all the birds at the same time, including birds that are low in the hierarchy.

Many commenters stated that captive birds should be housed in groups or pairs of compatible species or individuals to ensure that their need for social contact is met.

We agree that birds should be housed in such a way that their need for social contact is met. We note that sufficient space must be provided to house all birds safely, including birds low in the hierarchy.

A commenter stated that not all injuries due to aggression can be prevented and that the social needs of the birds are more important, making singly housing birds from dominance hierarchies to prevent injury unfeasible. The commenter recommended that APHIS use performance standards to evaluate “sufficient space” to provide for these social hierarchies to play out naturally with the understanding that harm cannot be entirely prevented.

The commenter is correct about the importance of the social needs of birds and that not all aggression among birds is preventable. In line with the commenter’s recommendation, we have developed a performance standard that requires sufficient space for all birds in a hierarchy, including low hierarchy birds, which is intended to minimize aggression and competition for space.

#### Primary Enclosures

##### Primary Enclosures: General Requirements—§ 3.153(a)

We proposed that primary enclosures must be designed and constructed of suitable materials so that they are structurally sound, and that the primary enclosures be kept in good repair and constructed and maintained so that they:

- Have no sharp points or edges that could injure the birds;
- Protect the birds from injury;
- Contain the birds securely;
- Restrict other animals from entering the enclosure;
- Ensure that birds have the option to remain dry and clean;
- Provide shelter and protection for each bird from climatic and environmental conditions that may be detrimental to its health and well-being; and
- Provide all the birds with easy and convenient access to clean food and potable water.

We also proposed that enclosures provide sufficient shade to comfortably shelter all birds housed in the primary enclosure at one time, including low ranking birds that are maintained in social groupings that form dominance hierarchies.

A commenter suggested that natural means of shade be added to this section.

We note in the discussion of § 3.152(b) that either artificial or natural shade is adequate, provided that some type of shade be available to all birds at once throughout the year as appropriate.

In addition, we proposed that all surfaces in contact with the birds must be readily cleaned and/or sanitized in accordance with proposed § 3.158 of the regulations, or be replaced when worn or soiled.

A commenter stated that in some cases, cleaning and sanitizing all surfaces in an enclosure is not reasonable, noting that many bird enclosures contain natural vegetation and trees that would be difficult to clean and sanitize as required by the proposed wording. The commenter suggested that we use flexible wording similar to the standard used for mammals in current § 3.131. Another commenter recommended language that allows for natural materials for some species and use of alternative methods of sanitation for natural materials that are not easily moved.

Cleaning and sanitation of trees and vegetation is not indicated under the standard. The standard in § 3.131 referred to by the commenter addresses cleaning and sanitation of “cages, rooms, and hard-surfaced pens or runs,” and § 3.158(b)(2) of our proposal only refers to hard surfaces of primary enclosures and food and water areas, and equipment needing to be sanitized.

We also proposed to require that floors be constructed in a manner that protects the birds’ feet and legs from injury. If flooring material is suspended, we proposed that it would have to be sufficiently taut to prevent excessive sagging under the birds’ weight. If substrate is used in the primary enclosure, the substrate would have to be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

A commenter stated that the requirement for an absorbent substrate is dangerous for raptors, noting that absorbent materials can harbor fungal spores and bacteria and produce ammonia, all of which place raptors at risk for respiratory disease. This and many other commenters also noted that pea gravel, sand, or other inert substrate is typically used in raptor facilities and that the regulations should recognize this practice. Another commenter noted that other sections in the standards disallow standing water or damp substrate and that therefore removal of the word “absorbent” from this requirement may be appropriate.

Under proposed § 3.158(b)(3), materials such as gravel, sand, grass, earth, planted areas, or absorbent bedding, can be cleaned or sanitized by removing and replacing contaminated material in whole or in spots as necessary or by establishing a natural composting and decomposition system. We are retaining the word “absorbent” as it is relevant in the context of species of birds for which absorbent substrates are used.

A commenter stated that the phrase “prevent excessive sagging” in

§ 3.153(a)(1)(x) is not well-defined and recommended that the wording be revised to “provide stable walking or perching surface.”

We are making no changes in response to the commenter, as “sufficiently taut to prevent excessive sagging under the bird’s weight” indicates that the surface is stable and safe. “Excessive sagging” is a significant term as it can reveal a potential structural hazard to birds housed in the enclosure.

We proposed that furniture-type objects, such as perches and other objects that enrich a bird’s environment, must be species-appropriate and designed, constructed, and maintained so as to prevent harm to the birds. If the enclosure houses birds that rest by perching, there must be perches available that are appropriate to the age and species of birds housed therein and a sufficient number of perches of appropriate size, shape, strength, texture, and placement to comfortably hold all the birds in the primary enclosure at the same time, including birds that are ranked low in a dominance hierarchy.

Finally, we proposed that primary enclosures adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

One commenter noted that the proposed rule does not require space for birds to escape from public view, even though this is a natural species-specific behavior, and that APHIS should require such structures as hide boxes and other opportunities for hiding as a part of the enhancement of the birds’ environment.

We agree that many birds require space for hiding from public view and that this is a natural, species-specific behavior that a facility can include in the environment enhancement plan required in proposed § 3.154, which we discuss at greater length later in this document. In addition, we note that § 2.131(b) requires that handling of all animals be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

The proposed standards in § 3.152 for outdoor facilities and § 3.153 for primary enclosures require that sufficient space exists to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. In

addition, primary enclosures that are adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

A commenter expressed concern with the requirement to screen enclosures from each other, noting that making such modifications would be a financial strain on their condor breeding program and disturb breeding birds. The commenter requested that we consider including a “grandfather” clause exempting structures and enclosures constructed before the implementation of the proposal, and to establish an annual monetary limit to put toward potential structural modifications needed for compliance. Another commenter also disagreed with the requirement for screened enclosures, stating that that not all species of birds will harm each other through unscreened common walls. The commenter asked that we amend the rule to permit battery cages with common unscreened sides with the approval of attending veterinarians as part of the veterinary care plan. Similarly, a commenter stated that a requirement for adjacent enclosures to be suitably screened should be enforced on a case-by-case, species-by-species basis, as screening is not needed with many non-aggressive bird species housed in adjacent enclosures.

The requirement in proposed § 3.153(a)(3) states that primary enclosures adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants. Screening as defined in the standard can simply mean a shared mesh separation between cages if birds sharing each side of the screen area are non-aggressive. If a facility does not want to use screens to separate aggressive birds, they can ensure cages are a sufficient distance apart to meet the standard.

#### Primary Enclosures: Space Requirements—§ 3.153(b)

Space requirements for the wide variety of birds subject to the Act are highly variable, and the requirements we proposed are performance-based standards intended to provide adequate space to ensure the health and well-being of the birds. We proposed that primary enclosures would have to be constructed and maintained to allow each bird to make normal postural and social adjustments, such as dust-bathing

and foraging, with adequate freedom of movement and freedom to escape from aggression by other animals according to the program of veterinary care developed, documented in writing, and signed by the attending veterinarian. Spaces would also have to be adequate and allow for normal postural and social adjustments and approved in writing by the attending veterinarian.

Some commenters suggested that we prescribe specific minimum space requirements for birds in the standards themselves, based on species and number of occupants, and that width of the space should be a greater consideration than height. One commenter stated that engineering standards for primary enclosure space will make compliance with and enforcement of the AWA unequivocal and easier for both licensees and inspectors, and noted that we have promulgated such standards for minimum space requirements for mammals covered under the AWA in other subparts.

As we have noted, we developed the space requirements for primary enclosures to be performance-based, with several requirements to ensure the health and well-being of the birds. Requiring facilities to comply with specific minimum enclosure sizes and width dimensions specific to each species would result in greater burden on many facilities to comply and on APHIS’ efforts in inspection and enforcement. Moreover, requiring specific enclosure sizes gives facilities and attending veterinarians less flexibility in determining what constitutes adequate space for individual birds to ensure their health and well-being. While the commenter is correct that other AWA subparts prescribe minimum space requirements for other animals, including dogs, cats, guinea pigs, hamsters, rabbits, and nonhuman primates, the number of species in each of these subparts is small compared to the hundreds, if not thousands, of bird species that could potentially be covered under this rulemaking. In addition, the space requirements to maintain the health and well-being of the species within each of these groups do not range nearly as widely as those for birds. We also note that Subpart F, “Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals,” does not prescribe minimum space requirements. Similar to birds, the large number of mammal species potentially covered under Subpart F requires

performance standards to ensure that all are adequately covered.

A commenter stated that the term “postural adjustment” does not specifically include full extension of both wings without feathers contacting perches or the sides of the cage, which can damage feathers and is known to be a cause of feather destructive behavior. Another commenter cited several sources that recommended the cage size be one and one-half to twice the width of the bird’s wingspan.

We believe the standard addresses the commenters’ concerns without including wingspan specifications for birds. In situations in which inadequate cage size for a bird could potentially result in feather damage or cause adverse behaviors, the standard requires that the facility provide adequate space to that bird to ensure its health and well-being—in other words, to provide that bird with enough room, relative to the bird’s size, to fully extend its wings in the cage. Moreover, an attending veterinarian, or a local veterinarian approved and directed by the attending veterinarian, can require that a bird be provided additional space if necessary to ensure the standard is met.

Several commenters expressed concern over our proposal to require documentation in the program of veterinary care that spaces in all enclosures housing birds are adequate and allow for normal postural and social adjustments. Some interpreted the requirement to mean that the attending veterinarian would document and require specific space dimensions for each of their birds, and stated that needing to comply with a static set of documented requirements would limit the flexibility they need to move birds between primary enclosures. Commenters also noted the large number of bird species and the wide range of husbandry needs for each, and indicated that breeding behaviors, compatibility between birds, and other husbandry concerns change frequently and require prompt adjustments to enclosure space. Other commenters added that facility caretakers know their birds and are in the best position to develop appropriate space needs for them that allow for normal postural and social adjustments.

As long as facility caretakers in consultation with the attending veterinarian are able to apply professionally accepted space standards that allow for normal postural and social adjustments, we agree that the attending veterinarian does not need to document and maintain a record of space requirements in the program of veterinary care. Therefore, we are

revising proposed § 3.153(b) to no longer require that space requirements be documented in the program of veterinary care. Compliance with the standard will be evaluated through APHIS inspections and regularly scheduled visits to the premises by the attending veterinarian. Facilities will still be required to consult with the attending veterinarian on space requirements and changes thereto, and the attending veterinarian may prescribe space requirements as deemed necessary for animal welfare. Also, under § 3.153(b)(1), the attending veterinarian must document instances in which he or she determines that making species-typical postural or social adjustments, such as dust-bathing, foraging, or running, would be detrimental to the bird's good health and well-being, and make such records available to APHIS for review. As we have noted, Subpart F, "Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, and Marine Mammals," neither prescribes minimum space requirements nor requires documentation of such requirements as a condition of compliance.

A commenter asked us to clarify how often the attending veterinarian's space plan must be updated.

As noted above, we are no longer requiring space requirements to be part of the program of veterinary care, although the requirements would have to be developed in consultation with the attending veterinarian.

One commenter stated that the first sentence of § 3.153(b) is a run-on sentence that creates ambiguity and should be edited. The commenter explained that, as drafted, the "adequate freedom of movement" requirement could be construed as being merged with the "freedom to escape from aggression" requirement, but opined that the USDA clearly views "adequate freedom of movement" as a separate and independent requirement for enclosure space.

The standard states that birds must be in an enclosure constructed and maintained so as to allow for freedom of movement and freedom to escape from aggression demonstrated by other animals in the enclosure. We do not see how the juxtaposition of "freedom to escape from aggression" with "adequate freedom of movement" makes "adequate freedom of movement" somehow less separate. "Adequate freedom of movement" means the freedom to move for any reason the bird chooses or needs to move.

In addition, the commenter stated that the way "program of veterinary care" is situated in the first sentence of § 3.153(b), the meaning could be construed as only requiring facilities to comply with space requirements in their own program of veterinary care. The commenter stated that the sentence must be broken into three sentences to clarify that it is ultimately up to the agency—and not a facility's veterinarian—to determine whether the enclosure space is adequate.

We disagree that the sentence cited by the commenter could be construed to allow facilities to determine space requirements without veterinary involvement. Although we are amending § 3.153(b) to no longer require that space requirements be documented in the program of veterinary care, we emphasize that facilities must develop space requirements in consultation with the attending veterinarian, and he or she may prescribe space requirements whenever deemed necessary.

We received numerous comments regarding space requirements in enclosures as it pertained to the ability of the enclosures to allow for flight.<sup>27</sup> Most persons commenting on this topic stated that flight is essential to bird health and well-being and noted that the proposed rule does not specifically require sufficient space to allow for flight.

One commenter noted that the proposed rule requires space for "adequate freedom of movement," which could be reasonably construed to at least sometimes require that flying birds should fly and added APHIS should acknowledge that adequate freedom of movement may require giving some birds flying space. Another commenter stated that, while acknowledging that captive conditions are inherently constraining and necessarily involve compensating for behavioral inhibition, for most birds the need to fly is essential to engaging in their most basic capacities and behaviors.

The ultimate objective of the proposed space standard is to ensure the health and well-being of every bird covered under the regulations. As many commenters have noted, there are thousands of species of birds with widely varying husbandry and care needs, including the need for space. However, the requirement for space to allow for adequate freedom of movement does not necessarily equate

with flight. Some birds, such as penguins and kiwis, are flightless, while many other species may be able to fly but choose to do so infrequently. Wildlife centers often maintain raptors and other wild birds that have lost the ability to fly, and some pet rescues take in injured or aged birds that no longer fly. Fledglings of flighted species will be able to fly at some point, but that point varies greatly depending on the species. Each of these birds has its own unique spatial needs for maintaining health and well-being. In short, species variability requires a performance standard which ensures every bird has space for adequate freedom of movement.

Most commenters supporting a requirement that birds be able to fly in enclosures did not provide details on space size for species. A commenter, however, stated that flight must be possible for birds in all directions and must not be restricted to distances less than 1,000 body lengths of the bird in question. Another commenter provided a list of suggested minimum space dimensions for enclosures to facilitate flight.

Given the great variation in sizes of bird species, enforcing such a body length space standard and requiring flight space "in all directions" would constitute a major compliance challenge to facilities that would not necessarily correlate to the space required for the health and well-being for individual birds, flighted as well as flightless, as our proposed standard does.

A commenter disagreed with our statement in the proposal that flight is not necessary to good health and humane treatment and cited research studies demonstrating that flight is critically important to their physiological and behavioral health and well-being. Other commenters stated that depriving birds of flight can decrease bone strength, cause muscle atrophy and physiologic changes to flight muscles, and contribute to atherosclerosis, obesity, lipomas, and physiologic stress. Several other commenters cited evidence from studies showing the benefits of flight for avian health and psychological well-being.

We noted in the proposed rule that birds can be in good health and maintained humanely in accordance with the AWA without a flight requirement, and as noted above, some species of birds are flightless by nature or have lost the ability to fly. Nonetheless, as we also noted, the attending veterinarian may prescribe space for flight if he or she determines it is necessary for a bird's health and well-being.

<sup>27</sup> See "9 CFR part 2, subpart E: Attending Veterinarian and Adequate Veterinary Care" for comments pertaining to deflighting birds by wing trimming and surgical procedures.

Another commenter stated that USDA offers no explanation of how flying birds can be humanely kept without the ability to fly. The commenter asked why the proposed rule focuses on posture while ignoring the need for space to engage in normal locomotion necessary to health and well-being.

We disagree with the commenter that the proposed rule focuses on postural adjustments, as this is only one requirement included under other behaviors such as dust bathing that require “adequate freedom of movement.”

In support of a flight requirement for birds, a commenter cited previous APHIS guidance advising licensees maintaining captive flying and gliding mammals to allow them sufficient space for flying and gliding.

Guidance we provided for flying and gliding mammals is based on the specific health and welfare needs of a small number of particular mammal species and is not necessarily or generally applicable to the adequate movement needs of bird species, which are greatly more variable.

Finally, a commenter proposed that the space requirement standards be amended to state that the professional opinion of the attending veterinarian regarding space requirements be definitive, absent a disciplinary finding by a veterinary board.

An attending veterinarian may prescribe space requirements as necessary to ensure the health and well-being of each bird. APHIS has no direct authority to regulate veterinary boards in the manner requested by the commenter.

On the other hand, some commenters stated that allowing space for flight is cost-prohibitive and may be dangerous in some species. One such commenter stated that pheasants and quail can incur head damage if startled and given sufficient space to fly into the top of an enclosure.

We noted in the proposal that one objective of the standards we proposed for birds, including standards for space in primary enclosures, is to provide a physical environment that ensures humane treatment of animals as required by the Act and affirmed by the attending veterinarian. In this final rule, the space requirements for such birds would be developed by the facility in consultation with the attending veterinarian to ensure that the space provided does not result in such injuries.

We also proposed exceptions to the space requirements for primary enclosures. We proposed in § 3.153(b)(1) that the species-typical postural or social adjustments of a bird may be

restricted—for instance, in the case of a bird having undergone a medical procedure whose recovery could be adversely impacted unless movement is restricted—where the attending veterinarian determines that making normal postural and social adjustments would be detrimental to the bird’s good health and recovery. The attending veterinarian must document the reason and recommended duration for the restriction and make such records available for review by an APHIS inspector.

A commenter asked that we include “as required by the research proposal approved by the Committee at research facilities” as one of the instances in which the normal postural and social adjustments of a bird may be restricted under § 3.153(b)(1).

We do not consider it necessary to add this language to proposed § 3.153(b), as under § 2.36 of the regulations, the IACUC may approve such exceptions, provided that the IACUC documents these exceptions in the Annual Report.

#### Tethering

We proposed in § 3.153(b)(2) that a bird’s normal postural and social adjustments may be restricted where the bird is tethered in accordance with professionally accepted standards. We provided that a bird may only be tethered if: (1) it is appropriate for the species; (2) it will not cause any form of harm to the bird; (3) the bird is maintained on a perch appropriate for the species and age of the bird while tethered; (4) the bird has sufficient space to fully extend its wings without obstruction; and (5) the tether does not entangle the bird.

One commenter asked that all tethering be prohibited, including in retail pet stores.

Retail outlets that meet the definition of *retail pet store* in § 1.1 are exempted from licensing and therefore not subject to the regulations.

A commenter stated that APHIS must prohibit tethering of birds that can easily sustain injury, including growing birds, owls, old world vultures, raptor species, and any bird that does not otherwise tolerate tethering. Another commenter stated that tethered birds may also develop or aggravate leg injuries from repeatedly hitting the end of the tether when startled or attempting to engage in natural behavior, including flight.

The proposed space standard in § 3.153(b)(1) prohibits any tethering that could cause any form of harm to the bird and requires that the bird is maintained on a perch appropriate for

the species and age of the bird while tethered. Licensees must comply with the regulations when tethering birds for any reason.

Several commenters expressed concern that tethering severely limits mobility of birds, restricts normal behaviors, and should not be used in place of an enclosure. Several other commenters stated that USDA provided no animal welfare rationale to justify depriving birds of their adequate freedom of movement and normal posture via tethering.

