



Animal Law Podcast: Transcript for Episode 83, Interview Kelsey Eberly & Dena Jones

Mariann Sullivan: Welcome to the Animal Law Podcast, Dena and Kelsey.

Kelsey Eberly: Thank you. Thanks for having us.

Dena Jones: Yes, thank you.

Mariann: I should say welcome back, Kelsey, because you've been on before. I'm excited that we're going to be talking about this case though, I'll tell you before we got on, I said, "I don't know, I'm a little confused about things so I hope I can ask the right questions." Because there's a lot that's confusing here and it's a little Orwellian too. I thought some of the language that seems to mean different things in different contexts. I don't always start off with this, but I think we should here, explaining some of the legal framework that we're dealing with to give that context because people don't necessarily know even what these statutes are and it requires a little explanation. So first, can you just explain what the PPIA is and what it provides regarding the dissemination of adulterated poultry products, which is a very important phrase in this case.

Kelsey: So the Poultry Products Inspection Act was passed in, I think, 1957. And it generally regulates the slaughter inspection, labeling, packaging of poultry products in order to ensure that poultry products are safe, that they are not misbranded so that their labeling is supposed to be truthful and the act sets forth a number of requirements that generally fall into two categories. So there are some requirements regarding misbranding. So the labeling part and those aren't relevant to this case. And there's others that are relevant to adulteration and adulteration is really a key phrase in the act.

And it's the part of the act that's supposed to regulate the safety of poultry products. So to prevent people from becoming sick, to ensure that the meat from these chickens and turkeys is sanitary and safe. And so adulteration is defined as a broad definition and includes things like: the product can't contain putrid

materials or poultry with certain diseases. So the statute is meant to broadly protect people from dangerous chicken and turkey products.

Mariann: We should also mention, in case there are some people who don't know, this whole thing exists in the context of the fact that we have Humane Methods of Slaughter Act, which has not been applied to birds.

So this is the only statute, I guess, the only statute that relates to the slaughter of birds at all. Can you tell us how adulterated products are defined? Either by the statute or the regs, in so far as it's relevant here? Because the issue that we're dealing with here is- does it relate to the humane treatment of, or the inhumane treatment of these birds in any way? So what provisions are there in there that define adulterated products that could be interpreted to relate to humane treatment?

Kelsey: So the one that comes to mind for me, and maybe, Dena, you have other thoughts, is the one that relates to poultry products that have been stored or maintained in unsanitary conditions.

So the act defines adulteration with respect to the circumstances, if you will, of the product's creation. So I don't know if that answers your question or, Dena, if you have other thoughts about that?

Dena: I think broadly adulteration can be interpreted as effecting the quality of the meat. So broken bones, bruises, dislocated joints, that sort of thing. Even the USDA would agree would represent adulteration. The USDA back in 2005, published a notice in the federal register, connecting those types of adulteration, bruises, broken bones, dislocated joints, to inhumane handling. So the USDA itself has drawn the connection. We don't even need to do that. We're trying to take it to the next step, which means they would regulate in order to keep those forms of adulteration out of the marketplace. But they've drawn the connection between humane handling and adulteration. We don't need to do that.

Mariann: Yes, they have drawn it, but they're in a little bit of denial about it from what I can tell. And that's why we're here. I'm sorry, you wanted to add something, Kelsey?

Kelsey: I just remembered another part of the definition of adulterated that's really relevant here is that it includes products from birds who have died otherwise than by slaughter. And so that basically means unless the bird has died in the manner that by having its throat slit, as part of the slaughter process, after being properly stunned, then the bird is adulterated. And so as we'll go on

to talk about, there are so many ways that birds coming into these slaughterhouses are dying otherwise than by slaughter. So they're dying on the transport trucks, they're dying on the conveyor belts, they're dying in the electrified stun bath and all of those dead birds, that die before the actual slaughter process, are adulterated. And so that's one of the big reasons the plaintiffs here asked the agency to regulate the treatment of birds.