We note that under the proposed space requirements in § 3.153(b)(2)(iv), tethering must allow the bird to have sufficient space to fully extend its wings without obstruction. In addition, most professionally accepted standards do not support replacing an enclosure with a tether, and do not allow tethered birds to be tethered unsupervised for a duration such that a bird’s health and well-being are adversely affected. Accordingly, if the professionally accepted standard does not support replacing an enclosure with a tether, then tethering in that instance would not be allowed under the requirements we proposed.

One commenter added that USDA fails to identify what organizations or guidelines are qualified to provide “professionally accepted standards” for tethering. Numerous other commenters stated that the standards should require time limits for tethering. One such commenter stated that the proposed regulations do not state whether tethering is acceptable only as a temporary means of primary containment or if it may be used permanently in place of free movement. The commenter added that while there may be circumstances in which tethering is an appropriate method of containment on a short-term basis, long-term tethering can never meet the welfare needs of any bird.

While we are not designating a required time limit for tethering, we stress that in proposed § 3.153(b)(2), birds must not be tethered unless it is appropriate for the species and will not cause harm to the birds. Several organizations, including the International Association of Avian Trainers and Educators and Association of Zoos and Aquariums, provide guidelines and professional standards for tethering birds. We do not regard tethering in itself as being detrimental to bird health and well-being, provided the provisions in this section are consistent with professionally accepted standards. Persons with questions about tethering and the regulation of birds can submit questions to [animalcare@usda.gov](mailto:animalcare@usda.gov).

On the other hand, a commenter representing raptor owners stated that tethering is a critically important tool for the proper care and management of captive raptors, as it is a stress-free way to keep a bird comfortable and safe from injury. The commenter added that proper tethering does not restrict normal postural or social adjustment.

The tethering requirements we have proposed are not inconsistent with the commenter's statements.

For the requirement in § 3.153(b)(2)(iii) to maintain birds "on perches appropriate for the species and age of the bird while tethered," a commenter recommended that a perch should include a person or an additional statement that the bird may also be "maintained on the person of the caretaker."

Caretakers are required to maintain birds on species- and age-appropriate perches but a person is not considered to be a perch while holding the bird.

We also proposed in § 3.153(b)(3) that when dealers, exhibitors, and research facilities breed or intend to breed their birds, such birds must be provided with structures and/or materials that meet the reproductive needs of the species during the appropriate season or time periods. A sufficient number of structures and materials must be provided to meet the needs of all breeding birds in an enclosure and to minimize aggression.

A commenter asked APHIS to revise the standard to make it clear that there is no requirement to provide breeding structures to birds not allowed to breed. Another commenter stated that an area for reproducing is not part of the primary enclosure and often nest material is limited at certain periods to discourage nesting.

We do not plan to revise the standard as it does not require that birds not allowed to breed have breeding structures provided. If persons choose to discourage their birds from nesting and breeding, the standards do not prohibit it, provided that the birds are otherwise maintained safely and humanely.

We proposed in § 3.153(b)(4) that birds intended for breeding, sale, in need of medical care, exhibited in traveling exhibits, or traveling for other reasons must be kept in enclosures that, at minimum, meet the specific space, safety, bedding, perch, and physical environment (including, but not limited to, temperature, humidity, sun and wind exposure) requirements for transport enclosures as specified in proposed § 3.162. At all other times, birds must be housed in enclosures that meet the space requirements of this section.

A commenter asked what the phrase "birds intended for breeding sale" means.

A comma was excluded from the proposal. The phrase was intended to read "birds intended for breeding, sale . . ." to indicate birds being transported for those purposes. We are making the correction in this final rule.

#### Primary Enclosures: Wading and Aquatic Birds—§ 3.153(c)

We proposed that primary enclosures housing wading and aquatic birds must contain a pool or other aquatic area and a dry activity area that allows easy ingress or egress of the pool or other aquatic area. We also proposed that the pool or other aquatic area must have sufficient surface area and depth to allow each bird to make normal postural and social adjustments, such as immersion, bathing, swimming, and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Additionally, we proposed that the dry areas must be of sufficient size to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. We stated that inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

A commenter stated that to the sentence beginning "Pools and other aquatic areas must be of sufficient surface area and depth to allow each bird to make normal postural and social adjustments . . .," a requirement should be added to consider the ecological needs of the species, such that adequate depth is provided to diving birds.

This requirement is implicit in our proposed requirement that each bird be allowed to make "normal postural and social adjustments."

A commenter noted the importance of bathing for many bird species and stated that we should explicitly require the provision of clean water in sufficient quantities and frequencies to promote normal, healthy bathing behaviors as appropriate for the species (not just wading and aquatic birds).

Under § 3.156, we require that potable water be provided in sufficient quantity to every bird housed at the facility or be offered to them as often as necessary to ensure their health and well-being. If bathing is necessary for the health and well-being of the bird species kept, this standard includes that requirement. If potable water is provided to birds

elsewhere in the enclosure, water in pools for bathing is only required to not pose a harm to the birds.

#### Environment Enhancement To Promote Psychological Well-Being—§ 3.154

We noted in the proposal the importance of providing environmental enhancement requirements specifically for birds. Under these requirements, dealers, exhibitors, and research facilities would have to develop, document, and follow a species-appropriate plan for environment enhancement adequate to promote the psychological well-being of their birds. The plan, which is part of the required program of veterinary care, would have to be approved by a veterinarian and be in accordance with the other regulations proposed in Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds and conform with currently accepted professional standards.

A commenter asked why birds are being held to the standard of non-human primates for environmental enhancement, when dogs, cats, and other species are not. The commenter added that social interaction and other enrichment activities are covered elsewhere in the proposed standards and thus the proposed standards in § 3.154 are not necessary.

We reply that birds are highly intelligent animals and meeting their enrichment needs constitute basic avian husbandry. We included § 3.154 specifically to address the unique enhancement needs of birds. It requires environment enhancement adequate to promote their psychological well-being. Husbandry and other standards we proposed do not specifically address this need. Finally, the commenter is incorrect about the proposed standards, in that the environmental enhancement standards for birds are different from those established for non-human primates.

Another commenter suggested that an enrichment plan can be created by the primary caretaker and customized as needed, and advised that APHIS revise the proposed standard so that whoever is most qualified can create and adjust the plan as needed.

We agree with the commenter that a caretaker or other knowledgeable person can create the environmental enhancement plan, subject to consultation with and approval by the attending veterinarian without it needing to be in his or her program of veterinary care. Accordingly, we are amending proposed § 3.154 by removing the requirement that the plan be part of a program of veterinary care.

We noted in the proposal that environmental enhancements do not typically require extensive or costly facility modifications. Depending on the species, enhancement actions in a plan could include ensuring that birds are kept in appropriate social groupings, that they are given opportunities to forage, or that they have access to species-appropriate perches and chewing materials.

Under the standard we proposed, the plan for environment enhancement must be made available to APHIS upon request, and also, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address social grouping needs, environmental enrichment, special considerations for young birds and birds needing to be isolated due to aggression or disease, use of restraints, and birds exempted from the plan.

Several commenters disagreed with our approach to environmental enhancement as described in the proposal, stating that APHIS needs to clarify that basic provisions such as opportunities to perch and forage alone are insufficient to fulfill the environmental enhancement standards. One commenter, for example, stated that given the advanced cognitive abilities of many birds, APHIS should also include the requirement that any enrichment plan include opportunities for birds to exercise control of their environment and make choices. One such commenter recommended that § 3.154(b) be amended to emphasize that a combination of novel and routinely rotated structural, object, and task enrichment specific to the species be provided, and that APHIS must offer structured guidance to ensure that the environmental enhancement standard is adequately implemented as proposed. Another commenter stated that regulated entities' enrichment program plans should include documentation to justify the plan, including novelty of enrichment, sensory stimulation, exemptions, and provisions for birds in persistent psychological distress. The same commenter added that USDA should require regulated entities to submit their plan to the agency annually for review, not just upon inspection. Additionally, the commenter stated that USDA should also develop guidance on particular needs of individual birds or classes of birds, including guidance on enhancement requirements for birds with special needs and solitary birds from social species.

We acknowledge the concerns of the commenters regarding the need to provide adequate, species-specific environmental enhancement to birds.

However, we are making no changes in response to the commenter's suggestions, as we believe development and execution of the plan as we have proposed will address environmental enhancement and enrichment needs specific to the birds being maintained, including challenging them cognitively and giving them opportunities to manipulate their environment consistent with professionally accepted standards. We welcome questions from licensees on enhancement practices for particular birds and compliance.

Under § 3.154(a) as proposed, the environment enhancement plan must include specific provisions to address the social needs of birds of species known to exist in social groups in nature. We proposed that specific provisions must be in accordance with currently accepted professional standards. Birds that are overly aggressive, debilitated, or in need of isolation due to a contagious disease must be excepted from social grouping requirements, and one or more birds suspected of contagious diseases must be isolated prior to and as directed by the attending veterinarian or as instructed in the program of veterinary care.

We also proposed that birds must only be housed with other animals, including members of their own species, if they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Bird compatibility must be determined in accordance with generally accepted professional practices and observations by husbandry staff and the attending veterinarian during his or her regularly scheduled visits to the facility.

Many commenters indicated that caretakers at facilities have experience with bird compatibility and are capable of grouping and housing birds so they are socially compatible.

We agree with the commenters on this point and we have amended the proposed standard to no longer require actual observations of compatibility by the attending veterinarian during his or her regularly scheduled visits to the facility. Facilities may determine social grouping of birds in accordance with professionally accepted standards and consultation with the attending veterinarian as needed.

In addition, we proposed that individually housed social species of birds must be able to see and hear birds of their own or compatible species unless determined otherwise by the attending veterinarian.

A commenter stated that, when possible, individuals of social species should be housed together with one or more individuals in the same enclosure, rather than within visual and auditory range.

The commenter's point is addressed in § 3.160, which requires that socially dependent birds be housed in social groups, unless the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs.

One commenter acknowledged that many bird species maintained in zoos and aquariums exist in social groups in nature. However, the commenter noted that reproducing this social structure may not always be possible in a captive setting due to the acquisition of birds from wildlife rehabilitators.

We are aware that zoos and other facilities may at times acquire a bird from a wildlife rehabilitator and that a lone bird is insufficient to re-create a natural social grouping. In such instances, a provision in proposed § 3.154(c)(4) provides for enhancement for individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

A commenter stated that social grouping may also be harmful to birds due to crowding and conflict, and another stated that some birds, though they live in social groups in the wild, will actually kill or become stressed when grouped.

We acknowledge that birds in social groupings can exhibit aggression and have included provisions in the standards to minimize harm to birds. We require in § 3.160 that socially dependent birds be housed in social groups, unless birds are determined to be incompatible. Under proposed § 3.153(b), primary enclosures must be constructed and maintained so as to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression by other animals.

In proposed § 3.154(b), we stated that the plan must address species-specific environmental enrichment for birds and include enrichment materials or activities that provide the birds with the means to express noninjurious species-typical activities. We noted in the proposal that examples of environmental enrichments could include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding

methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

A commenter agreed with the need for enrichment but asked APHIS to clarify that natural enrichment such as leaves and branches, varied diets, and social interaction is both sufficient and preferred over artificial enrichment objects such as toys. Another commenter stated that enrichment for breeding birds is different than for non-breeding birds, and that interacting with a mate and raising chicks is considered by many aviculturists as sufficient enrichment.

We acknowledge that many species and individual birds may prefer natural enrichments, social interaction, and variation in diet to toys, and we believe our enrichment standards allow for that preference as well as for birds that use toys. We disagree with the commenter that the process of breeding and raising chicks in itself constitutes enrichment.

A commenter also asked APHIS to explicitly require that at least a portion of feed is presented in a way that encourages natural species-typical foraging behaviors. Another commenter stated that APHIS should incorporate into the final rule requirements that all birds who engage in foraging behaviors be given a daily time-consuming foraging opportunity.

We note that in proposed § 3.153 we require sufficient space so as to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, and that proposed § 3.154 offers “foraging or task-oriented feeding methods” as one example of environmental enrichment. Should facilities wish to include a scheduled foraging opportunity as enrichment, they may do that.

A commenter disagreed with the proposed standard, stating that environmental enhancement is clearly aimed towards mammals or parrots and that during mating season, swings, mirrors and other such items can cause injury or death to breeding birds and their offspring. Another commenter stated that some parrots who have not been exposed to a diversity of novelty may be neophobic and introducing novel objects can cause fear reactions.

The program of environmental enhancement must be developed with the approval of the attending veterinarian. All birds benefit from enrichment in their environments, and its complexity is dependent on the species. Any enrichment items or activities that may adversely affect the health and well-being of the species in question will not be permitted. Further,

APHIS will impose no requirements that may interfere with a species’ natural behaviors when nesting and breeding.

We noted in the proposed rule that businesses may use their expertise and ability to apply professional standards to determine the composition of the perches and other objects, their size and location, and other relevant considerations for avian welfare, so long as they meet the standard.

A commenter expressed concern about allowing businesses to make such determinations, adding “big box” retail outlets have a history of harm to parrots and finches with inappropriate perching, inadequate veterinary care, and untrained employees.

The “big box” retail outlets that the commenter referenced tend to sell birds to customers in face-to-face transactions, and thus are considered retail pet stores that are exempt from AWA regulation. Because the public can visually inspect the animals at the store to observe their standard of care, we have long considered this sufficient to ensure the health and well-being of the animals being sold. That being said, to the extent that the “big box” stores currently engage in virtual sales of birds or sales where the buyer, seller, and the bird are not all physically present so that the buyer can inspect the bird, they will be considered dealers under this rule and regulated as such. In both instances, we consider the commenter’s concern to be addressed.

We proposed in § 3.154(c) that special considerations for certain birds must be included in the enhancement plan. Such birds, determined based on the needs of the individual species and under the instructions of the attending veterinarian, include infants and young juveniles, birds showing signs of psychological distress through behavior or appearance, birds used in research for which an IACUC-approved protocol requires restricted activity, and individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

We are amending “infants and young juveniles” in § 3.154(c)(1) by replacing these terms with “nestling, chicks, or fledglings.” We are making this change as these are the terms more frequently used by commenters in the aviculture community and in publications containing professionally accepted aviculture standards.

A commenter disagreed with the inclusion of infant birds because they do not require special attention during the growing process with regards to environmental enrichment, noting that

they are focused on growing and learning their environment.

We disagree with the commenter, as chicks develop rapidly and require sensory enrichment for their well-being, although it may be different in form from adult bird enrichment.

A commenter stated that considerations of social birds unable to see and hear other compatible birds may be contingent on whether another such bird is available to meet this requirement. The commenter suggested that we add the qualification to the requirement stating “. . . unless a compatible species is not available, or the attending veterinarian determines that it would endanger their health, safety, or well-being.”

We are making no change in response to the commenter’s suggestion. Paragraph (c) of § 3.154 requires that certain birds be provided special attention regarding enhancement of their environment, including “individually housed social species of birds that are unable to see and hear birds of their own or compatible species” in paragraph (c)(4). In other words, when compatible species are not available, their absence must be offset by environmental enhancement.

We also proposed restrictions on restraint devices in paragraph (d) of § 3.154. Birds must not be permitted to be kept in restraint devices unless required for health reasons as determined by the attending veterinarian or approved by a research facility, and any restraining actions must be for the shortest period possible. If the bird is to be restrained for more than 12 hours, it must be provided the opportunity daily for unrestrained activity for at least 1 continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the IACUC at research facilities.

A few commenters asked that tethering and restraint devices be further defined. Another commenter stated that it is unclear whether the tethering referenced in § 3.153(b)(2) is considered to be a restraint device under § 3.154(d), and requested that we clarify this point.

The tethers and restraint devices referred to by the commenter are for distinct purposes, although both limit movement. The tether provision in proposed § 3.153(b)(2) is intended to limit the space in which birds can move or run, while under § 3.154(d), birds are not permitted to be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the IACUC at

research facilities. Any restraining actions must be for the shortest period possible.

A commenter asked how the restrictions will relate to falconry, where jesses are used when handling birds.

Jesses and other items on birds used for falconry are not covered under the AWA and excluded from regulation, although jesses on birds not used in falconry would be covered.

In proposed § 3.154(e)(1), we provided that the attending veterinarian may exempt a bird from participation in the environment enhancement plan due to considerations of health or condition and well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted bird. Unless the exemption is based on a permanent condition, a review of the exemption by the attending veterinarian must occur every 30 days.

One commenter stated that wild-caught birds are diverse in their requirements and may only be housed in facilities for a short time, and proposed that we use a flexible standard given the diverse needs of different bird species and research groups. Another commenter concerned about unintended habituation in a California condor breeding program asked us to include a provision stating that birds destined for release to the wild may be exempt from environmental enrichment activities that require interactions with staff, specifically that we define “permanent condition” in § 3.154(e) for exempting a bird from participation in enhancement activities to include pre-release candidates or birds destined for release into the wild.

Proposed § 3.154(e) provides that the attending veterinarian may exempt a bird from participation in the environment enhancement plan due to considerations of health or condition and well-being. Human interaction is not required for enrichment of birds destined for release into the wild, and nesting materials or dietary options can be provided to the birds as enrichment without such interaction. Facilities using wild-caught birds in short-term housing may tailor their environment enhancement plan to these birds’ needs, subject to approval by the attending veterinarian. We see no reason to include pre-release into the wild as a “permanent condition,” as pre-release is not a medical condition.

For research facilities, we proposed in paragraph (e)(2) that an IACUC may exempt an individual bird from participation in some or all of the required environment enhancement

plans for scientific reasons set forth in the research proposal. The basis of the exemption must be documented in the approved proposal and reviewed at appropriate intervals as determined by the IACUC, but not less than annually.

A few commenters stated that the annual review requirement is inconsistent with a November 2021 final rulemaking,<sup>28</sup> which amended the regulations so that the required annual review of research/teaching activities is now required no less than once every 3 years. The commenters requested that APHIS harmonize the proposed regulations with those of the National Institutes of Health/Office of Laboratory Animal Welfare (OLAW).

The commenter is referring to § 2.31(d)(5), which requires the IACUC to conduct complete reviews of covered activities at appropriate intervals as determined by the IACUC, but not less than every 3 years. However, § 2.36(a) requires that an Annual Report be submitted by research facilities on or before December 1 covering the previous year. Among the requirements of the Annual Report in § 2.36(b), the facility is required to assure that it has followed professionally acceptable standards governing the care, treatment, and use of animals, and that exceptions to the standards and regulations be explained by the principal investigator and approved by the IACUC.

In § 3.154(e)(3), we proposed that records of any exemptions from participation in the environment enhancement plan must be maintained by the dealer, exhibitor, or research facility for at least 1 year and made available to APHIS upon request.

A commenter stated that the proposed language for maintaining records of exemptions “in accordance with § 2.80 of this subchapter” is incorrect, as § 2.80 makes no reference to such records. Instead, the commenter stated that paragraph (e)(3) should be amended to use language from current § 3.81(e)(3): “Records of any exemptions must be maintained by the dealer, exhibitor, or research facility and must be available to USDA officials or officials of any pertinent funding Federal agency upon request.”

The commenter is correct. We intended records maintenance and availability for the proposed environment enhancement program to be similar procedural requirements to the current nonhuman primate environment enhancement program in

subpart D. We have revised the regulatory text accordingly.

#### *Animal Health and Husbandry Standards*

##### Feeding—§ 3.155

We proposed a general feeding standard that is flexible enough to ensure the health and well-being of all birds. Specifically, the diet provided must be appropriate for the species, size, age, and condition of the bird. The food must be wholesome, palatable to the birds, and free of contamination, and be of sufficient quantity and nutritive value to maintain a healthy condition and weight of the bird and to meet its normal daily nutritional requirements.

A commenter stated that the concept of “free from contamination” is overly broad and unclear if it would only apply to gross contamination or if there is an expectation that a laboratory analysis should be done on food for covert contamination.

The proposed requirement states that the food must be “wholesome, palatable to the birds, and free of contamination.” Unless there is cause to suspect covert contamination that may injure the birds, the standard does not require that food be subject to laboratory analysis. This requirement is similar to those in other subparts regarding food for mammal species.

We also proposed that birds must be fed at least once a day except as directed by the attending veterinarian.

A commenter stated that raptors have highly specialized feeding habits that vary through the year, and which are closely attended to by falconers and other raptor owners. As a result, the commenter stated that veterinary oversight for this routine element of falconry and raptor husbandry is unnecessary and contrary to well-established management procedures. Similarly, a commenter noted that for many raptors, fast days are a part of the animals’ natural history, and stated that fast days should not be eliminated by daily feeding.

Feeding practices associated with falconry are not covered under the AWA and thus excluded from regulation.

A commenter stated that imposing these proposed requirements would be detrimental to condors, as they only eat once a week. One commenter asked us to modify the requirement that birds must be fed at least once a day except as directed by the attending veterinarian by adding, “or required by the research proposal approved by the Committee at research facilities.” Another commenter noted that food may be made accessible

<sup>28</sup> AWA Research Facility Registration Updates, Reviews, and Reports (86 FR 66919–66926, Docket No. APHIS–2019–0001), November 24, 2021.

to birds through feeders to which they have free access and there may be no need to refill them at least once a day. Similarly, a commenter asked that APHIS amend this regulation to require that feeders must be checked once a day to ensure that food is available and wholesome but to eliminate the requirement that birds be fed daily. Another commenter asked how this standard will be enforced, asking whether access to food with daily checks to ensure adequate supply and cleanliness will meet this standard, or is it expected that food be replaced daily regardless of condition.

We acknowledge that some birds do not eat daily or are on a restricted diet in accordance with professional standards or medical and research needs. Moreover, feeders to which birds have free access do not need to be refilled daily, although food quality and maintenance of feeding receptacles must conform with proposed § 3.155(a) and (b). Accordingly, we are revising the daily feeding requirement in § 3.155 to read, “Birds must be fed at least once a day except as directed by the attending veterinarian, normal fasts, or other professionally accepted practices.”

If birds are maintained in group housing, we proposed in § 3.155(a) to require measures appropriate for the species to ensure that all the birds receive a sufficient quantity of food. For example, for some flighted birds, such measures may include locating multiple food receptacles at different levels in the enclosure to ensure that all the birds have access to food receptacles and the food contained therein, including birds that are ranked low in a dominance hierarchy.

We also proposed in § 3.155(b) that food receptacles and feeding areas must be kept clean and sanitized in accordance with proposed § 3.158, and that food and any food receptacles must be located so as to minimize any risk of contamination by excreta, precipitation, and pests. Used food receptacles must be cleaned and sanitized before they can be used to provide food to birds maintained in a separate enclosure. We also proposed that measures must be taken to ensure there is no molding, deterioration, contamination, or caking or undesirable wetting or freezing of food within or on food receptacles and that food receptacles be made of a durable material that can be easily cleaned and sanitized or replaced when worn or soiled. Group-housed birds must have multiple food receptacles where needed to ensure that all birds have access to sufficient feed.

A commenter asked that we consider removing the term “precipitation” from

the list of contaminants, as proposed § 3.155 already requires that food not be subject to undesirable wetting.

We see the commenter’s point but are retaining “precipitation” in the list to underscore the point that placing food in areas open to weather events is one way that “undesirable wetting” can occur.

#### Watering—§ 3.156

We proposed in § 3.156 that potable water must be provided in sufficient quantity to every bird housed at the facility, unless restricted by the attending veterinarian. If potable water is not continually available to the birds, it must be offered to them as often as necessary to ensure their health and well-being.

To the proposed requirement that potable water be available to birds or offered as necessary to ensure their health and well-being, a commenter suggested that we add the qualification “unless restriction is required by the research proposal approved by the Committee at research facilities.”

We reply that this qualification is already covered in the regulations. In addition to proposed § 3.156 allowing for restriction by the attending veterinarian, paragraph (f)(2)(ii) of § 2.38 provides that “the short-term withholding of food or water from animals, when specified in an IACUC-approved activity that includes a description of monitoring procedures, is allowed by these regulations.”

We also proposed that water receptacles must be kept clean and sanitized in accordance with § 3.158 as often as necessary to keep them free of contamination. Used water receptacles must be cleaned and sanitized before they may be used to provide water to birds maintained in a separate enclosure. Finally, group-housed birds must have multiple water receptacles where needed to ensure that all birds have access to sufficient water. We received no comments that specifically addressed water receptacles and are adding these proposed requirements to the regulations.

#### Water Quality—§ 3.157

We proposed minimum water quality standards for the good health and well-being of the animals. If the primary enclosure or other areas in which birds may enter contain pools or other aquatic areas, such areas must not be detrimental to the health of the birds within. Particulate animal and food waste, trash, or debris that enters such pools or other aquatic areas must be removed as often as necessary to maintain the required water quality and

minimize health hazards to the birds. Pools or other aquatic areas that are equipped with drainage systems must provide adequate drainage so that all of the water contained in such areas may be effectively eliminated when necessary to clean the pool or other aquatic area and for other purposes while not risking harm to birds. We also proposed that pools or other aquatic areas with standing water, such as some ponds, must be aerated and have an incoming flow of fresh water or be managed in another manner to maintain appropriate water quality in accordance with current professionally accepted standards for the bird species in these ponds.

A commenter stated that in the context of outdoor pools, this section does not align with proposed § 3.156 and asked if the “required water quality” of this section fulfills the “potable” water requirement.

The commenter is correct with respect to the water quality requirement of this section being equivalent to potable water in § 3.156. Some birds do not live in exhibits with water features, and so obtain their potable water in accordance with § 3.156. We note that birds in exhibits with water features may choose to obtain their water intake from ponds and other features. Under paragraph (a), the water in pools and water features must not be detrimental to bird health if birds bathe in it or choose to drink it instead of other water provided to them.

Another commenter stated that the statement to “maintain the required water quality” is a vague requirement, and that additional guidance is needed.

We disagree and note that, to maintain the required water quality, the proposed standard provides guidance in the form of removing particulate animal and food waste, trash, or debris that enters the pool or other aquatic area. Also, to maintain water quality for pools or other aquatic areas without drainage systems, the guidance is that water be aerated and have an incoming flow of fresh water or that these requirements be performed in accordance with current professionally accepted standards appropriate for the species. These standards, widely available, are an additional form of guidance for meeting the standard.

When the water is chemically treated, we proposed that the chemicals must be added so as not to cause harm, discomfort, or distress to the animals. Natural organisms (such as fish, reptiles, amphibians, mammals, algae, commensal bacteria, protozoa, coelenterates, or mollusks) that do not degrade water quality, prevent proper maintenance, or pose a health hazard to

the birds are not considered to be contaminants. Should birds appear to be harmed by water quality, corrective action must be taken immediately.

Finally, we proposed the standard that pools or other aquatic areas must be salinized for birds that require salinized water for their good health and well-being in accordance with current professionally accepted standards.

A commenter noted that in paragraph (c), the proposal refers to “professionally accepted standards” to aid in deciding whether salinization is required for their health and well-being but does not indicate what these standards are. The commenter suggested removing the reference to “professionally accepted standards” and indicating instead that a species successfully housed in a freshwater environment does not have to be provided a saltwater environment simply because in the wild they live in that environment.

We agree that some birds living in the wild in a saltwater environment can be housed in captivity in a freshwater environment with no negative effects on their health and well-being. As long as birds that need appropriately salinized water for their health and well-being are provided with it, the standard is met. However, we are retaining the reference to “professionally accepted standards” because such resources can help facilities determine which species of birds can move between water environments of different salinities while retaining their health and well-being.

Cleaning, Sanitization, Housekeeping, and Pest Control

#### Cleaning—§ 3.158(a)

We proposed a standard requiring that excreta and food waste be removed from primary enclosures and from under and around primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste, to prevent soiling of the birds contained in the primary enclosures, and to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean primary enclosures, measures must be taken to protect birds from being harmed, wetted involuntarily, or distressed in the process. Standing water, except in pools or other aquatic areas, must be removed from the primary enclosure.

We also proposed in § 3.158(a)(2) that scheduled cleaning must be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors. Scheduled cleaning

must resume when cleaning would no longer disrupt such behaviors. We proposed to require that a schedule of cleaning be documented when breeding season began, when the primary enclosure was last cleaned, and when cleaning is expected to resume. Such records would have to be available for review by an APHIS inspector. If there is no delay in cleaning due to breeding or nesting activities, the cleaning schedule does not need to be documented.

Some commenters asked if, in addition to cleaning schedules, daily observation of birds could be modified to reduce disruption of breed and nesting activity.

In subpart D of the AWA regulations, § 2.40(b)(3) requires that dealers and exhibitors perform “daily observation of all animals to assess their health and well-being.” We note that some captive animals, such as hibernating bears, denning wolves, and prairie dogs in zoos may deliberately occupy spaces that are not easily observed. Similarly, in certain enclosures containing large numbers of animals, it is not always possible to directly observe every animal every day. When these are normal, species-specific behaviors known to facility staff, they actively monitor the animal’s environment and ensure its protection, check that food and water are available, and conduct other husbandry and care activities and assessments as needed during times the animal is not visible within its den, nest, or other space. Facilities knowledgeable of professional standards are aware that disrupting animals in such states to observe them can actually be detrimental to their health and well-being. We agree with this means of assessing the health and well-being of animals engaged in such natural behaviors, provided the facility has the approval of the attending veterinarian and that he or she is able to confirm that the animal is being cared for properly. APHIS will impose no requirements that interfere with a species’ natural behavior when it comes to nesting and breeding.

A commenter asked what criteria we will use to determine the degree of “excessive accumulation” of food waste for cleaning or replacing natural elements in the enclosure, noting that birds are naturally messy.

The standard in § 3.158(a) requires that accumulation of feces and food waste be prevented from becoming excessive. If the waste is excessive, it means that it is adversely affecting the health and well-being of the bird or activities such as nesting.

#### Sanitization—§ 3.158(b)

We proposed a standard requiring that primary enclosures and food and water receptacles for birds must be sanitized as often as necessary to prevent accumulation of dirt, debris, food waste, excreta, and other disease hazards. As with cleaning, we stipulated that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those species of birds that are easily disrupted during such behaviors but must resume when it no longer disrupts such behaviors. In such situations, a schedule of sanitization must be documented that includes when breeding season began, when the primary enclosure was last sanitized, and when sanitization is expected to resume. Such records must be available for review by an APHIS inspector.

A commenter opposed to the sanitization requirement stated that, because their birds breed year-round, it is impossible to sanitize surfaces that the birds come in contact with while they are in their breeding cages or flight pens, and that sanitizing cages, flight pens, and feeding and watering devices is unnecessary anyway. The commenter added that birds would have to be removed from the cages or flight pens in order to perform this requirement, resulting in months of lost production. The commenter asked that the sanitization requirement be flexible enough to address the individual needs of each facility. Similarly, another commenter asked that inspectors work with facilities to minimize these types of impacts during inspections.

We will not impose any requirements that interfere with a species’ natural behavior when it comes to nesting and breeding, and APHIS inspectors work closely with facilities to minimize or eliminate impacts on nesting and breeding activities. However, never sanitizing the facilities is not an option, as this could jeopardize the health and well-being of the birds within. Accordingly, proposed § 3.158(b) provides that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those birds that are easily disrupted during such behaviors. Sanitization must resume when such activity no longer disrupts breeding, egg-sitting, or feeding of chicks.

A commenter asked us to specify whether applications of soap and hot water would meet the sanitization requirement.

If the application of soap and hot water meets the definition of *sanitize* in § 1.1, which means “to make physically clean and to remove and destroy, to the

maximum degree that is practical, agents injurious to health," it meets the standard in § 3.158(b).

We proposed that the hard surfaces of primary enclosures and food and water areas and equipment must be sanitized before a new bird may be brought into a housing facility or if there is evidence of infectious disease among the birds in the housing facility.

A commenter asked us to consider changing "housing facility" to "primary enclosure," adding that "housing facility" includes any structure with environmental controls that houses or is intended to house animals. The commenter opined that in a facility with multiple rooms, the entry of a new bird into one area of the housing facility would not necessitate sanitation of all primary enclosures and food and water areas in the facility.

We are making no changes in response to the commenter's request, as there may be food and water areas or other common areas shared by birds that would require sanitation. We would not require sanitization of cages, rooms, or areas in a facility that are not accessed by the new bird. The standard also considers evidence of infectious disease among birds at a facility, which may require broader sanitization measures.

We also required in paragraph (b)(3) that primary enclosures using materials that cannot be sanitized using conventional methods, such as gravel, sand, grass, earth, planted areas, or absorbent bedding, be sanitized by removing all contaminated material as necessary or by establishing a natural composting and decomposition system sufficient to prevent wasted food accumulation, odors, disease, pests, insects, and vermin infestation.

A commenter asked us to clarify the frequency that these materials would need to be removed and replaced.

The frequency for removal and replacement of contaminated material will vary according to the characteristics of each facility. If the contaminated material accumulates such that it creates health or welfare risks for birds and facility staff, it must be removed at a frequency to prevent such an adverse situation.

For materials such as sand, gravel, and earth that cannot be sanitized through conventional means, a commenter asked that other means of sanitization be permitted such as removal of excessive accumulations of wastes or maintaining an effective natural composting and decomposition system.

We note in § 3.158(b)(3) that other such means of sanitization of such

materials described by the commenter are options for meeting the standard.

A commenter stated that APHIS should eliminate redundancy in the regulation by condensing § 3.158(a) and (b) into one single regulation. The commenter explained that the use of the term "cleaning" and its apparent definition in § 3.158(a) is redundant, because the sanitization requirement in § 3.158(b) by definition already includes cleaning.

We are making no changes in response to the commenter's request, as "cleaning" and "sanitization" are not redundant terms. While there may be overlap in the two processes, cleaning primarily removes dirt, waste, and other visible debris from an area, while sanitizing reduces the number of pathogens on clean surfaces to acceptable levels.

#### Housekeeping for Premises—§ 3.158(c)

We noted in the proposed rule that good housekeeping practices are essential in minimizing pest risks that can occur in animal areas, and proposed the standard that premises where housing facilities are located, including buildings, surrounding grounds, and exhibit areas, must be kept clean and in good repair in order to protect the birds from injury and disease, to facilitate the husbandry practices required in the regulations, and to reduce or eliminate areas where rodents and other vertebrate and invertebrate animals harmful to birds can live and breed. Premises also must be kept free of accumulations of trash, junk, waste products, and discarded matter. In addition, we proposed that weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the birds.

#### Pest Control—§ 3.158(d)

A pest control program is necessary to promote the health and well-being of birds at a facility and to reduce contamination by pests in the animal area, so we proposed that a safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests be established and maintained so as to promote the health and well-being of the birds and reduce contamination by pests in animal areas. We also proposed to prohibit the use of insecticides, chemical agents, or other methods of controlling pests that may be harmful to the birds in primary enclosures and in other areas or on surfaces with which the birds may come in contact.

A commenter asked that we clarify what is being defined as a "pest" and what control measures are required.

A pest is any animal that adversely affects the health and well-being of covered animals. Depending on the pest, a facility could use any professionally accepted method available to control the pest, provided it is effective and not harmful to the birds.

One commenter stated that there is no insecticide that is not harmful to birds and suggested that safe containment units to catch pests not accessible to birds be used instead.

An insecticide may be used with birds provided it is safe for the birds, effective, and applied in accordance with its on-label use. If a facility chooses to use a containment unit for catching pests that will not harm birds and that safely and effectively meets the standard for pest control, the facility may do so.

#### Employees—§ 3.159

We proposed that a sufficient number of adequately trained employees or attendants must be utilized to maintain the professionally acceptable level of husbandry and handling practices set forth in the standards. The need for personnel to have the knowledge and skill to perform these practices is addressed in the current standards for all other animals covered under the AWA regulations. The standards we proposed for birds must be conducted under the supervision of a caretaker who has appropriate experience in the husbandry and care of birds that are being managed in a given setting. We received no substantive comments on this section and are adding it to the regulations.

#### Compatibility and Separation—§ 3.160

We proposed a standard requiring that socially dependent birds be housed in social groups, unless the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs. Veterinary exemption is also permissible where such social grouping is not in accordance with a research proposal and the proposal has been approved by the research facility IACUC. Birds may only be housed with other animals, including members of their own species, if they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility must be determined in accordance with generally accepted professional practices, and by actual observation, to

ensure that the birds are, in fact, compatible. These requirements are necessary to allow birds to peacefully coexist in primary enclosures and to protect their physical health and well-being.

A commenter stated that the final rule should require variations on housing compatible species together with an order of preference that mandates that social species be housed in an enclosure with compatible individuals. The commenter added that if individuals from social species are not housed with compatible individuals, a written justification for alternative housing should be developed, approved, and signed by the attending veterinarian along with a plan to implement social housing.

We agree insofar that only the attending veterinarian can make such exceptions to the standard. The plan must include provisions to address the social needs of social species and must address individually housed social species of birds that are unable to see and hear birds of their own or compatible species. However, the only exception that needs to be documented is when the attending veterinarian exempts a bird from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being.

A commenter stated that it is unrealistic to assume a veterinarian has the best knowledge of interaction in the flocks and that the determination of how to house individuals based on social interaction should be on the breeder, who is around the flocks daily. The commenter added that, under § 3.160, the veterinarian should only be responsible if birds need to be removed from the flock for medical reasons.

Compatibility of birds must be determined in accordance with generally accepted professional practices and actual observations. We note that facilities can group birds socially based on their knowledge of the birds and professionally accepted practices, although the attending veterinarian may exempt an individual bird because of its health or condition, or in consideration of its well-being, or specific management needs. While facilities know their birds well, only a veterinarian has the medical expertise needed to evaluate the birds in order to make such exceptions.