Mariann: So if I understand, right, the kind of the heart of your argument is that the statute and the agency define the product as adulterated, but the way it got adulterated had to have been caused by inhumane treatment of the birds and the agency has even acknowledged that at times. Now you mentioned some of the horrific, actual slaughter practices. What about, you mentioned broken bones and bruises. Without making everybody turn the podcast off because they can't bear to listen to it anymore; can you just briefly talk about what happens to these birds at slaughter, or once they enter the slaughter plant, that results in all these things that their dead bodies end up being called adulterated, but it happened to them when they were alive.

Kelsey: So I think it's really important to remember what state the birds are in when they're put on the trucks and coming to the slaughterhouse. So when they leave the factory farms, they are often sick, they've been growing so quickly that their legs might be about to give out because their bodies have grown so fast. They're packed in by the thousands inside their barns and then they're picked up by their feet and shoved into transport crates, one after the other, as fast as they can and they're crammed in there. So when they get to the slaughterhouse, they've already had the stressors of six weeks of basically torture on the farm and this hellish transport situation where they might be exposed to the elements, crammed in with all the other birds so by the time they get to the slaughterhouse, many of them are either dead or close to death. They're not in good shape. And then their transport crates are dumped onto conveyor belts that take them into the slaughterhouse. So even before the slaughter process begins, these birds are often injured or sick or dying or dead.

And so that's important to remember. When we're thinking about the agency's obligation to prevent adulteration that comes from the inhumane treatment of these birds on the slaughterhouse premises and at the point of slaughter. But then once we get into the slaughterhouse, there are so many different ways, as I described, that the birds can be injured or mistreated that lead them to become adulterated as defined by the statute. And so that could be being dumped by the hundreds onto crowded conveyor belts, where they suffocate and die. That could be their legs being broken as they're hung on the shackles that could be drowning in the stun bath when the line, malfunctions and stops.

There's many, many, many ways, unfortunately, that these birds are injured and die. That are horrible for the birds, but that also, cause this food safety issue, this adulteration issue.

Mariann: So I think we need to go into a little bit more legal background because I just want to cover a few more concepts before we move on to the actual petition that you brought and the lawsuit. The statute requires antemortem, of course they don't like to use the word death, antemortem inspection and post-mortem inspection. Can you describe what these inspections look like and what they're looking for? And exactly how many bird's bodies get discarded during these inspection processes?

Kelsey: So there's antemortem inspection and post-mortem inspection and USDA inspectors inside these slaughterhouses are supposed to conduct both. So they're supposed to examine the birds while they're still alive. Basically to look for diseases and conditions that would render them adulterated and would require the agency to condemn them. And condemning just means taking them out of the human food supply. And so they're supposed to examine them on their transport crates and essentially sort the dead ones and the sick ones and the ones that would be condemned out from the quote unquote healthy ones.

But I think once once you see what the slaughter process actually looks like, you see the number of birds coming in on the transport crates and see how many are dumped in and see what utter chaos it is; the idea of the agency doing these sort of bird by bird antemortem inspection is absolutely ridiculous because there's absolutely no way that any person could examine every one of these birds or even one out of a hundred or one out of a thousand These slaughterhouses are so huge and the volume of birds coming in is so, so enormous that it sort of defies belief that there could be an antemortem inspection process that adequately, you know, identify the birds. And so that job is often left to the people hanging the birds. They're supposed to be able to tell when they're hanging a dead bird or a live bird on the shackles. And so often, they're not able to do that because they're trying to hang 140 or 175 birds a minute. So that's antemortem inspection.

Mariann: I just want to make sure everybody takes note of that 140 to 175 birds per minute. It's just unbelievable. The post-mortem inspections actually do end up with a lot of dead birds being discarded. Don't they?

Kelsey: Yeah. And the post-mortem inspection phase, inspectors are supposed to be looking at the birds and removing the carcasses that are adulterated; that have fecal contamination, or the birds are bright red from having been boiled

alive in the stun bath or in the water bath that is supposed to loosen their feathers.

And so at that stage, inspectors are supposed to be examining the birds and taking out the dead ones, or the ones that were dead when they went into the slaughter process. But again, the volume is such that is a very difficult job. Even setting aside the sort of privatized inspection system that is increasingly taking foot in the large slaughterhouses.

Mariann: Yeah. And I think it's notable that they don't, they seem to be pretty comfortable with a lot of dead birds getting discarded because most of them make it through and they're just worth so unbelievably little, in and of themselves, that the fact that a lot get harmed in some way that makes them not pass inspection just is really a minor cost of doing business.