#### Transportation Standards

In the transportation standards we proposed, we acknowledged the fact that many birds have highly specialized transportation needs. While most birds require space to make normal postural

adjustments during transport, other birds may injure themselves if their movements are not restricted. Therefore, we intended these standards to account for these animals' unique needs and provide them with equivalent protection and care as other covered animals.

Many foreign air carriers are members of the International Air Transport Association (IATA) and already comply with most of the physical requirements contained in the proposed regulations. The IATA regulations generally align with the intent of the AWA in ensuring the humane and safe transportation of animals but diverge from the regulations and standards in certain areas, such as recordkeeping requirements. Where such divergences exist, we proposed that the AWA regulations and standards be followed.

A few commenters recommended following the IATA Live Animal Regulations and Container Requirements for both air and ground transports of avian species.

For recordkeeping and any other procedural divergences from the IATA, we will use the transportation standards proposed here. While the AWA regulations align with IATA standards in many ways, we have developed the transportation standards specifically to meet the needs of compliance with the Act.

#### Consignments to Carriers and Intermediate Handlers—§ 3.161

Regulated entities, such as dealers and exhibitors, may elect to consign their bird to a carrier or intermediate handler in connection with the animal's transportation in commerce. To ensure the health and well-being of birds during such transport in commerce, we proposed to establish several conditions that must be met before carriers and intermediate handlers can accept a bird for transport. Specifically, we provided that carriers and intermediate handlers must not accept a live bird for transport in commerce more than 4 hours before the scheduled departure time of the primary conveyance on which the animal is to be transported. However, a carrier or intermediate handler may agree with anyone consigning a bird to extend this time by up to 2 hours if specific prior scheduling of the animal shipment to a destination has been made, provided that the extension is not detrimental to the health and well-being of the bird as determined by the consignor.

One commenter expressed broad concerns about how the proposed transportation regulations will affect the ability to obtain birds by impacting carriers and intermediate handlers,

including time when animals can be transported after capture, requirements for primary enclosures, and regular observation and other requirements during transportation. Another commenter stated that several airlines no longer transport birds and the proposed transportation standards may cause the remaining carriers to no longer accept birds, which will make it very difficult to ship birds.

We acknowledge the commenters' concerns but are making no changes in response. The objective of these transportation standards is to ensure the health and well-being of birds during transport. If carriers and transporters have compliance questions regarding enclosures and required responsibilities during transport, they can direct questions to APHIS-Animal Care.

Another commenter requested that because seasonal migration often dictates when research on wild birds can occur, APHIS should allow newly regulated carriers and intermediate handlers at least 1 year to analyze and adjust their operations in accordance with the final rule.

We agree, and noted above that we are setting a period of implementation 365 days after publication for new licensees and registrants before the rule is applicable, and a 180-day period for current licensees and registrants.

We proposed that carriers and intermediate handlers of birds must not accept a live bird for transport in commerce unless they are provided with the name, address, and telephone number of the consignee. Additionally, in proposed § 3.161(c), carriers and intermediate handlers must not accept a live weaned bird for transport in commerce unless the consignor certifies in writing to the carrier or intermediate handler that the bird was offered food and water during the 4 hours prior to delivery to the carrier or intermediate handler.

A commenter stated that a health certificate should be a requirement for birds being transported.

The commenter has not provided a reason as to why such a certificate would be necessary to the health and well-being of birds. We note that most species of mammals covered under the AWA regulations do not require a health certificate for transport.

A commenter proposed that any carrier may accept for transport a bird if the consignor furnishes to the carrier a signed certificate stating that the primary enclosure complies to the standards, unless the enclosure is obviously defective and cannot reasonably be expected to contain the bird without causing it suffering or

injury. The commenter added that a copy of such certificate must accompany the shipment certifying that the enclosure complies with USDA standards for primary enclosures.

Under § 3.161(d), carriers and intermediate handlers must not accept a live bird for transport unless the primary enclosure of the birds meets the requirements of § 3.162, which lists structural and safety considerations. In addition, carriers and intermediate handlers must not accept a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably. It is the carrier's responsibility to determine the requirements are met. If the carrier chooses to require a consignor to attest to the compliance of an enclosure, the carrier may do so for protection from liability or other reasons but APHIS does not require such a certificate or consider it to have any official status.

In § 3.161(f), we proposed that carriers and intermediate handlers must attempt to notify the consignee at least once in every 6-hour period following the arrival of any live birds at the bird holding area of the terminal cargo facility. The time, date, and method of each attempted notification and the final notification to the consignee and the name of the person notifying the consignee must be recorded on the copy of the shipping document retained by the carrier or intermediate handler and on a copy of the shipping document accompanying the bird shipment.

A commenter asked us to require that whenever a live bird shipment is delayed in transit, where those delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture providing foods.

We agree with the commenter and are amending § 3.161(f) to require that if delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture providing foods.

Under § 3.161(g), we proposed that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified as a part of the consignee's program of veterinary care.

One commenter stated that the proposed rule provides no restrictions on transport of unweaned birds who are physically too vulnerable and fragile to travel, and asked APHIS to prohibit the transport of unweaned birds unless medically necessary. Another commenter stated that unweaned birds should only be transported in emergencies. Citing the susceptibility of unweaned birds to stresses and temperature changes during transport, other commenters similarly disagreed with transporting unweaned birds unless transport is essential to safeguard the animal's welfare as determined by the attending veterinarian.

We agree with the commenter that transport of unweaned birds subjects them to many stressful and potential risks that would benefit from additional oversight. The attending veterinarian makes the determination as to whether the unweaned birds can be transported safely. Accordingly, we are amending proposed § 3.161(g) to indicate that carriers and intermediate handlers must not accept unweaned birds for transport unless instructions for conditions of transport to ensure the health and well-being of the birds are specified and written by the attending veterinarian, and signed within 10 days of shipment. These instructions are intended to ensure that temperature, handling, and other conditions of transport are not detrimental to the health and well-being of the birds in accordance with the Act. The instructions would no longer need to be in the program of veterinary care but would accompany the shipment.

A commenter disagreed with prohibiting the shipment of unweaned raptors on domestic flights, noting that raptors in transit do not typically take food or water, even if capable. The commenter stated that the prohibition on unweaned raptors places an unreasonable expectation on transport agents and APHIS should exempt raptors in this section. Another commenter stated that to support efforts to protect endangered bird species, USDA must allow the movement of unweaned endangered birds or even fertile eggs between licensed facilities for artificial incubation, hand-rearing, and other biological care.

We note that in amended § 3.161(g), unweaned birds may be transported via commercial carrier, provided that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment. The transport instructions can include specific food and water requirements as needed.

Under the proposed standard, certification for shipment of birds must be securely attached to the outside of the primary enclosure in a manner that makes it easy to notice and read, and must include the following information for each live bird: The consignor's name, address, email, and telephone number; the number of birds; the species or common names of the birds; the time and date the bird(s) was last fed and watered; and the specific instructions for the next feeding(s) and watering(s) for a 24-hour period; and the consignor's signature and the date and time the certification was signed.

We also proposed that carriers and intermediate handlers must not accept a live bird for transport in commerce in a primary enclosure unless the enclosure meets the requirements of § 3.162. A carrier or intermediate handler is prohibited from accepting a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably. Carriers and intermediate handlers must not accept a live bird for transport in commerce unless their animal holding area can maintain climatic and environmental conditions in accordance with the requirements of proposed § 3.168. Section 3.168 sets out climatic and environmental conditions for the transportation of animals and requires, among other things, that such transportation must be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress.

#### Primary Enclosures Used To Transport Live Birds

Under proposed § 3.162, no person subject to the AWA regulations may transport or deliver for transport in commerce a bird unless the following requirements are met.

#### Primary Enclosures: Construction— § 3.162(a)

We proposed that birds in transport must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate, except as provided in paragraph (e) of § 3.162. Primary enclosures used to transport birds must be constructed so that:

- The primary enclosure is strong enough to contain the birds securely and comfortably and to withstand the rigors of transportation normally encountered during transportation;
- The interior of the enclosure has no sharp points or edges and no protrusions that could injure the birds contained therein;

- The bird is at all times securely contained within the enclosure and cannot put any part of its body outside the enclosure in a way that could result in injury to itself, to handlers, or to other persons or to other animals nearby;

- The birds can be easily and quickly removed from the enclosure in an emergency;

- Unless the enclosure is permanently affixed to the conveyance, adequate handholds or other devices such as handles are provided on its exterior, and enable the enclosure to be lifted without tilting it, and ensure that anyone handling the enclosure will not be in contact with the bird contained inside;

- Unless the enclosure is permanently affixed to the conveyance, it is clearly marked on top and on one or more sides with the words "Live Animals," in letters at least 1 inch (2.5 cm) high, and with arrows or other markings to indicate the correct upright position of the primary enclosure;

- Any material, treatment, paint, preservative, or other chemical used in or on the enclosure is nontoxic to the bird and not harmful to its health or well-being;

- A bird that has a fractious or stress-prone disposition must be contained in an enclosure that is padded on the top and sides and has protective substrate on the bottom to prevent injury to the bird during transport;

- Proper ventilation must be provided to the birds in accordance with § 3.162(b);

- The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray. If a mesh or other nonsolid floor is used in the enclosure, it must be designed and constructed so that the bird cannot put any part of its body through the holes in the mesh or the openings in the nonsolid floor; and

- If substrate (newspaper, towels, litter, straw etc.) is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

These standards consider the need for birds to be supported and protected from injury during transportation.

A commenter expressed concern that while padding may be needed with some birds, the material used for padding the sides of the crate could restrict the ventilation as required under proposed § 3.162(b). Another commenter cited the danger of entanglement within the padding, as well as the cost of modifying crates for larger businesses.

Under proposed § 3.162(a)(7), any material used in or on the enclosure must not be harmful to the bird's health or well-being. This includes padding within the crate.

A commenter expressed concern with the proposed requirements for transport enclosures. While acknowledging that it is unrealistic for birds to be housed in enclosures that meet primary enclosure standards while in transit, the commenter noted that the proposed rule, as written, allows for birds to be maintained in transport cages in perpetuity and thus denied the essential space and environment required of primary enclosures. The commenter asked that APHIS eliminate or provide time limits on the proposed rule's exemption from primary enclosure standards for birds that are traveling for exhibition or other reasons.

"In active transit" means transporting a bird in a primary enclosure that complies with the standards in proposed § 3.153 to another location where it will be housed. Birds should not be transported or housed in an enclosure meeting the requirements for transportation in perpetuity, and after finishing active transit must be housed again in a suitable primary enclosure as provided for under proposed § 3.153.

#### Primary Enclosures: Ventilation— § 3.162(b)

It is critically important to ensure that birds are provided adequate fresh air for their respiratory needs. We proposed that, unless the primary enclosure is permanently affixed to the conveyance, there must be ventilation openings located on two vertical walls of the primary enclosure that are at least 16 percent of the surface area of each wall, or ventilation openings located on all four walls of the primary enclosure that are at least 8 percent of the total surface area of each wall. We additionally proposed that at least one-third of the total minimum area required for ventilation of the primary enclosure must be located on the lower one-half of the primary enclosure, and at least one-third of the total minimum area required for ventilation of the primary enclosure must be located on the upper one-half of the primary enclosure.

A commenter stated that this standard, as written, would not allow the use of standard rigid plastic air kennels for transporting birds, which are commonly used successfully for many bird species. The commenter requested that we provide flexibility to this standard to allow for such kennels. Another commenter stated that the standard is extremely specific and does not support IATA-approved kennels

that are routinely used in the zoo and aquariums for transporting avian species.

We agree with the commenters and are amending proposed § 3.162(b) to remove the part of the standard for ventilation specifications on the lower half of the enclosure. This will allow the use of the containers specified by the commenter and will support IATA-approved kennels meeting our standard.

Another commenter asked whether cardboard shipping boxes used for poultry by the U.S. Postal Service, and sometimes used for shipping game birds or pigeons, would be covered under the standards.

A cardboard shipping box of the use and type described by the commenter is in compliance under the standard. We note, however, that the birds mentioned by the commenter are not covered under the AWA, meaning they are excluded from regulation.

We proposed that, unless the primary enclosure is permanently affixed to the conveyance, projecting rims or other devices must be on the exterior of the outside walls with any ventilation openings to prevent obstruction of the ventilation openings. The projecting rims or similar devices must be large enough to provide a minimum air circulation space of 0.75 inches (1.9 cm) between the primary enclosure and anything the enclosure is adjacent to, unless 90 percent or greater of the surface area of the enclosure wall is open (*e.g.*, cage mesh). We also proposed that any visually obscuring mesh used to provide security for the bird in the enclosure must not interfere with proper ventilation.

We also proposed that if a primary enclosure is permanently affixed within the animal cargo space of the primary conveyance so that the front opening is the only source of ventilation for such primary enclosure, the front opening must open directly to the outside or to an unobstructed aisle or passageway within the primary conveyance. Such front ventilation opening must be at least 90 percent of the total surface area of the front wall of the primary enclosure and covered with bars, wire mesh, or smooth expanded metal. We received no comments on this proposed requirement and are adding it to the regulations.

#### Primary Enclosures: Cleaning— § 3.162(c)

We proposed in § 3.162(c) that primary enclosures used to hold or transport birds in commerce must be cleaned and sanitized before each use in accordance with § 3.158 by the dealer, research facility, exhibitor, or operator

of an auction sale. We received no substantive comments on this proposed requirement and are adding it to the regulations.

#### Primary Enclosures: Compatibility—§ 3.162(d)

We proposed that live birds transported in the same primary enclosure must be of the same species or compatible species and maintained in compatible groups. Socially dependent birds must be able to see and hear each other.

A commenter stated that there are instances where a social bird is singly being shipped to a new flock or where it is preferable to keep the crate dark for reasons related to stress and visual access to other birds could be problematic.

The instances described by the commenter do not conflict with the proposed requirement, provided that the shipping is compliant with all other standards, and the health and well-being of the birds being shipped is not adversely affected.

#### Primary Enclosures: Space and Placement—§ 3.162(e)

We proposed in § 3.162(e) that primary enclosures used to transport live birds must be large enough to ensure that each bird has sufficient space to turn about freely and to make normal postural adjustments, except that certain species may be restricted in their movements according to professionally accepted standards when such freedom of movement would constitute a danger to the birds, their handlers, or other persons. We received no substantive comments specifically on this provision.

#### Primary Enclosures: Accompanying Documents and Records—§ 3.162(f)

Documents accompanying the shipment of birds must be attached in an easily accessible manner to the outside of a primary enclosure which is part of such shipment and could not be allowed to obstruct ventilation openings.

A commenter noted that some crates have additional compartments, especially for international shipments, that could store all documentation for the shipment. The commenter added that paperwork is sometimes pulled off the exterior of the crate and lost during transport. The commenter asked if a drawer outside of where the animal is contained meets the definition of outside of primary enclosure.

A drawer on or near the enclosure containing the animal in which documentation would be obscured or

not readily visible does not meet the standard. This is because the primary purpose of having paperwork attached directly to the enclosure is to ensure essential information is easily noticed and read, such as when feed and water were offered, in accordance with the food and water requirements in proposed § 3.164(e).

#### Primary Conveyances (Motor Vehicle, Rail, Air, and Marine)—§ 3.163

We proposed that the animal cargo space of primary conveyances used in transporting live birds must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and minimizes the entry of exhaust from the primary conveyance during transportation. The animal cargo space must also have a supply of air that is sufficient for the normal breathing of all the animals being transported in it, and each primary enclosure containing birds must be positioned in the animal cargo space in a manner that provides protection from the elements and that allows each bird enough air for normal breathing. During transportation, the climatic conditions in the animal cargo area must be maintained in accordance with the requirements of § 3.168.

We also proposed in § 3.163 that primary enclosures must be positioned in the primary conveyance to allow the birds to be quickly and easily removed from the conveyance in an emergency. We also proposed that the interior of the bird cargo space be kept clean. Finally, we provided that live birds not be transported with any material, substance (e.g., dry ice), or device which may reasonably be expected to be injurious to the health and well-being of the birds unless proper precaution is taken to prevent such injury. We received no substantive comments specifically addressing these proposed provisions and are adding them to the regulations.

#### Food and Water in Transport—§ 3.164

We proposed in § 3.164(a) the standard that all weaned birds must be offered food and potable water within 4 hours before being transported in commerce.

A commenter disagreed that raptors in transport should be offered food and water every 4 hours, stating that raptors naturally do not eat daily and receive about 80% of the water they need from food. Another commenter stated that there should be exceptions to the requirement for the offering of food and water 4 hours prior to delivery, as species such as raptors, pelicans, and

penguins go extended periods without food, and harm can occur by feeding too close to a shipment due to potential regurgitation/aspiration issues. A commenter stated that veterinarians should be allowed to waive the 4-hour pre-transport feeding/watering rule prior to transport when doing so is in the best interests of the birds being transported.

We agree with these commenters and others who noted that some birds have special feeding requirements that preclude feeding within 4 hours of transport. Accordingly, we are amending § 3.164(a) to require that all weaned birds be offered food and potable water within 4 hours before being transported in commerce, unless the attending veterinarian approves a delay or unless a delay is in accordance with professionally accepted standards. We reiterate that falconry is not covered under the AWA and therefore excluded from regulation.

Another commenter stated that some chick species still absorbing their yolk sac may appear weaned, but providing the chick with food prior to absorption can result in severe medical implications and death. The commenter asked how APHIS will address this concern.

We amended § 3.161(g) to indicate that carriers and intermediate handlers must not accept unweaned birds for transport unless transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment. The commenter could request such instructions from the attending veterinarian.

We also proposed to require in § 3.164(c) that dealers, exhibitors, research facilities, and operators of auction sales must provide potable water to all weaned birds transported in their own primary conveyance at least every 12 hours after such transportation is initiated, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently. We proposed in § 3.164(c) that all weaned birds must be fed at least once in each 24-hour period, except as directed by veterinary treatment, normal fasts, or other professionally accepted standards. Birds that require feeding more or less frequently must be fed accordingly. Also, a sufficient quantity of food and water or other source of hydration must accompany the bird to meet its needs for food and water during period of transport, except as directed by veterinary treatment and other professionally accepted standards.

A commenter stated that for most birds, every 24 hours is far too infrequent for feeding and suggested that they be fed every 12 hours when stopping for hydration.

We reply that under proposed § 3.164(c) birds that require feeding more or less frequently must be fed accordingly.

We proposed in § 3.164(d) that a sufficient quantity of food and water or other source of hydration must accompany the bird to provide food and water during period of transport, except as directed by veterinary treatment and other professionally accepted standards. We received no comments specific to this proposed requirement and are adding it to the regulations.

We proposed in § 3.164(e) that any dealer, research facility, exhibitor, or operator of an auction sale offering any live bird to any carrier or intermediate handler for transportation in commerce must securely affix to the outside of the primary enclosure used for transporting the bird written instructions for the in-transit food and water requirements of the bird contained in the enclosure. We proposed to prohibit carriers and intermediate handlers from accepting any live birds for transportation in commerce unless written instructions concerning the food and water requirements of the bird being transported are affixed to the outside of its primary enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easy to notice and read. Carriers and intermediate handlers must be able to ensure that food and water is provided according to regulatory schedules while ensuring that birds cannot escape.

#### Care in Transit—§ 3.165

During surface transportation of birds, we proposed that any person subject to the AWA regulations transporting birds in commerce must ensure that the operator of the conveyance, or a person accompanying the operator, visually observes the birds as frequently as circumstances may allow, but not less than once every 4 hours, to ensure that the birds are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in proposed § 3.168, and that all other applicable standards are met. The regulated person must ensure that the operator or person accompanying the operator determines whether any of the birds are in physical distress and obtains any veterinary care needed for the birds as soon as possible.

Similarly, when birds are transported by air, we will require that live birds be visually observed by the carrier as frequently as circumstances may allow, but not less than once every 4 hours, if the animal cargo space is accessible during flight. If the animal cargo space is not accessible during flight, the carrier must visually observe the live birds whenever they are loaded and unloaded and whenever the bird cargo space is otherwise accessible to ensure that they are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The carrier must also determine whether any such live birds are in physical distress and arrange for any needed veterinary care as soon as possible.

Some commenters stated that frequent checking on avian species during transport may cause undue stress. One such commenter suggested that for such sensitive species or individuals, an alternative such as a letter from the husbandry team and veterinarian could provide instruction for appropriate check frequency in lieu of the 4-hour requirement.

We acknowledge commenter concerns on this topic but are making no changes to the requirement. Birds in transit by ground or air must be observed as frequently as circumstances may allow, but not less than once every 4 hours if accessible, to ensure that the birds are being maintained in accordance with all requirements and applicable welfare standards. We require a similar transit check for certain other mammal species in subpart F, § 3.140(a) and subpart D, § 3.90(a) and (b).

A commenter recommended that APHIS reevaluate the requirement to observe the birds frequently during shipping and transport, as this may cause distress to the bird and hardship for the shipping company. Further, this and other commenters observed that delivery or air cargo handlers may not know the warning signs indicating whether a particular bird is in distress or requires assistance.

Visual observation of the bird in the enclosure does not require disturbing or handling the bird. We note that carriers are accustomed to this practice, as we currently require a similar transit check for certain other mammal species. While cargo handlers would not be expected to have the expertise of an experienced caretaker or veterinarian, they should be able to recognize signs of obvious physical distress in birds such as panting.

Finally, we proposed to prohibit any person subject to the AWA regulations from transporting in commerce birds that are ill, injured, or in physical distress, except to receive veterinary care for the condition.

A commenter asked us to clarify what is considered an injury under this prohibition, noting that some wild birds that acquire an injury are deemed non-releasable but suitable for education and exhibition. The commenter asked whether an injured bird could be transported for exhibit if their injury is permanent and as healed as it will be, but they remain restricted in their movement.

We define an injured bird as one from which the animal is still actively healing or recovering.

#### Terminal Facilities: Placement—§ 3.166(a)

We proposed to require that carriers and intermediate handlers not commingle shipments of live birds with other animals or inanimate cargo in animal holding areas of terminal facilities. This proposed standard helps to ensure that the live birds are accessible for observation and that the following standards concerning cleaning, sanitization, and pest control in terminal facilities are met.

A commenter asked us to clarify the proposed prohibition on commingling live birds with other animals during shipment, particularly with respect to the risk APHIS is trying to avoid. The commenter added that absent a justification for this requirement, it may simply become another disincentive for commercial carriers to transport zoological animals.

Animals or inanimate cargo must not be commingled with live birds in the same shipment at the terminal facility in order to minimize risks to the health and well-being of the birds, such as contact with other animals or stacked cargo hindering ventilation. A similar prohibition exists for commingling in § 3.91 for nonhuman primates.

Similarly, another commenter asked us to define “commingle.”

We define “commingle” to mean placing different species of animals, or mixing birds with inanimate cargo, in the same confined space such that their welfare may be adversely affected.

Another commenter noted that this standard is more restrictive than the corresponding regulation for mammals in § 3.141, which states that carriers and intermediate handlers shall not commingle live animal shipments with inanimate cargo. The commenter expressed concern that the more restrictive language could reduce

commercial carriers' willingness to ship birds.

The proposed standards for birds necessarily include considerations of health and well-being that differ in some respects from those developed for mammals. Determination of requirements is based primarily on the welfare needs of birds in accordance with the AWA and not on business choices.

**Terminal Facilities: Cleaning, Sanitization, and Pest Control—§ 3.166(b)**

We proposed to require that all animal holding areas of terminal facilities be cleaned and sanitized in a manner prescribed in § 3.158, as often as necessary to prevent an accumulation of debris or excreta and to minimize vermin infestation and disease hazards. Terminal facilities must follow an effective program in all animal holding areas for the control of insects, ectoparasites, and other pests. We received no comments specifically addressing this paragraph and are adding it to the regulations.

**Terminal Facilities: Ventilation—§ 3.166(c)**

We proposed that ventilation must be provided in any animal holding area in a terminal facility containing birds, by means of windows, doors, vents, or air conditioning. The air must be circulated by fans, blowers, or air conditioning so as to minimize drafts, odors, and moisture condensation. We received no comments specifically on this provision and are adding it to the regulations.

**Terminal Facilities: Temperature—§ 3.166(d)**

We proposed that the climatic and environmental conditions in animal holding areas must be maintained in accordance with the performance standard in § 3.168 governing climatic and environmental conditions.

A commenter proposed that we add the requirement that transporting devices must be covered to provide protection for live birds when the outdoor air temperature falls below 50 °F and such live birds shall not be subjected to surrounding air temperatures which fall below 32 °F for a period of more than 45 minutes, unless such birds are accompanied by a certificate of acclimation to lower temperatures.

We are making no changes in response to the commenter's request, as considerable variability exists in the temperature ranges of each species. Some penguin species, for example, require temperature ranges at or below

32 °F. The performance standards for climatic and environmental conditions in proposed § 3.168 are intended to provide flexibility to ensure that the transportation of all live birds is done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress.

**Handling—§ 3.167**

We proposed that any person subject to the AWA regulations who moves (including loading and unloading) live birds within, to, or from the animal holding area of a terminal facility or a primary conveyance does so as quickly and efficiently as possible and provides sufficient shade to protect the birds from the direct rays of the sun and sufficient protection to allow the birds the option to remain dry during rain, snow, and other precipitation. We proposed that climatic and environmental conditions must be maintained in accordance with the requirements in § 3.168.

We also proposed to require that any person handling a primary enclosure containing a live bird uses care and avoids causing physical harm or distress to the bird, and that the primary enclosure containing a live bird must not be allowed to be tossed, dropped, or tilted, or stacked in a manner which may reasonably be expected to result in its falling. We received no substantive comments specifically on these provisions and are adding them to the regulations.

**Climatic and Environmental Conditions During Transportation—§ 3.168**

Finally, we proposed in § 3.168 to require that the transportation of all live birds be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress. When climatic or environmental conditions, including temperature, humidity, exposure, ventilation, pressurization, time, or other environmental conditions present a threat to the health or well-being of a live bird, appropriate measures must be taken immediately to alleviate the impact of those conditions. The different climatic and environmental factors prevailing during a journey must be considered when arranging for the transportation of and when transporting live birds. Considerations may include, but are not limited to:

- The temperature and humidity level of any enclosure used during transportation of live birds must be controlled by adequate ventilation or any other means necessary;

- Appropriate care must be taken to ensure that live birds are not subjected to prolonged drafts detrimental to their health or well-being;

- Appropriate care must be taken to ensure that live birds are not exposed to direct heat or cold if detrimental to their health or well-being, such as placement in direct sunlight or near a hot radiator; and

- During prolonged air transit stops in local climatic conditions that could produce excessive heat for live birds held in aircraft compartments, the aircraft doors must be opened and, if necessary, equipment must be used to control the condition of the air within compartments containing live birds.

We also provided examples of factors to consider when meeting these requirements. Specifically, we will provide that, in order to determine what climatic and environmental conditions are appropriate for a live bird, factors such as, but not limited to, the bird's age, species, physiological state, last feeding and watering, and acclimation must be considered when such information is available.

A commenter proposed that auxiliary ventilation, such as fans or air conditioning, be used for any holding area containing live birds when the air temperature within such animal holding area is 85 °F or higher, and that the air temperature around any live bird in any holding area must not be allowed to fall below 32 °F nor be allowed to exceed 95 °F at any time. Moreover, the commenter asked that we require that no live bird be subjected to surrounding air temperatures which exceed 85 °F for more than 4 hours at any time. The same commenter also proposed that to determine compliance, the air temperature around any live bird shall be measured and read outside the primary enclosure which contains such bird at a distance not to exceed 0.91 meters (3 feet) from any one of the external walls of the primary enclosure and at a level approximately halfway between the top and bottom of the enclosure.

The proposed regulations for environmental and climatic conditions during transport are intended to be performance-based. Accordingly, welfare implications of temperatures that may adversely affect birds are already addressed in the proposed language. As noted in previous responses, birds may prefer different ambient temperatures.

Finally, for birds that are not able to maintain a constant body temperature at ambient temperatures, we proposed to require their transportation in a brooder or other temperature-regulating unit that

effectively assists the bird in maintaining a constant body temperature during transport. Signs that a bird is able to independently maintain a constant body temperature include the bird's ability to open its eyes fully and sit erect and the appearance of full or partial feathering on the body of the bird. We received no comments on this proposed requirement and are adding it to the regulations.

We proposed to require that the temperature of the brooder or other temperature-regulating unit would have to be monitored during transportation and appropriate for the live bird. Written instructions for the temperature requirements of birds transported in brooders or other temperature-regulating units must be securely affixed to the outside of the primary enclosure used for transporting the bird, and must be attached in accordance with § 3.162(f) in a manner that makes them easily noticed and read. We received no comments on these requirements and are adding them to the regulations.

#### Guidance for Newly Regulated Entities

We noted in the proposed rule that APHIS would provide guidance to new and current licensees and registrants through documents, guides, and training to help them achieve compliance with the new regulations for birds. In the proposed rule, we invited potential licensees and other interested persons to comment on the types of training and guidance they need and the modes by which it might be best provided.

One commenter asked that APHIS establish an email address to which the regulated community can submit questions for prompt agency response, and to publish answers to frequently asked questions.

Persons with questions about the regulation of birds can submit questions to [animalcare@usda.gov](mailto:animalcare@usda.gov). We also intend to develop guidance by publishing and responding to frequently asked questions.

Commenters also suggested that we conduct webinars explaining the new standards and how to implement them. A commenter requested that we consider providing online workshops for those who will be affected by these regulations, and another requested that we make training materials available so that falconry organizations can educate their members on the changes they may face.

We acknowledge the value of providing such resources to help newly licensed persons come into compliance

with the standards and intend to develop both web-based and paper-based training resources to reach as many licensees as possible. We also note that practices associated with falconry are not covered under the AWA and therefore excluded from coverage.

A few commenters also requested that it would be helpful for APHIS and USFWS to issue guidance identifying areas in which each Agency's requirements intersect with the other and summarizing each agency's requirements accordingly. A commenter also requested that we conduct joint, live webinars with APHIS and OLAW to discuss the intersection between existing regulations included in *The Guide for the Care and Use of Laboratory Animals* and the proposed rule. The same commenter also asked for guidance on how these intersecting regulations apply to birds that are captured for research, teaching, or testing and then released, as well as to birds that are captured and then used for terminal studies.

The commenters have provided useful suggestions for new guidance, particularly as these regulations intersect with regulations and policies of other Federal agencies. We intend to develop guidance on these topics as we receive and evaluate them.

A commenter proposed that we add, for the sale of birds, an educational certification requirement to ensure the buyer knows how to adequately care for a bird.

We are making no changes in response to the commenter's request, as we do not have the authority to impose such a requirement on pet owners and other buyers who will not be conducting any activities covered under the AWA.

#### Legal Issues

A commenter stated that requiring current facilities to comply with the proposed standards is unconstitutional pursuant to *Bowen v. Georgetown Univ. Hosp.* because such standards cannot be retroactively applied. The commenter stated that APHIS must grandfather the structures of all facilities preexisting the enactment of these regulations.

This final rule does not have retroactive effect, and we have established an implementation period after it is effective before we will enforce it. The case is not germane.

A commenter stated that a jurisdictional conflict exists because APHIS has failed to acknowledge that Congress granted regulatory authority of migratory birds through the MBTA and

the Bald and Golden Eagle Protection Act to the USFWS and that authority has not been removed by Congress or a Federal court regardless of the 2002 amendment to the AWA.

Agencies may have overlapping jurisdiction over an entity or subject area.

#### Economic Issues

Estimates of the number of persons affected by this rule and costs of compliance are included in the final economic analysis accompanying this rule, along with comments and responses we received on the analysis prepared for the proposed rule.

#### Miscellaneous

A commenter asked whether our estimated number of respondents under the Paperwork Reduction Act referred to respondents to the proposed rule or the estimate of licensees.

The estimated number of respondents refers to the number of licensees and registrants affected by the rule.

A commenter stated that APHIS needs to consider eliminating the term "husbandry" from the regulations and replace it with "guardianship," as the former carries sexist, supremacist connotations.

We are making no changes in response to the commenter, as "husbandry" is an established term used widely to connote the management, care, and breeding of animals.

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule, with the changes discussed in this document.

#### Executive Orders 12866 and 13563 and Regulatory Flexibility Act

This final rule has been determined to be significant for the purposes of Executive Order 12866 and, therefore, has been reviewed by the Office of Management and Budget.

We have prepared an economic analysis for this rule. The economic analysis provides a cost-benefit analysis, as required by Executive Orders 12866 and 13563, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and equity). Executive Order

13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The economic analysis also provides a final regulatory flexibility analysis that examines the potential economic effects of this rule on small entities, as required by the Regulatory Flexibility Act. The economic analysis is summarized below. Copies of the full analysis are available on the *Regulations.gov* website (see footnote 3 in this document for a link to *Regulations.gov*) or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

We are establishing new regulations and standards and amending existing regulations governing the humane handling, care, treatment, and transportation of birds, other than birds bred for use in research, covered under the Animal Welfare Act. This action will ensure the humane handling, care, treatment, and transportation of birds not bred for use in research covered under the Act. The benefit of this rule will be improved animal welfare because certain birds will be brought under the protection of the AWA. The rule will help ensure the humane handling and care of birds and help ensure that such birds are monitored for their health and humane treatment.

The final rule will affect certain U.S. facilities that handle or maintain birds not bred for use in research. This includes entities that sell birds as pets at the wholesale level or at retail if not sold in face-to-face transactions, or transport birds in commerce, or use birds for exhibition, unless otherwise exempt. In addition, facilities affected will include research facilities that use wild-caught birds, as well as carriers and intermediate handlers of birds.<sup>29</sup>

We note that under this rule, several licensing exemptions apply to some persons possessing and using birds. Most small bird breeders that actually sell birds are likely considered retail pet stores and are thus exempt from licensing under this rule. A retail pet store is any place of business or residence at which the seller, buyer, and the pet animal available for sale (including pet birds) are all physically

present so that the buyer may personally observe the animal prior to purchasing and/or taking custody of that animal. In addition, the current regulations provide an exemption for *de minimis* sized entities that are not otherwise required to obtain a license. This final rule establishes a new *de minimis* exemption specific to birds, to exempt from the licensing requirements any person who sells 200 or fewer pet birds of 250 grams or less annually, and/or sells 8 or fewer pet birds of more than 250 grams annually, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license.

Exemptions are also provided for any person who buys, sells, transports, or negotiates the sale, purchase, or transportation of any animals used only for the purposes of food or fiber; persons practicing falconry and raptors used in falconry, unless they are engaged in activities outside of falconry that will be covered under the AWA; any person keeping four or fewer raptors for exhibition who is not otherwise required to obtain a license; and any person who buys animals solely for his or her own use or enjoyment and who does not sell or exhibit animals. Under these regulations, these exemptions to licensing will apply to bird breeders as well as bird exhibitors. Those considered exempt will not be required to obtain a license under this rule.

Newly regulated entities will be subject to licensing, animal identification, and recordkeeping requirements, as well as standards for facilities and operations, animal health and husbandry, and transportation under this rule. Licensing costs will be incurred by all new licensees. Other costs will depend on the manner and extent to which entities are not currently complying with the basic standards under the AWA. Some of these costs will be one-time costs in the first year, such as providing adequate shelter; others may be recurring costs, such as providing adequate veterinary care.

A great deal of uncertainty surrounds the number of facilities that will be affected by this rule. Uncertainty also surrounds the number of those facilities that will need to make structural or operational changes, as well as the extent of such changes. For purposes of this final regulatory analysis, we estimate that the number of newly regulated entities is likely between 5,975 to 7,913. This includes 1,625 to 3,563 newly licensed breeders and distributors and 4,000 newly licensed exhibitors, and as many as 350 new registrants—250 newly regulated research facilities and 100 newly regulated carriers and intermediate handlers. These estimates are based on information gathered from a variety of sources, including industry experts, internal records on existing regulated entities, other U.S. government agencies, industry group surveys and other data, online registries, and information from public comments on the proposed rule. More information about the development of the estimates is contained in the body of the Regulatory Impact Analysis.

For new licensees, total new licensing costs could be between \$225,000 and \$303,000 averaged annually. We have also estimated that the total annual cost of the recordkeeping and other information collection requirements to be about \$5.7 million. The new annual costs could total between \$5.9 million and \$6 million.

In addition, one-time costs could be incurred. If all newly regulated licensees and registrants must develop new contingency plans, the total associated one-time cost for new contingency planning could be from about \$370,000 to \$1.66 million. If all newly regulated dealers and research facilities must develop a new written program of veterinary care (PVC), the total associated one-time cost for new PVC development could be from \$1.25 million to \$1.66 million. Therefore, all one-time new costs for new licensees could range from \$1.62 million to \$3.32 million in total across all new licensees. Table A presents those annual and one-time costs likely to be incurred by newly regulated facilities.

TABLE A—POTENTIAL COMPLIANCE COSTS FOR NEW LICENSEES ASSOCIATED WITH THE RULE, 2021 DOLLARS

Activity	Certain potential costs	Potential total for all newly regulated entities
Licensing .....	\$120/3-year license .....	\$225,000 to \$303,000/year (averaged).
Recordkeeping and Other Information Collection <sup>1</sup> .....	20 hours annually; \$790/respondent .....	\$5.7 million/year.
Total Potential New Annual Costs .....	\$830 annually .....	\$5.9–\$6 million/year.

<sup>29</sup> Only those research facilities that use wild-caught birds for research, testing, teaching, or experimentation, including activities such as

investigations into animal propagation and wildlife ecology, would be subject to the provisions of this

final rule. Facilities using birds bred for use in research would not be subject to this rule.