I have one more question. And this is the really hard one. This is the one that I had trouble figuring out; what the hell are, good commercial practices and what are they? Are they written down? Does everyone have a list of what good commercial practices are and who makes them up? Because they're referred to, I think, in the regs at some point, but they seem to mean different things in different places. Am I right?

Dena: Yeah. They're referred to once in the regulations in the section regarding birds entering the scald tank and drowning. They did mention good commercial practices in this 2005 notice that I mentioned before in the federal register, that connected adulteration with humane handling. And in that they actually mentioned the National Chicken Council and National Turkey Federation animal care guidelines, as an example, not as good commercial practice but an example of good commercial practices. In discussions with the USDA, I pointed out to them that the government has never identified the National Chicken Council standards as representing good commercial practices in any formal way. And so they stopped referring to National Chicken Council guidelines as good commercial practices, following that discussion that I had with them. Yeah, it's not defined, but it is understood to mean the industry's animal care guidelines.

Mariann: Okay. But, as you pointed out, there is this one place where it refers specifically to a requirement that the birds are bled out before their bodies are scalded. So that kind of gets put into the regs and then, doesn't the agency kind of act like they're always following good commercial practices? This seems to be like a major claim that they make. This broad way to refer to everything that is done to the birds during the whole process is written down somewhere. But we don't actually know where, or what they say!

Dena: Yeah. And the other part of that regulation that refers to good commercial practices is the loss of process control. And that's actually what they refer to the most, even over good commercial practices. So they're basically saying that they take action and they stop production when there's loss of process control. So what's a loss of process control? That's is apparently in the eye of the inspector-beholder, because it's up to them to determine what loss of process control is, but that's the term that they use primarily to describe what's acceptable and what's not. And to determine when they take action and step in. So going back to that regulation about the birds entering the scald tank; they decided long time ago, about 10 years ago, that a single bird entering the scald tank would not be a regulatory violation. It had to be a loss of process control, so it has to be multiple birds. And again, it's up to the inspector's discretion as to what represents a loss of process control. How many birds? Is it two, is it five? Is it a dozen? So supposedly one bird is not loss of process control and not an indication of failure of good commercial practices. That has to be multiple birds.

Mariann: And we don't know how many?

Dena: No. I know it's all very confusing.

Mariann: I think it might be meant to be.

Dena: Yeah, well, that's the reason why we brought the petition and ultimately the lawsuit is what they're doing is extremely arbitrary and have themselves painted into a corner and because they're doing these checks. So every slaughterhouse, every shift the inspector looks for compliance with good commercial practices, even though they've never defined what it is that they're inspecting for.

Mariann: So I'm not crazy. That's actually what's going on?

Dena: Yeah.

Mariann: So except for this loss of control, where an unknown number of birds go into the scalding tank before they've bled out. Except for that one place where there's not really a line drawn, but it's a pretend line drawn, is this just complete self enforcement that the industry just decides? Like what good commercial practices are? Does FSIS enforce them in some way that has to do with the humane treatment of the birds? Or they just say they exist and we'll trust the industry to enforce them?

Dena: The answer is yes and no.

Mariann: It would be, it just would be!

Dena: They actually do take enforcement actions for violation of undefined good commercial practices. So what's an enforcement action? They slow the line, they stop the line and they do this regularly. We see the records documenting that they do it, but I think most of the time they do it, they don't even document it. So they will stop the line themselves, physically hit the button, stop the line. They will tell the plant to slow the line. They will put a red tag, which is called a reject tag, it has a number on it. It's applied to certain area of the plant or a certain piece of equipment that is not functioning properly and cannot be used until the tag is removed. They do those things for poultry slaughter, and they do them for violations of good commercial practices. But it's done relatively rarely, to our knowledge. And it's done very inconsistently because they haven't put any of this in regulation.

Mariann: It's crazy. And I think I noticed in your petition that you said they might vary from plant to plant or from region to region because nothing's written down about what a good commercial practice is.