TABLE A—POTENTIAL COMPLIANCE COSTS FOR NEW LICENSEES ASSOCIATED WITH THE RULE, 2021 DOLLARS—Continued

Activity	Certain potential costs	Potential total for all newly regulated entities
Contingency Planning <sup>1</sup>	1 to 2 hours preparation, and 1 hour training; \$62 to \$210/-entity.	\$370,000 to \$1.66 million.
Program of Veterinary Care <sup>1</sup>	\$210 per facility, new; \$70 per facility for an update ..	\$1.25 million to \$1.66 million.
Total Potential New One-Time Costs	\$132–\$420 one time <sup>2</sup>	\$1.62 to \$3.32 million one time.

<sup>1</sup> These are only new costs where these activities are not already occurring. Therefore, these costs could be overestimated. Totals may not sum due to rounding.  
<sup>2</sup> These estimates are based on the facility drawing up their own program of veterinary care and then having this document approved by the attending veterinarian.

To the extent that facilities are already keeping records, have already done contingency planning, and have already developed a program of veterinary care for their birds, these costs could be overestimated. For example, both the 2011 Guide for Care of Laboratory Animals and the 2010 Guide for the Care of Agricultural Animals in Research (“the Guide”) and the 2010 Guide for the Care of Agricultural Animals in Research and Teaching (“the Ag-Guide”) require contingency planning and emergency preparedness. Research facilities receiving funding from the U.S. Public Health Service (PHS) are required to follow standards of care set forth in the Guide. PHS-funded research facilities that utilize farm animals for biomedical research must follow either the Guide or the Ag-Guide. Research facilities may voluntarily acquire accreditation by the Association for Assessment and Accreditation of Laboratory Animal

Care International (AAALAC). AAALAC uses the Guide as the standard when assessing animal care and use programs in the United States.

In addition to those requirements, newly regulated entities must meet regulatory standards for bird identification, and performance standards for facilities and operations, health and husbandry, and transportation. However, as acknowledged by a wide spectrum of commenters in listening sessions, commenters on the proposed rule, and commenters on previous APHIS actions, bird dealers and exhibitors are often complying with professionally accepted standards to protect avian health and prevent discomfort and thus already maintain their facilities well above the minimum standards of this rule. The provisions of this rule are performance-based, rather than having specific engineering standards. We do acknowledge that some commenters

interpreted all of the costs presented in the analysis accompanying the proposed rule to be new costs applicable to all regulated entities, regardless of whether that entity was already in compliance with the requirements. However, only those newly regulated entities that are considerably noncompliant will need to make significant structural and/or other operational changes in order to comply with the standards in this rule.

Neither the number of entities that will need to make changes nor the extent of those changes is known. Therefore, the overall cost of structural and operational changes that will be incurred due to this rule is also unknown. We discuss illustrative and non-prescriptive examples of costs that could be incurred by some newly regulated noncompliant facilities. While not prescriptive, Table B presents potential compliance costs illustrative of those that could be incurred by some newly regulated noncompliant entities.

TABLE B—AREAS OF POTENTIAL COMPLIANCE COSTS [Structural or operational modification]

Activity	Some potential costs
New bird identification	None Needed: \$0. OR Primary enclosure label/record <\$0.02/bird in labor and materials. OR Microchip \$4–\$17/each; Microchip reader \$66–\$413/facility. Labor for banding or microchipping \$28–\$56. OR Leg or wing band \$0.03–\$0.55/each; Labor for banding or microchipping \$28–\$56.
Additional veterinary care, as needed	Not Needed: \$0. OR \$40–\$344/bird.
Facility Repairs	None Needed: \$0. OR \$56–\$112/repair.
Access to Water	Not Needed: \$0. OR For facility with 20 birds; \$722 for plumbed water. OR \$99–\$330 for bottles.
Access to Electrical Power	Not Needed: \$0. OR \$440–\$2,200/generator.
Temperature & Humidity	Not Needed: \$0. OR Brood box thermometer \$7–\$165/each; Space heating \$28–\$220.
Ventilation improvements	None Needed: \$0. OR Hardware cloth \$22–\$55; Attic fan \$55–\$330 plus installation; HEPA filter \$110–\$220.
Shelter improvements	None Needed: \$0. OR Nest box \$56–\$112.
Primary enclosure improvements	None Needed: \$0. OR Commercial enclosures \$110, to \$1,100/each; Repair or upgrade of existing enclosure \$256–\$387.
Environment enhancement	Not Needed: \$0. OR \$11–\$22/enclosure.
Cleaning, sanitation, and pest control	Not Needed: \$0. OR Storage container/shed \$165–\$1,100; Label maker \$22.
New labor (includes other listed activities)	Not Needed: \$0. OR 1–10 hours/week; \$1,453–\$14,527/year.
New training	Not Needed: \$0. OR \$45–\$75/employee.
Food storage improvements	None Needed: \$0. OR Containers \$11–\$110; Commercial freezer \$275–\$1,650.
New primary enclosures during transport	None Needed: \$0.

TABLE B—AREAS OF POTENTIAL COMPLIANCE COSTS—Continued  
[Structural or operational modification]

Activity	Some potential costs
New food, water, and health monitoring during transit ..	OR Pet crates approved for air travel \$66–\$385. Not Needed: \$0. OR Brooder \$165–\$660.

**Note:** Illustrative example costs that *could* be incurred by *some* newly regulated noncompliant facilities.

The majority of businesses potentially affected by this final rule are likely to be small entities. As explained, the wide range in potential cost is mainly derived from the uncertainty surrounding the total number of breeders that will need to become licensed as a result of this rule and the number of those newly regulated entities that will then need to make structural or operational changes, as well as from the specific structural or operational changes chosen to remedy instances of noncompliance.

#### Executive Order 12372

This program/activity is listed in the Catalog of Federal Domestic Assistance under No. 10.025 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.)

#### Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. It is not intended to have retroactive effect. The Act does not provide administrative procedures which must be exhausted prior to a judicial challenge to the provisions of this rule.

#### Executive Order 13175

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments.” Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes or on the distribution of power and responsibilities between the Federal Government and Indian Tribes.

In 2020, the U.S. Court of Appeals for the D.C. Circuit ruled that APHIS must schedule virtual listening sessions to gather comments on establishing standards for birds. APHIS subsequently consulted with Tribal nations on November 4, 2021, and no questions or

comments were raised at that time. In the proposed rulemaking, APHIS determined that this rule may have substantial direct effects on one or more Tribes and affirmed its intention to fully comply with Executive Order 13175. During the comment period, APHIS received no requests for consultation or comment from Tribal nations. Should a Tribe request consultation, APHIS will collaborate with the Office of Tribal Relations to ensure meaningful consultation occurs.

#### Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule, as defined by 5 U.S.C. 804(2).

#### Paperwork Reduction Act

In accordance with Section 3507(d) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), some of the reporting and recordkeeping requirements included in the proposed rule and this final rule were previously approved under Office of Management and Budget (OMB) control number 0579–0036, Animal Welfare. The remaining reporting and recordkeeping requirements that were solely associated with the proposed rule and this final rule were submitted to OMB as a new information collection and were assigned OMB comment-filed number 0579–0486. After approval, this information collection will be merged into 0579–0036 in the future.

New information collection requirements created by the regulations of this final rule include bird identification records, environmental enhancement plan records, cleaning and sanitation records, consignment documents, and certifications for shipment of birds. Estimates reflected in 0579–0486 include additional respondents, responses, and burden estimates across all activities affected by this rule. As described above, APHIS received several public comments on the proposed rule concerning recordkeeping burden, but the estimates were unchanged. The remaining information collection procedures and forms are also unchanged, except estimates for numbers of respondents

for 22 activities were increased to capture a new segment of the business community now affected by the rule change. APHIS added 1,159 respondents across the 22 activities for a new total of 7,427 estimated respondents, which in turn added 14,165 additional estimated responses (164,850 total) and 19,579 hours of estimated burden (147,877 total). Estimated hours per response remained unchanged.

#### E-Government Act Compliance

The Animal and Plant Health Inspection Service is committed to compliance with the E-Government Act to promote the use of the internet and other information technologies, to provide increased opportunities for citizen access to Government information and services, and for other purposes. Specific details about forms for reportable activities can be found in the information collection request supporting statement.

APHIS uses DocuSign and eFile as a master, cross-program IT system for providing a standard approach to collect, record, analyze, maintain, and report certification, accreditation, registration, permitting, and other licensing activities and processes. This system is designed to comply with the Government Paperwork Elimination Act (GPEA) and e-Authentication, and will be used by the Animal Care Program office to conduct inspections and serve as a central point for information sharing whereby eFile business processes, standard operational procedures, and sharing data internally. The respondent will be able to input the necessary information directly into the system. APHIS anticipates that this will save time and cost both for the regulated community and for the Animal Care program.

For forms not available via DocuSign and eFile, APHIS is working towards making them available for download from Agency websites. APHIS is striving to ensure these forms are in fillable PDF format for simplified completion and printing or electronic storage. These forms may be submitted via regular mail or courier services (such as FedEx, UPS, etc.), fax, or email to APHIS at the respondents' preference. The documents may require a physical signature of the

respondent, or printing if accompanying transported animals. The use of electronic submissions (fax and email) affords a decrease in notification time, record of submission, and reduction of paperwork, costs, and mailing activities. Respondents are free to maintain required records as best suited for their organization.

For assistance with E-Government Act compliance related to this final rule, please contact Mr. Joseph Moxey, APHIS' Paperwork Reduction Act Coordinator, at (301) 851-2483, or the Animal Care contact listed above under **FOR FURTHER INFORMATION CONTACT.**

**List of Subjects**

*9 CFR Parts 1 and 2*

Animal welfare, Pets, Reporting and recordkeeping requirements, Research.

*9 CFR Part 3*

Animal welfare, Marine mammals, Pets, Reporting and recordkeeping requirements, Research, Transportation.

Accordingly, we are amending 9 CFR parts 1, 2, and 3 as follows:

**PART 1—DEFINITION OF TERMS**

■ 1. The authority citation for part 1 continues to read as follows:

**Authority:** 7 U.S.C. 2131-2159; 7 CFR 2.22, 2.80, and 371.7.

■ 2. Section 1.1 is amended as follows:

- a. In the definition of *Animal*, by adding a sentence before the last sentence;
- b. By adding in alphabetical order definitions for *Bird* and *Bred for use in research*;
- c. By revising the definitions of *Carrier*, *Exhibitor*, *Farm animal*, *Intermediate handler*, and *Pet animal*;
- d. By adding in alphabetical order a definition for *Poultry*; and
- e. By revising the definitions of *Retail pet store* and *Weaned*.

The additions and revisions read as follows:

**§ 1.1 Definitions.**

\* \* \* \* \*

*Animal* \* \* \* This term also excludes falconry. \* \* \*

\* \* \* \* \*

*Bird* means any member of the class Aves, excluding eggs, but including birds once the hatching process commences.

*Bred for use in research* means an animal that is bred in captivity and used for research, teaching, testing, or experimentation purposes.

\* \* \* \* \*

*Carrier* means the operator of any airline, railroad, motor carrier, shipping

line, or other enterprise which is engaged in the business of transporting any animals for hire. Except anyone transporting a migratory bird covered under the Migratory Bird Treaty Act from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities, and has obtained authorization from the U.S. Fish and Wildlife Service for that purpose, is not a "carrier".

\* \* \* \* \*

*Exhibitor* means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts (including free-flighted bird shows), zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse, dog, and pigeon races, an owner of a common, domesticated household pet who derives less than a substantial portion of income from a nonprimary source (as determined by the Secretary) for exhibiting an animal that exclusively resides at the residence of the pet owner, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, field trials, coursing events, falconry, purebred dog and cat shows, bird fancier shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary.

\* \* \* \* \*

*Farm animal* means any domestic species of cattle, sheep, swine, goats, llamas, horses, or poultry, which are normally and have historically been kept and raised on farms in the United States and used or intended for use as food or fiber, or for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. This term also includes animals such as rabbits, mink, chinchilla, and ratites when they are used solely for purposes of meat, fur, feathers, or skin, and animals such as horses and llamas when used solely as work and pack animals.

\* \* \* \* \*

*Intermediate handler* means any person, including a department, agency, or instrumentality of the United States or of any State or local government (other than a dealer, research facility, exhibitor, any person excluded from the definition of a dealer, research facility, or exhibitor, an operator of an auction

sale, or a carrier), who is engaged in any business in which he receives custody of animals in connection with their transportation in commerce. Except anyone transporting a migratory bird covered under the Migratory Bird Treaty Act from the wild to a facility for rehabilitation and eventual release in the wild, or between rehabilitation facilities, and has obtained authorization from the U.S. Fish and Wildlife Service for that purpose, is not an "intermediate handler".

\* \* \* \* \*

*Pet animal* means any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, hamsters, and birds. This term also includes but is not limited to such birds as canaries, cockatiels, lovebirds, and budgerigar parakeets. This term excludes exotic animals and wild animals.

\* \* \* \* \*

*Poultry* means any species of chickens, turkeys, swans, partridges, guinea fowl, and pea fowl; ducks, geese, pigeons, and doves; grouse, pheasants, and quail.

\* \* \* \* \*

*Retail pet store* means a place of business or residence at which the seller, buyer, and the animal available for sale are physically present so that every buyer may personally observe the animal prior to purchasing and/or taking custody of that animal after purchase, and where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchillas, domesticated ferrets, domesticated farm-type animals, birds, and coldblooded species. Such definition excludes -

- (1) Establishments or persons who deal in dogs used for hunting, security, or breeding purposes;
- (2) Establishments or persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warmblooded animals such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;
- (3) Any establishment or person selling warmblooded animals (except laboratory rats and mice) for research or exhibition purposes;
- (4) Any establishment wholesaling any animals (except rats and mice); and
- (5) Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises.

\* \* \* \* \*

*Weaned* means that a mammal has become accustomed to take solid food and has so done, without nursing, for a period of at least 5 consecutive days; or that a bird has become accustomed to take food and has so done, without supplemental feeding from a parent or human caretaker, for a period of at least 5 consecutive days.

\* \* \* \* \*

**PART 2—REGULATIONS**

■ 3. The authority citation for part 2 continues to read as follows:

**Authority:** 7 U.S.C. 2131–2159; 7 CFR 2.22, 2.80, and 371.7.

■ 4. Section 2.1 is amended as follows:

■ a. In paragraph (a)(3)(iii), by removing the semicolon at the end of the paragraph and adding a period in its place, and adding two sentences after the newly added period;

■ b. In paragraph (a)(3)(vi), by adding “, feathers, skin,” after the word “food”;

■ c. By redesignating paragraph (a)(3)(viii) as paragraph (a)(3)(ix) and adding a new paragraph (a)(3)(viii);

■ d. In paragraph (b)(2)(ii), by removing the words “subparts A through F” in the first sentence and adding the words “subparts A through G” in their place and adding two sentences after the last sentence; and

■ e. By revising the OMB citation at the end of the section.

The additions and revision read as follows:

**§ 2.1 Requirements and application.**

(a) \* \* \*

(3) \* \* \*

(iii) \* \* \* Also exempt from licensing is any person who sells 200 or fewer pet birds 250 grams or less, and/or sells 8 or fewer pet birds more than 250 grams, determined by average adult weight of the species, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively sells more than 200 pet birds 250 grams or less, and/or sells more than 8 pet birds more than 250 grams, regardless of ownership;

\* \* \* \* \*

(viii) Any person who maintains a total of four or fewer raptors for exhibition, holds a valid permit from the U.S. Fish and Wildlife Service, and is not otherwise required to obtain a license. This exemption does not extend to any person acting in concert with others where they collectively maintain a total of more than four raptors for

exhibition, regardless of possession and/or ownership;

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) \* \* \* Notwithstanding these provisions, a licensee in possession of birds on March 23, 2023, may continue to operate under that license until its scheduled expiration date. APHIS encourages such persons to apply for a new license at least 90 days before expiration of the current one.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0470, and 0579–0486)

■ 5. Section 2.2 is amended by revising the OMB citation at the end of the section to read as follows:

**§ 2.2 Acknowledgement of regulations and standards.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0470, and 0579–0486)

■ 6. Section 2.3 is amended by revising the OMB citation at the end of the section to read as follows:

**§ 2.3 Demonstration of compliance with standards and regulations.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 7. Section 2.5 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.5 Duration of license and termination of license.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 8. Section 2.11 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.11 Denial of license application.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 9. Section 2.25 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.25 Requirements and procedures.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 10. Section 2.26 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.26 Acknowledgment of regulations and standards.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 11. Section 2.30 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.30 Registration.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 12. Section 2.31 is amended as follows:

■ a. In paragraph (d)(1)(ix):

■ i. In the third sentence, by removing the word “non-rodents” and adding the words “animals, other than rodents and birds,” in its place; and

■ ii. In the fourth sentence, by adding the words “and birds” after the word “rodents”; and

■ b. By adding an OMB citation at the end of the section.

The addition reads as follows:

**§ 2.31 Institutional Animal Care and Use Committee (IACUC).**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 13. Section 2.33 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.33 Attending veterinarian and adequate veterinary care.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 14. Section 2.35 is amended by revising the OMB citation at the end of the section to read as follows:

**§ 2.35 Recordkeeping requirements.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 15. Section 2.36 is amended by adding an OMB citation at the end of the section to read as follows:

**§ 2.36 Annual report.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036 and 0579–0486)

■ 16. Section 2.38 is amended by revising the OMB citation at the end of the section to read as follows:

**§ 2.38 Miscellaneous.**

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579–0036, 0579–0479, and 0579–0486)

■ 17. Section 2.40 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 18. Section 2.50 is amended as follows:

■ a. By redesignating paragraphs (e)(2) and (3) as paragraphs (e)(3) and (4), respectively, and adding a new paragraph (e)(2); and

■ b. In newly redesignated paragraph (e)(3) introductory text, by removing the words “dogs or cats” and adding the words “dogs, cats, or birds” in their place; and

■ c. By adding an OMB citation at the end of the section.

The additions read as follows:

§ 2.50 Time and method of identification.

\* \* \* \* \*

(e) \* \* \*

(2) When one or more birds are confined in a primary enclosure, the bird shall be identified by:

(i) A label attached to the primary enclosure which shall bear a description of the birds in the primary enclosure, including:

(A) The number of birds;

(B) The species of the birds;

(C) Any distinctive physical features of the birds; and

(D) Any identifying marks on the birds; or

(ii) A leg or wing band applied to each bird in the primary enclosure by the dealer or exhibitor that individually identifies each bird by description or number; or

(iii) A transponder (microchip) placed in a standard anatomical location for the species in accordance with professionally accepted standards, provided that the receiving facility has a compatible transponder (microchip) reader that is capable of reading the transponder (microchip) and that the reader is readily available for use by an APHIS official and/or facility employee accompanying the APHIS official.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 19. Section 2.75 is amended by revising the last sentence in paragraph (b)(1) introductory text and adding an OMB citation at the end of the section to read as follows:

§ 2.75 Records: Dealers and exhibitors.

\* \* \* \* \*

(b)(1) \* \* \* The records shall include any offspring born or hatched of any animal while in his or her possession or under his or her control, to the extent that any identification or counting of offspring can be carried out without unduly disturbing nesting or rearing activities.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 20. Section 2.76 is amended by revising paragraph (a)(7) and adding an OMB citation at the end of the section to read as follows:

§ 2.76 Records: Operators of auction sales and brokers.

(a) \* \* \*

(7) A description of the animal which shall include:

(i) The species and the breed or type of animal;

(ii) The sex of the animal; or if the animal is a bird, only if the sex is readily determinable;

(iii) The date of birth or hatch date; or, if unknown, the approximate age or developmental stage; and

(iv) The color and any distinctive markings; and

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 21. Section 2.77 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.77 Records: Carriers and intermediate handlers.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 22. Section 2.78 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.78 Health certification and identification.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 23. Section 2.79 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.79 C.O.D. shipments.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 24. Section 2.80 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.80 Records, disposition.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 25. Section 2.125 is amended by adding an OMB citation at the end of the section to read as follows:

§ 2.125 Information as to business; furnishing of same by dealers, exhibitors, operators of auction sales, intermediate handlers, and carriers.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

■ 26. Section 2.126 is amended by revising the OMB citation at the end of the section to read as follows:

§ 2.126 Access and inspection of records and property; submission of itineraries.

\* \* \* \* \*

(Approved by the Office of Management and Budget under control numbers 0579-0036 and 0579-0486)

PART 3—STANDARDS

■ 27. The authority citation for part 3 continues to read as follows:

Authority: 7 U.S.C. 2131-2159; 7 CFR 2.22, 2.80, and 371.7.

■ 28. The heading for subpart F is revised to read as follows:

Subpart F—Specifications for the Humane Handling, Care, Treatment, and Transportation of Warmblooded Animals Other Than Dogs, Cats, Rabbits, Hamsters, Guinea Pigs, Nonhuman Primates, Marine Mammals, and Birds

■ 29. Subpart G, consisting of §§ 3.150 through 3.168, is added to read as follows:

Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds

Facilities and Operating Standards

Sec.

3.150 Facilities, general.

3.151 Facilities, indoor.

3.152 Facilities, outdoor.

3.153 Primary enclosures.

3.154 Environmental enhancement to promote psychological well-being.

Animal Health and Husbandry Standards

3.155 Feeding.

3.156 Watering.

3.157 Water quality.

3.158 Cleaning, sanitization, housekeeping, and pest control.

3.159 Employees.

3.160 Compatibility and separation.

Transportation Standards

3.161 Consignments to carriers and intermediate handlers.

- 3.162 Primary enclosures used to transport live birds.
- 3.163 Primary conveyances (motor vehicle, rail, air, and marine).
- 3.164 Food and water requirements.
- 3.165 Care in transit.
- 3.166 Terminal facilities.
- 3.167 Handling.
- 3.168 Climate and environmental conditions during transportation.

### Subpart G—Specifications for the Humane Handling, Care, Treatment, and Transportation of Birds

#### Facilities and Operating Standards

##### § 3.150 Facilities, general.

(a) *Structure; construction.* Housing facilities for birds must be designed and constructed so that they are structurally sound for the species of bird housed in them. They must be kept in good repair, protect the birds from injury, and restrict other animals from entering that may negatively affect the welfare of the birds within. Housing facilities must employ security measures that contain all birds securely. Such measures may include safety doors, entry/exit doors to the primary enclosure that are double-door, or other equivalent systems designed to prevent escape of the birds. Birds that are flight-restricted or cannot fly and are allowed to roam free within the housing facility or a portion thereof must have access to safety pens, enclosures, or other areas that offer the birds protection during overnight periods and at times when their activities are not monitored.

(b) *Condition and site.* Housing facilities and areas used for storing animal food or bedding must be free of any accumulation of trash, waste material, other discarded materials, junk, weeds, and brush. Housing facilities must be kept neat and free of clutter, including equipment, furniture, and stored material, but may contain materials actually used and necessary for cleaning the area, and fixtures or equipment necessary for proper husbandry practices or research needs.

(c) *Surfaces.* The surfaces of housing facilities must be constructed in a manner and made of materials that allow them to be readily cleaned and/or sanitized, or removed and replaced when worn or soiled. Interior surfaces and surfaces that come in contact with birds must be:

- (1) Nontoxic to the bird;
  - (2) Free of rust or damage that affects the structural integrity of the surface or prevents cleaning; and
  - (3) Free of jagged edges or sharp points that could injure the birds.
- (d) *Water and electric power.* The facility must have reliable electrical

power adequate for heating, cooling, ventilation, and lighting, if necessary, or for carrying out other husbandry requirements in accordance with the regulations in this subpart. The facility must provide adequate potable water for the birds' drinking needs and water for cleaning and for carrying out other husbandry requirements in accordance with the regulations in this subpart.

(e) *Storage.* Supplies of food, including food supplements, bedding, and substrate must be stored in a manner that protects the supplies from deterioration, spoilage (harmful microbial growth), contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. All food must be stored in a manner that prevents deterioration of its nutritive value. Live food must be maintained in a manner to ensure wholesomeness. Substances such as cleaning supplies and disinfectants that are harmful to the birds but that are required for normal husbandry practices must not be stored in food storage and preparation areas but may be stored in cabinets in the animal areas, provided that they are stored in properly labeled containers that are adequately secured to prevent potential harm to the birds. Animal waste and dead animals and animal parts not intended for food must not be kept in food storage or food preparation areas, food freezers, food refrigerators, and animal areas.

(f) *Waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, substrate, dead animals, debris, garbage, water, and any other fluids and wastes, in a manner that minimizes contamination and disease risk. Trash containers in housing facilities and in food storage and preparation areas must be able to contain trash securely to minimize odors and be inaccessible to animals and pests.

(g) *Drainage.* Housing facilities must be equipped with disposal and drainage systems that are constructed and operated so that animal wastes and water, except for water located in pools or other aquatic areas (e.g., ponds, waterfalls, fountains, and other water features), are rapidly eliminated so the animals have the option of remaining dry. Pools and other aquatic areas must be maintained in accordance with the regulations in § 3.157. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained so that they effectively drain water. If closed drainage systems are

used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage. If the facility uses sump ponds, settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located a sufficient distance from the bird area of the housing facility to prevent odors, diseases, insects, pests, and vermin infestation in the bird area. If drip or constant flow watering devices are used to provide water to the animals, excess water must be rapidly drained out of the animal areas by gutters, pipes, or other methods so that the animals have the option of remaining dry.

(h) *Toilets, washrooms, and sinks.* Toilets and washing facilities such as washrooms, basins, sinks, or showers must be provided for animal caretakers and must be readily accessible.

##### § 3.151 Facilities, indoor.

(a) *Temperature and humidity.* The air temperature and, if present, pool or other aquatic area (e.g., ponds, waterfalls, fountains, and other water features), and air humidity levels in indoor facilities must be sufficiently regulated and appropriate to bird species to protect the birds from detrimental temperature and humidity levels, to provide for their health and well-being, and to prevent discomfort or distress, in accordance with current professionally accepted standards.

(b) *Ventilation.* Indoor housing facilities must be sufficiently ventilated at all times when birds are present to provide for their health, to prevent their discomfort or distress, and to minimize accumulations of moisture condensation, odors, and levels of ammonia, chlorine, and other noxious gases. The ventilation system must minimize drafts.

(c) *Lighting.* Indoor housing facilities must have lighting, by natural or artificial means, or both, of appropriate quality, distribution, and duration for the species of birds involved. Such lighting must be sufficient to permit routine inspection and cleaning. Lighting of primary enclosures must be designed to protect the birds from excessive illumination that may cause discomfort or distress.

(d) *Indoor pool or other aquatic areas.* Indoor pools or other aquatic areas (e.g., ponds, waterfalls, fountains, and other water features) must have sufficient vertical air space above the pool or other aquatic area to allow for behaviors typical to the species of bird under consideration. Such behaviors may include, but are not limited to, diving and swimming.

**§ 3.152 Facilities, outdoor.**

(a) *Acclimation.* Birds may not be housed in outdoor facilities unless the air humidity and temperature ranges and, if applicable, pool or other aquatic area (e.g., ponds, waterfalls, fountains, and other water features) temperature ranges do not adversely affect bird health and comfort. Birds may not be introduced to an outdoor housing facility until they are acclimated to the ambient temperature and humidity and, if applicable, pool or other aquatic area temperature range which they will encounter therein.

(b) *Shelter from inclement weather.* Outdoor housing facilities must provide adequate shelter, appropriate to the species and physical condition of the birds, for the local climatic conditions to protect the birds from any adverse weather conditions. Shelters must be adequately ventilated in hot weather and have one or more separate areas of shade or other effective protection that is large enough to comfortably contain all the birds at one time and prevent their discomfort from direct sunlight, precipitation, or wind. Shelter must also be constructed to provide sufficient space to comfortably hold all of the birds at the same time without adverse intraspecific aggression or grouping of incompatible birds. For birds that form dominance hierarchies and that are maintained in social groupings, shelter(s) must be constructed so as to provide sufficient space to comfortably hold all the birds at the same time, including birds that are low in the hierarchy.

**§ 3.153 Primary enclosures.**

(a) *General requirements.* Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(1) Primary enclosures must be constructed and maintained so that they:

- (i) Have no sharp points or edges that could injure the birds;
- (ii) Protect the birds from injury;
- (iii) Contain the birds securely;
- (iv) Restrict other animals from entering the enclosure;
- (v) Ensure that birds have the option to remain dry and clean;
- (vi) Provide shelter and protection for each bird from climatic and environmental conditions that may be detrimental to its health and well-being;
- (vii) Provide sufficient shade to comfortably shelter all birds housed in the primary enclosure at one time, including low ranking birds that are maintained in social groupings that form dominance hierarchies;

(viii) Provide all the birds with easy and convenient access to clean food and potable water;

(ix) Ensure that all surfaces in contact with the birds may be readily cleaned and/or sanitized in accordance with § 3.158 or be replaced when worn or soiled; and

(x) Have floors that are constructed in a manner that protects the birds' feet and legs from injury. If flooring material is suspended, it must be sufficiently taut to prevent excessive sagging under the bird's weight. If substrate is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

(2) Furniture-type objects, such as perches and other objects that enrich a bird's environment, must be species-appropriate and be designed, constructed, and maintained so as to prevent harm to the bird. If the enclosure houses birds that rest by perching, there must be perches available that are appropriate to the age and species of birds housed therein and a sufficient number of perches of appropriate size, shape, strength, texture, and placement to comfortably hold all the birds in the primary enclosure at the same time, including birds that are ranked low in a dominance hierarchy.

(3) Primary enclosures that are adjacent to one another or that share a common side with another enclosure must be suitably screened from each other or kept at a sufficient distance apart in order to prevent injury of the occupants due to predation, territorial disputes, or aggression.

(b) *Space requirements.* Primary enclosures must be constructed and maintained so as to allow each bird to make normal postural and social adjustments, such as dust-bathing and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other animals. Both part-time and full-time attending veterinarians at a facility must consult with the facility to ensure that the space in all enclosures housing birds is adequate and allows for normal postural and social adjustments. Inadequate space may be indicated by evidence of malnutrition, poor condition, debility, stress, or abnormal behavior patterns. The normal postural and social adjustments of a bird may be restricted:

(1) When the attending veterinarian determines that making species-typical postural or social adjustments, such as dust-bathing, foraging, or running, would be detrimental to the bird's good health and well-being. The attending

veterinarian must document the reason and recommended duration for the restriction and make such records available for review by an APHIS inspector.

(2) When the birds are tethered in accordance with current professionally accepted standards. Birds must not be tethered unless:

- (i) It is appropriate for the species of bird;
- (ii) It will not cause harm to the birds;
- (iii) The birds are maintained on perches appropriate for the species and age of the bird while tethered;
- (iv) The birds have sufficient space to fully extend their wings without obstruction; and
- (v) The tether does not entangle the birds.

(3) When dealers, exhibitors, and research facilities breed or intend to breed their birds, such birds must be provided with structures and/or materials that meet the reproductive needs of the species during the appropriate season or time periods. A sufficient number of structures and materials must be provided to meet the needs of all breeding birds in an enclosure and to minimize aggression.

(4) Birds intended for breeding, sale, in need of medical care, exhibited in traveling exhibits, or traveling for other reasons must be kept in enclosures that, at minimum, meet the individual specific space, safety, bedding, perch, and physical environment (including, but not limited to, temperature, humidity, sun and wind exposure) requirements for transport enclosures as specified in § 3.162. At all other times, birds must be housed in enclosures that meet the space requirements of this section.

(c) *Special space requirements for wading and aquatic birds.* Primary enclosures housing wading and aquatic birds must contain a pool or other aquatic area (e.g., ponds, waterfalls, fountains, and other water features) and a dry area that allows easy ingress or egress of the pool or other aquatic area. Pools and other aquatic areas must be of sufficient surface area and depth to allow each bird to make normal postural and social adjustments, such as immersion, bathing, swimming, and foraging, with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Dry areas must be of sufficient size to allow each bird to make normal postural and social adjustments with adequate freedom of movement and freedom to escape from aggression demonstrated by other birds in the enclosure. Inadequate space may be indicated by evidence of

malnutrition, poor condition, debility, stress, or abnormal behavior patterns.

**§ 3.154 Environment enhancement to promote psychological well-being.**

Dealers, exhibitors, and research facilities must develop, document, and follow a species-appropriate plan for environment enhancement adequate to promote the psychological well-being of birds. The plan must be approved by the attending veterinarian and must be in accordance with the regulations in this subpart and with currently accepted professional standards as cited in appropriate professional journals or reference guides. This plan must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency. The plan, at a minimum, must address each of the following:

(a) *Social grouping.* The environment enhancement plan must include specific provisions to address the social needs of species of birds known to exist in social groups in nature. Such specific provisions must be in accordance with currently accepted professional standards as cited in appropriate professional journals or reference guides. The plan may provide for the following exceptions:

(1) If a bird exhibits vicious or overly aggressive behavior, or is debilitated as a result of age or other conditions (e.g., arthritis), it can be housed separately;

(2) Additionally, birds that have or are suspected of having a contagious disease must be isolated from healthy animals in the colony as directed by the attending veterinarian. When an entire group or room of birds is known to have been or believed to be exposed to an infectious agent, the group may be kept intact during the process of diagnosis, treatment, and control.

(3) Birds may not be housed with other species of birds or animals unless they are compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility of birds must be determined in accordance with generally accepted professional practices and actual observations as directed by the attending veterinarian, to ensure that the birds are in fact compatible. Individually housed social species of birds must be able to see and hear birds of their own or compatible species unless the attending veterinarian determines that it would endanger their health, safety, or well-being. If individually housed social species of birds are unable to see and hear birds of their own or compatible species then special attention regarding

enhancement to their environment must be provided as specified in paragraph (c)(4) of this section.

(b) *Environmental enrichment.* The physical environment in the primary enclosures must be enriched by materials or activities that would provide the birds with the means to express noninjurious species-typical activities. Species differences should be considered when determining the type or methods of enrichment. Examples of environmental enrichments include providing perches, swings, mirrors, and other increased cage complexities; providing objects to manipulate; varied food items; using foraging or task-oriented feeding methods; and providing interaction with the care giver or other familiar and knowledgeable person consistent with personnel safety precautions.

(c) *Special considerations.* Certain birds must be provided special attention regarding enhancement of their environment, based on the needs of the individual species and/or individual bird and in accordance with the instructions of the attending veterinarian. Birds requiring special attention are the following:

(1) Nestlings, chicks, or fledglings;

(2) Those that show signs of being in psychological distress through behavior or appearance;

(3) Those used in research for which the Institutional Animal Care and Use Committee (IACUC)-approved protocol requires restricted activity; and

(4) Individually housed social species of birds that are unable to see and hear birds of their own or compatible species.

(d) *Restraint devices.* Birds must not be permitted to be maintained in restraint devices unless required for health reasons as determined by the attending veterinarian or by a research proposal approved by the IACUC at research facilities. Any restraining actions must be for the shortest period possible. If the bird is to be restrained for more than 12 hours, it must be provided the opportunity daily for unrestrained activity for at least 1 continuous hour during the period of restraint, unless continuous restraint is required by the research proposal approved by the IACUC at research facilities.

(e) *Exemptions.* (1) The attending veterinarian may exempt an individual bird from participation in the environment enhancement plan because of its health or condition, or in consideration of its well-being. The basis of the exemption must be recorded by the attending veterinarian for each exempted bird. Unless the basis for the

exemption is a permanent condition, the exemption must be reviewed at least every 30 days by the attending veterinarian.

(2) For a research facility, the IACUC may exempt an individual bird from participation in some or all of the otherwise required environment enhancement plans for scientific reasons set forth in the research proposal. The basis of the exemption shall be documented in the approved proposal and must be reviewed at appropriate intervals as determined by the IACUC, but not less than annually.

(3) Records of any exemptions must be maintained by the dealer, exhibitor, or research facility for at least 1 year in accordance with § 3.81(e)(3) and must be made available to APHIS upon request, and, in the case of research facilities, to officials of any pertinent funding agency.

(Approved by the Office of Management and Budget under control number 0579-0486)

**Animal Health and Husbandry Standards**

**§ 3.155 Feeding.**

(a) The diet for birds must be appropriate for the species, size, age, and condition of the bird. The food must be wholesome, palatable to the birds, and free of contamination. It must be of sufficient quantity and nutritive value to maintain a healthy condition and weight range of the bird and to meet its normal daily nutritional requirements. Birds must be fed at least once a day except as directed by the attending veterinarian, normal fasts, or other professionally accepted practices. If birds are maintained in group housing, measures appropriate for the species must be taken to ensure that all the birds receive a sufficient quantity of food.

(b) Food and, if used, food receptacles must be readily accessible to all the birds being fed. Food and any food receptacles must be located so as to minimize any risk of contamination by excreta, precipitation, and pests. Food receptacles and feeding areas must be kept clean and sanitized in accordance with § 3.158. Used food receptacles must be cleaned and sanitized before they can be used to provide food to birds maintained in a separate enclosure. Measures must be taken to ensure there is no molding, deterioration, contamination, or caking or undesirable wetting or freezing of food within or on food receptacles. Food receptacles must be made of a durable material that can be easily cleaned and sanitized or be replaceable when worn or soiled. Group-housed birds must

have multiple food receptacles where needed to ensure that all birds have access to sufficient feed.

### § 3.156 Watering.

Potable water must be provided in sufficient quantity to every bird housed at the facility, unless restricted by the attending veterinarian. If potable water is not continually available to the birds, it must be offered to them as often as necessary to ensure their health and well-being. Water receptacles must be kept clean and sanitized in accordance with § 3.158 as often as necessary to keep them clean and free of contamination. Used water receptacles must be cleaned and sanitized before they may be used to provide water to birds maintained in a separate enclosure. Group-housed birds must have multiple water receptacles where needed to ensure that all birds have access to sufficient water.

### § 3.157 Water quality.

(a) The primary enclosure or any other area in which birds may enter must not contain pools or other aquatic areas (*e.g.*, ponds, waterfalls, fountains, and other water features) that are detrimental to the health of the birds contained therein.