Dena: Yeah. The Animal Welfare Institute has reviewed every single good commercial practice record issued since January of 2006. So thousands of them, we have our own database, we enter them and we brought a lawsuit to force the agency, the USDA, to voluntarily disclose the records. And we won that well in a settlement agreement. So they're all available online for anybody without FOIA. So we have that information and there are plants that are huge plants that slaughter hundreds of millions of birds every year that never get any records. And then there are other plants where they're obviously very judicious, conscientious inspectors writing up a plant repeatedly. Virtually every day for something. So it varies greatly. I've discussed this with the USDA, they're aware of this. And this is another argument for regulation is that this quasi-voluntary system that they've set up is not functioning very well. And we know it isn't because we look at the records and there's so much inconsistency from plant to plant as to how the inspection personnel handle the humane handling of poultry.

Mariann: Wow, really astounding. So I'm assuming that's the background, the legal background. Now we're going to get to the petitions, but is there anything else you want to add about a law that I didn't mention that is relevant here? Or a

regulation that is relevant that I didn't mention? Or do you think we can get into the petitions?

Kelsey: I don't know if we're going to go into this when we talk about the petitions, but I do think it might be a little bit helpful to understand why we're not talking about the Humane Methods of Slaughter Act. If you want to go into that, Mariann, at all?

Mariann: I think I mentioned at the beginning that it doesn't apply, but do you want to go into a little bit more why we believe it doesn't apply? Or why they believe it doesn't?

Kelsey: We believed it did apply. Some people did. maybe not, Dena? At least there was an argument that the term livestock could include birds and there was litigation about that and the agency said it didn't. And so that's why we're not talking about the Humane Slaughter Act anymore. We're talking about the Poultry Products Inspection Act. But there is a Humane Methods of Slaughter Act that is supposed to ensure the humane slaughter of livestock and birds make up 98% of the farmed animals slaughtered in this country. And so that law not applying to them means that there is no humane slaughter law that applies to the vast majority of animals slaughtered.

Mariann: And this is very different from other countries where. I mean, not everywhere, but certainly in Europe, humane slaughter acts obviously apply to birds. I think it's shocking that it doesn't, but that's where we are. Alright, we're going to get into your petitions, but before we get into them, let's just briefly describe what a petition for rule making is, who can bring one and what it can accomplish. Just for people who aren't familiar with administrative law.

Kelsey: Yeah. any person can submit a petition for rule making to a federal agency. You're basically asking the agency to issue rules to carry out the purposes of a statute. So in this case, the plaintiff organizations are petitioning the USDA's Food Safety and Inspection Service to issue rules pursuant to the Poultry Products Inspection Act. To ask the agency to carry out its statutory mandate under that act.

Mariann: Let's talk about the first one in which, if I understand, you asked FSIS to promulgate regulations to reduce poultry adulteration because of this kind of obvious situation that they were only catching it after the fact, and they could be catching it before the fact, and that would improve the entire process. Have I basically said the idea behind this? And can you tell us who the petitioners were and what they were arguing?

Dena: The petitioners are the Animal Welfare Institute and Farm Sanctuary. Just to go back a little bit, I mentioned this 2005 notice, which was the first time the USDA acknowledged there was a connection between the quality of products being produced and how the birds were being treated.

About 2010 to 2012, we actually discovered through other FOIA requests that the USDA was routinely checking compliance with these so-called good commercial practices in every poultry plant. We had no idea they were actually doing that until we did a FOIA and found out that they were. And so we suddenly had this trove of information regarding what was going on in poultry slaughter plants that we never had before.

We didn't want to go back down the route of arguing humane slaughter, which is a technical term. It means rendering an animal insensible before cutting or shackling and hoisting. We didn't want to do that because 1995 ALDF and AWI had an unsuccessful petition for that exact thing. And then there were two unsuccessful lawsuits in the 2000s. So we decided to try this alternative approach of adulteration. And we knew that we would be covering handling and not necessarily humane slaughter. So insensibility was not an issue for us. Unfortunately we'd felt that we couldn't address that because we were going after the connection between handling and adulteration. We drafted the petition and part of it was based on these records that we had received through FOIA. And it took us about two years to draft it because we waited for FOIA records to come in and so submitted the petition in December of 2013. And it was co-written by the Animal Welfare Institute and Farm Sanctuary.

Mariann: So what practices were you referring to specifically? That you were saying these are inhumane practices and they're contributing to adulteration and that's why you should be writing regs to prevent them. I guess we've gone over some of the things, but can you just briefly talk about what it was you were really trying to stop?

Dena: Yeah, that's interesting because based on the undercover investigations that were done by animal advocacy groups in the early to mid 2000s, we thought that the main issue was excessive use of force by workers, particularly in shackling. And so we expected to see a lot of that and there is some of that.

But the majority of adulteration or potential adulteration was probably not coming from that. At least based on the records. My view is limited here based on the records we received from the USDA. Instead, it was things such as Kelsey mentioned before, with the treatment of the birds in transport and holding so extreme heat, extreme, cold, really high DOAs. Live birds being discarded with dead birds. And so they suffocated. And one of the things that we

didn't know that much about that really surprised us was malfunctioning equipment or improper operation of equipment by plant employees. And so one example, and Kelsey alluded to this, is they're dumping the birds onto a conveyor belt to prepare to shackle them and maybe there's a maintenance issue on the slaughter line. It stops, but the dumper operator doesn't notice or doesn't pay attention. He just continues to dump the birds. And you have hundreds of birds suffocated in those kinds of instances. And we really weren't aware of that kind of mechanical issue and also just worker competence until we got these records. And so all of that is the foundation of why we brought this petition and ultimately decided to challenge the denial. Because it's not just workers beating up on animals. There is some of that, but there's just the whole systematic process all along the way. There's an opportunity for birds to be stressed out by heat or cold, or to be injured or to die.

But if they die, the body's going to be condemned. So from an adulteration perspective, we're not that worried about the animals that ultimately die because USDA and the plant workers probably catch almost all of those. The question is what happens to all these birds that are injured or stressed out throughout the process? And the bodies are not condemned and the carcasses go through and they end up in the marketplace. That's adulteration that these regulations could address.

Kelsey: Can I just add one thing? This goes to, I think, a phrase we were using earlier, "loss of process control." They're not exactly the same, but the Animal Legal Defense Fund did an investigation of a Texas poultry slaughterhouse in 2015. And it wasn't even worker incompetence. It was, they had to dump a certain number of crates every day. They had a quota, they had to meet. And so even though the conveyor belt was breaking down all the time and hundreds of birds were suffocating getting mixed in with live birds, they had to meet their quota. The speed and volume of these facilities, again, is so great that many of the adulteration risks that Dena's describing, just come from the overwhelming impetus to slaughter a huge number of birds every single day. And so that's something that the petition was trying to get at.

Mariann: Yeah. And I think these are arguments that we see the movement trying to make in so many different contexts that the industry always wants to talk about the workers. That the workers there are bad apples or doing it improperly. And it's the system, the whole system forces the workers to be in this position. Not that there isn't any gratuitous cruelty, but most of the cruelty is just simply built in. So they catch the birds who are dead, you say, but they don't catch the birds who have been injured. But, their function, because they don't, except for that one concession they made where humane treatment makes a difference. Their function is really to keep the food healthy, not to worry about

the treatment of the birds. Is the food unhealthy? It's defined as adulterated and is it actually unhealthy because of the kinds of injuries that are caused to these birds? Or is that just a legal argument?

Kelsey: I think certainly if there's a broken bone in a piece of chicken, that's a consumer safety and a food safety issue, but I think we have to look at this against the backdrop of the catastrophe of food safety that is poultry products right now. There've been so many investigative reports that talk about the amount of chicken and turkey that are just allowed to be contaminated with drug resistant salmonella and Campylobacter. So the agency is clearly failing to prevent these massive public health issues that cause 2 million infections a year and can lead to incredibly terrible health consequences, especially for children and the elderly. Those issues are related to certain inhumane treatments because one of the banes of animal lawyers' existence is the continued use of live hang slaughter. And when birds are supposed to be electrified and numbed and supposed to have their necks cut, but so often miss the blade. And so they drown in the scalding tank. The scalding tank is basically a fecal soup. You know, the water is supposed to be warm enough to loosen the birds feathers, but not so hot that they cook their flesh. And so you have this pool of water into which all these birds are being dropped and they've got bodily fluids on them and they're breathing in this air and that's a place that, the birds can become contaminated with these germs that all the other birds have. And so that's one example of the link between an inhumane process and adulteration. The petition, wasn't saying you need to end live hang slaughter. It was just saying, having recognized the link between inhumane treatment and adulteration, you need to regulate it.