(1) Particulate animal and food waste, trash, or debris that enters the pool or other aquatic area must be removed as often as necessary to maintain the required water quality and minimize health hazards to the birds.

(2) Pools or other aquatic areas with drainage systems must provide adequate drainage and must be located so that all of the water contained in such pools or other aquatic areas may be effectively eliminated when necessary for cleaning the pool or other aquatic area or for other purposes. Pools or other aquatic areas without drainage systems must be aerated and have an incoming flow of fresh water or be managed in a manner that maintains appropriate water quality in accordance with current professionally accepted standards appropriate for the species.

(b) When the water is chemically treated, the chemicals must be added in a manner that does not cause harm, discomfort, or distress to the animals. Should birds appear to be harmed by water quality, appropriate action must be taken immediately.

(c) Pools and other aquatic areas must be salinized for birds that require such water for their good health and well-being in accordance with current professionally accepted standards.

### § 3.158 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning.* (1) Excreta and food waste must be removed from primary enclosures and from under and around primary enclosures as often as necessary to prevent excessive accumulation of feces and food waste, to prevent soiling of the birds contained in the primary enclosures, and to reduce disease hazards, insects, pests, and odors. When steam or water is used to clean primary enclosures, measures must be taken to protect birds from being harmed, wetted involuntarily, or distressed in the process. Standing water, except for such water in pools or other aquatic areas (*e.g.*, ponds, waterfalls, fountains, and other water features), must be removed from the primary enclosure.

(2) Scheduled cleaning may be modified or delayed during breeding, egg-sitting, or feeding of chicks for birds that are easily disrupted during such behaviors. Scheduled cleaning must resume when such cleaning no longer disrupts breeding, egg-sitting, or feeding of chicks. A schedule of cleaning must be documented and must include when breeding season began, when the primary enclosure was last cleaned, and when cleaning is expected to resume. Such records must be available for review by an APHIS inspector.

(b) *Sanitization.* (1) Primary enclosures and food and water receptacles for birds must be sanitized as often as necessary to prevent accumulation of dirt, debris, food waste, excreta, and other disease hazards. *Provided, however,* that sanitization may be modified or delayed during breeding, egg-sitting, or feeding of chicks for those birds that are easily disrupted during such behaviors. Sanitization must resume when such activity no longer disrupts breeding, egg-sitting, or feeding of chicks. A schedule of sanitization must be documented that includes when breeding season began, when the primary enclosure was last sanitized, and when sanitization is expected to resume. Such records must be available for review by an APHIS inspector.

(2) The hard surfaces of primary enclosures and food and water areas and equipment must be sanitized before a new bird is brought into a housing facility or if there is evidence of infectious disease among the birds in the housing facility.

(3) Primary enclosures using materials that cannot be sanitized using conventional methods, such as gravel, sand, grass, earth, planted areas, or absorbent bedding, must be sanitized by removing all contaminated material as necessary or by establishing a natural

composting and decomposition system that is sufficient to prevent wasted food accumulation, odors, disease, pests, insects, and vermin infestation.

(c) *Housekeeping for premises.*

Premises where housing facilities are located, including buildings, surrounding grounds, and exhibit areas, must be kept clean and in good repair in order to protect the birds from injury and disease, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents, pests, and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the birds.

(d) *Pest control.* A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests must be established and maintained so as to promote the health and well-being of the birds and reduce contamination by pests in animal areas. Insecticides, chemical agents, or other pest control products that may be harmful to the birds must not be applied to primary enclosures and other bird contact surfaces unless the application is consistent with manufacturer recommendations or otherwise approved for use and does not harm birds.

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### § 3.159 Employees.

A sufficient number of adequately trained employees or attendants must be utilized to maintain the professionally acceptable level of husbandry and handling practices set forth in this subpart. Such practices must be conducted under the supervision of a bird caretaker who has appropriate experience in the husbandry and care of birds that are being managed in a given setting.

### § 3.160 Compatibility and separation.

(a) Socially dependent birds, such as clutch-mates, must be housed in social groups, except where the attending veterinarian exempts an individual bird because of its health or condition, or in consideration of its well-being, or for specific management needs, or where such social grouping is not in accordance with a research proposal and the proposal has been approved by the research facility IACUC.

(b) Birds may not be housed with other animals, including members of their own species, unless they are

compatible, do not prevent access to food, water, or shelter by individual animals, and are not known to be hazardous to the health and well-being of each other. Compatibility must be determined in accordance with generally accepted professional practices and by actual observations to ensure that the birds are, in fact, compatible.

(c) Birds that have or are suspected of having a contagious disease or communicable condition must be separated from healthy animals that are susceptible to the disease as directed by the attending veterinarian.

### Transportation Standards

#### § 3.161 Consignments to carriers and intermediate handlers.

(a) Carriers and intermediate handlers must not accept a live bird for transport in commerce more than 4 hours before the scheduled departure time of the primary conveyance on which the animal is to be transported. However, a carrier or intermediate handler may agree with anyone consigning a bird to extend this time by up to 2 hours if specific prior scheduling of the animal shipment to a destination has been made, provided that the extension is not detrimental to the health and well-being of the bird as determined by the consignor.

(b) Carriers and intermediate handlers must not accept a live bird for transport in commerce unless they are provided with the name, address, and telephone number of the consignee.

(c) Carriers and intermediate handlers must not accept a live weaned bird for transport in commerce unless the consignor certifies in writing to the carrier or intermediate handler that the bird was offered food and water during the 4 hours prior to delivery to the carrier or intermediate handler; provision for unweaned birds is made in paragraph (g) of this section. The certification must be securely attached to the outside of the primary enclosure in a manner that makes it easy to notice and read. The certification must include the following information for each live bird:

(1) The consignor's name, address, telephone number, and email address;

(2) The number of birds;

(3) The species or common names of the birds;

(4) The time and date the bird was last fed and watered and the specific instructions for the next feeding(s) and watering(s) for a 24-hour period; and

(5) The consignor's signature and the date and time the certification was signed.

(d) Carriers and intermediate handlers must not accept a live bird for transport in commerce unless the primary enclosure in which the birds are contained meets the requirements of § 3.162. A carrier or intermediate handler must not accept a live bird for transport if the primary enclosure is defective or damaged and cannot be expected to contain the bird safely and comfortably.

(e) Carriers and intermediate handlers shall not accept a live bird for transport in commerce unless their animal holding area maintains climatic and environmental conditions in accordance with the requirements of § 3.168.

(f) Carriers and intermediate handlers must attempt to notify the consignee at least once in every 6-hour period following the arrival of any live birds at the bird holding area of the terminal cargo facility. The time, date, and method of each attempted notification and the final notification to the consignee and the name of the person notifying the consignee must be recorded on the copy of the shipping document retained by the carrier or intermediate handler and on a copy of the shipping document accompanying the bird shipment. If delays will cause the shipment to arrive more than 12 hours later than its originally scheduled arrival, the carrier or intermediate handler must contact the consignor or the consignee to notify them of the delay of the live shipment and to determine the necessity or methods to supply fresh food, water, or moisture-providing foods.

(g) Carriers and intermediate handlers must not accept unweaned birds for transport unless an attending veterinarian finds that such transportation is necessary for veterinary care, and transport instructions are specified and written by the attending veterinarian, and signed within 10 days of shipment.

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#### § 3.162 Primary enclosures used to transport live birds.

Any person subject to the Animal Welfare regulations (this part and parts 1 and 2 of this subchapter) must not transport or deliver for transport in commerce a bird unless the following requirements are met:

(a) *Construction of primary enclosures.* The bird must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate. Primary enclosures used to transport birds must be constructed so that:

(1) The primary enclosure is strong enough to contain the bird securely and comfortably and to withstand the normal rigors of transportation;

(2) The interior of the enclosure has no sharp points or edges and no protrusions that could injure the bird contained therein;

(3) The bird is at all times securely contained within the enclosure and cannot put any part of its body outside the enclosure in a way that could result in injury to itself, to handlers, or to other persons or to animals nearby;

(4) The bird can be easily and quickly removed from the enclosure in an emergency;

(5) Unless the enclosure is permanently affixed to the conveyance, adequate handholds or other devices such as handles are provided on its exterior, and enable the enclosure to be lifted without tilting it, and ensure that anyone handling the enclosure will not be in contact with the bird contained inside;

(6) Unless the enclosure is permanently affixed to the conveyance, it is clearly marked on top and on one or more sides with the words "Live Animals," in letters at least 1 inch (2.5 centimeters) high, and with arrows or other markings to indicate the correct upright position of the primary enclosure;

(7) Any material, treatment, paint, preservative, or other chemical used in or on the enclosure is nontoxic to the bird and not harmful to its health or well-being;

(8) A bird that has a fractious or stress-prone disposition must be contained in an enclosure that is padded on the top and sides and has protective substrate on the bottom to prevent injury to the bird during transport;

(9) Proper ventilation is provided to the animal in accordance with paragraph (b) of this section; and

(10) The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray. If a mesh or other nonsolid floor is used in the enclosure, it must be designed and constructed so that the bird cannot put any part of its body through the holes in the mesh or the openings in the nonsolid floor. If substrate (newspaper, towels, litter, straw, etc.) is used in the primary enclosure, the substrate must be clean and made of a suitably absorbent material that is safe and nontoxic to the birds.

(b) *Ventilation.* (1) Unless the primary enclosure is permanently affixed to the conveyance, there must be ventilation openings located on two vertical walls of the primary enclosure that are at least

16 percent of the surface area of each such wall or ventilation openings located on all four walls of the primary enclosure that are at least 8 percent of the total surface area of each such wall.

(2) Unless the primary enclosure is permanently affixed to the conveyance, projecting rims or other devices must be on the exterior of the outside walls with any ventilation openings to prevent obstruction of the ventilation openings. The projecting rims or similar devices must be large enough to provide a minimum air circulation space of 0.75 inches (1.9 centimeters) between the primary enclosure and anything the enclosure is adjacent to, unless 90 percent or greater of the surface area of the enclosure wall is open (e.g., cage mesh).

(3) Any visually obscuring mesh used to provide security for the bird in the enclosure must not interfere with proper ventilation.

(4) If a primary enclosure is permanently affixed within the animal cargo space of the primary conveyance so that the front opening is the only source of ventilation for such primary enclosure, the front opening must open directly to the outside or to an unobstructed aisle or passageway within the primary conveyance. Such front ventilation opening must be at least 90 percent of the total surface area of the front wall of the primary enclosure and covered with bars, wire mesh, or smooth expanded metal.

(c) *Cleaning of primary enclosures.* A primary enclosure used to hold or transport birds in commerce must be cleaned and sanitized before each use in accordance with § 3.158 by the dealer, research facility, exhibitor, or operator of an auction sale.

(d) *Compatibility.* Live birds transported in the same primary enclosure must be of the same species or compatible species and maintained in compatible groups. If more than one bird is being transported, socially dependent birds must be able to see and hear each other.

(e) *Space and placement.* Primary enclosures used to transport live birds must be large enough to ensure that each bird contained therein has sufficient space to turn about freely and to make normal postural adjustments; *Provided, however,* That certain species may be restricted in their movements according to professionally accepted standards when such freedom of movement would constitute a danger to the birds, their handlers, or other persons.

(f) *Accompanying documents and records.* Documents accompanying the shipment must be attached in an easily

accessible manner to the outside of a primary enclosure which is part of such shipment and must not obstruct ventilation openings.

**§ 3.163 Primary conveyances (motor vehicle, rail, air, and marine).**

(a) The animal cargo space of primary conveyances used in transporting live birds must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and prevents the entry of exhaust from the primary conveyance during transportation.

(b) The animal cargo space must have a supply of air that is sufficient for the normal breathing of all the animals being transported in it.

(c) Each primary enclosure containing birds must be positioned in the animal cargo space in a manner that provides protection from the elements and that allows each bird enough air for normal breathing.

(d) During transportation, the climatic conditions in the animal cargo area shall be maintained in accordance with the requirements of § 3.168.

(e) Primary enclosures must be positioned in the primary conveyance in a manner that allows the birds to be quickly and easily removed from the primary conveyance in an emergency.

(f) The interior of the bird cargo space must be kept clean.

(g) Live birds may not be transported with any material, substance (e.g., dry ice), or device which may reasonably be expected to be injurious to the health and well-being of the birds unless proper precaution is taken to prevent such injury.

**§ 3.164 Food and water requirements.**

(a) All weaned birds must be offered food and potable water within 4 hours before being transported in commerce, unless the attending veterinarian approves a delay or a delay is in accordance with professionally accepted standards.

(b) Dealers, exhibitors, research facilities, and operators of auction sales must provide potable water to all weaned birds transported in their own primary conveyance at least every 12 hours after such transportation is initiated, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently. Carriers and intermediate handlers must provide potable water to all live, weaned birds at least every 12 hours after accepting them for transportation

in commerce, except for birds which, according to professionally accepted standards or under the direction of the attending veterinarian, require watering or feeding more or less frequently.

(c) All weaned birds must be fed at least once in each 24-hour period, except as directed by veterinary treatment, normal fasts, or other professionally accepted standards. Birds that require feeding more or less frequently must be fed accordingly.

(d) A sufficient quantity of food and water or other source of hydration must accompany the bird to provide food and water for such bird during period of transport, except as directed by veterinary treatment and other professionally accepted standards.

(e) Any dealer, research facility, exhibitor, or operator of an auction sale offering any live bird to any carrier or intermediate handler for transportation in commerce must securely affix to the outside of the primary enclosure used for transporting the bird written instructions for the in-transit food and water requirements of the bird contained in the enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easily noticed and read.

(f) No carrier or intermediate handler may accept any live bird for transportation in commerce unless written instructions concerning the food and water requirements of such bird while being so transported is affixed to the outside of its primary enclosure. The instructions must be attached in accordance with § 3.162(f) and in a manner that makes them easily noticed and read.

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**§ 3.165 Care in transit.**

(a) *Surface transportation (ground and water).* During surface transportation, any person subject to the Animal Welfare regulations in this part and parts 1 and 2 of this subchapter transporting birds in commerce must ensure that the operator of the conveyance, or a person accompanying the operator, visually observes the birds as frequently as circumstances may allow, but not less than once every 4 hours, to ensure that the birds are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The regulated person must ensure that the operator or person accompanying the operator determines whether any of the

birds are in physical distress and obtains any veterinary care needed for the birds as soon as possible.

(b) *Air transportation.* When transported by air, live birds must be visually observed by the carrier as frequently as circumstances may allow, but not less than once every 4 hours, if the animal cargo space is accessible during flight. If the animal cargo space is not accessible during flight, the carrier must visually observe the live birds whenever they are loaded and unloaded and whenever the bird cargo space is otherwise accessible to ensure that they are receiving sufficient air for normal breathing, that climatic and environmental conditions are being maintained in accordance with the requirements in § 3.168, and that all other applicable standards are met. The carrier must determine whether any such live birds are in physical distress and arrange for any needed veterinary care as soon as possible.

(c) *Prohibition on the transport of ill, injured, or distressed birds.* Any person subject to the Animal Welfare regulations in this part and parts 1 and 2 of this subchapter may not transport in commerce birds that are ill, injured, or in physical distress, except to receive veterinary care for the condition.

### § 3.166 Terminal facilities.

(a) *Placement.* Carriers and intermediate handlers must not commingle shipments of live birds with other animals or inanimate cargo in animal holding areas of terminal facilities.

(b) *Cleaning, sanitization, and pest control.* All animal holding areas of terminal facilities must be cleaned and sanitized in a manner prescribed in § 3.158 as often as necessary to prevent an accumulation of debris or excreta and to minimize vermin infestation and disease hazards. Terminal facilities must follow an effective program in all animal holding areas for the control of insects, ectoparasites, and other pests of birds.

(c) *Ventilation.* Ventilation must be provided in any animal holding area in a terminal facility containing birds, by means of windows, doors, vents, or air conditioning. The air must be circulated by fans, blowers, or air conditioning so as to minimize drafts, odors, and moisture condensation.

(d) *Climatic and environmental conditions.* The climatic and environmental conditions in an animal holding area containing live birds shall be maintained in accordance with the requirements of § 3.168.

### § 3.167 Handling.

(a) Any person subject to the Animal Welfare regulations (this part and parts 1 and 2 of this subchapter) who moves (including loading and unloading) live birds within, to, or from the animal holding area of a terminal facility or a primary conveyance must do so as quickly and efficiently as possible and must provide the following during movement of the live birds:

(1) *Shelter from sunlight and extreme heat.* Sufficient shade shall be provided to protect the live birds from the direct rays of the sun.

(2) *Shelter from rain and snow.* Sufficient protection shall be provided to allow the live birds the option to remain dry during rain, snow, and other precipitation.

(3) *Climatic and environmental conditions.* Climatic and environmental conditions during movement shall be maintained in accordance with the requirements of § 3.168.

(b) Any person handling a primary enclosure containing a live bird must use care and must avoid causing physical harm or distress to the bird.

(c) A primary enclosure containing a live bird must not be tossed, dropped, or tilted, and must not be stacked in a manner which may reasonably be expected to result in its falling.

### § 3.168 Climatic and environmental conditions during transportation.

(a)(1) Transportation of all live birds shall be done in a manner that does not cause overheating, excessive cooling, or adverse environmental conditions that could cause discomfort or stress. When climatic or environmental conditions, including temperature, humidity, exposure, ventilation, pressurization, time, or other environmental conditions, or any combination thereof, present a threat to the health or well-being of a live bird, appropriate measures must be taken immediately to alleviate the impact of those conditions. The different climatic and environmental factors prevailing during a journey must be considered when arranging for the transportation of and when transporting

live birds. Corrections may include, but would not be limited to:

(i) The temperature and humidity level of any enclosure used during transportation of live birds must be controlled by adequate ventilation or any other means necessary;

(ii) Appropriate care must be taken to ensure that live birds are not subjected to prolonged drafts detrimental to their health or well-being;

(iii) Appropriate care must be taken to ensure that live birds are not exposed to direct heat or cold if detrimental to their health or well-being; and

(iv) During prolonged air transit stops in local climatic conditions that could produce excessive heat for live birds held in aircraft compartments, the aircraft doors must be opened and, if necessary, equipment must be used to control the condition of the air within compartments containing live birds.

(2) In order to determine what climatic and environmental conditions are appropriate for a live bird, factors such as, but not limited to, the bird's age, species, physiological state, last feeding and watering, and acclimation shall be considered when such information is available.

(b) Birds that are not able to maintain a constant body temperature at ambient temperatures must be transported in a brooder or other temperature-regulating unit that effectively assists the bird in maintaining a constant body temperature during transport.

(1) The temperature of the brooder or other temperature-regulating unit must be monitored during transportation and appropriate for the live bird.

(2) Written instructions for the temperature requirements of birds transported in brooders or other temperature-regulating units must be securely affixed to the outside of the primary enclosure used for transporting the bird. The instructions must be attached in accordance with § 3.162(f) in a manner that makes them easily noticed and read.

Done in Washington, DC, this 13th day of February 2023.

**Mae Wu,**

*Deputy Under Secretary for Marketing and Regulatory Programs.*

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