Mariann: Yeah, that really makes a lot of sense that these kinds of bruises and broken bones, putting aside the horrific cruelty to the animals, because that's what the law does, in a place where there's an enormous amount of infection obviously that infection is much more likely to be part of the bird that's headed home into somebody's home because there's broken bones or broken flesh or whatever. So yeah, that does make a lot of sense. And I apologize to everybody for having to make this connection, but, it's the insane legal system that we have.

All right. There's a second petition, before we move on to the decisions, can you say what the second petition added.

Dena: The Animal Welfare Institute started looking at the worst problems, and we identified transport and holding is the cause of probably the most deaths. It's probably somewhere between 10 and a hundred times the birds that die in the scald tank die before they ever get to the slaughter line. Not only are there birds

that are dying, there have to be the birds that survive. They have to be enduring tremendous stress, and it's usually heat and cold. They're not adequately being protected from extremes. So I made the mistake of writing a letter to the USDA, which I do regularly. But I asked for policy and regulation changes so they deemed it a petition. So the letter was about these transport and holding incidents, which was neglect of birds and the fact that the inspector spent so much time writing up these, sometimes two, three pages long descriptions, narratives of what happened. It was clear to me that the inspectors were frustrated and they had no recourse and they wanted a recourse. It's like they were speaking to me through these records. And so I thought I'd help out and write a letter and suggest that they address this problem. And unfortunately, by deeming it at a petition, it sat there for years and it was eventually combined, we were told, I was told during a meeting with them that they were going to combine our two, my letter and our original petition into one. And so that's what they did.

Mariann: It's a sad commentary that because it's deemed a petition, that means it will take years. But, yeah, that's where we are, and it has, in fact, taken years but here we are, the petitions were ultimately denied. The petitions or the petition, I'm not sure which. Were or was denied. And can you tell us about that decision?

Kelsey: So the agency sent this letter that said we're denying your petition because... and gave two basic reasons. The first was we don't have jurisdiction to regulate inhumane treatment. They love telling everybody that they don't have a humane slaughter law so they just have no power to do this, which is ridiculous because the entire petition, we have not been talking about the humane slaughter law and humane slaughter, we've been talking about adulteration and that's what the petition was about. The petition was saying, "You already regulate all these things that are happening in slaughterhouses in order to prevent adulteration. Here's one more thing you need to regulate." So the idea that we're asking for humane slaughter regulations is just false. But the second grounds was that the existing non-regulations that guidelines and the non-binding and undefined good commercial practices, those are doing a good enough job. And they didn't say why or how they didn't engage with any of the evidence that Animal Welfare Institute and Farm Sanctuary had presented. They just said, "We've considered this and we're doing a good job and it's effective." Period. That was the end. It was a, like a two-page denial letter.

Mariann: This is what I thought I was confused about, but I guess I wasn't that confused because what I thought they said was, "We don't do anything about humane treatment. And anyway, what we're doing about humane treatment is just fine."

Kelsey: Exactly.

Mariann: Yeah. Okay. And we're not going to tell you what that is. We don't write that down, but it's good. Don't worry. So these good commercial practices, we don't really know what they say, but they do say that they require that the birds be handled humanely and we just don't really know what that means or whether that's true. Aside from the fact that we don't know what they say; do we know how they're enforced? I understand that there's something called a voluntary systematic approach for enforcing good commercial practices. Is that true? If it's true? It sounds pretty bad.

Dena: Yeah. Typically they use the systematic approach with livestock, with the HMSA. I don't hear it used with the commercial practices, but the plants do have, the bigger plants, all the big companies do have their own guidelines regarding good commercial practices. And so when the inspectors go around, as I mentioned before, every poultry slaughter plant, every shift, and we FOIA-ed these lists of checks. So we know that they actually do conduct them. So hundreds of thousands of checks are done every year by the USDA of good commercial practices, whatever that is. And when they go around and see a violation. So what's a violation? Well, they started out by using the National Chicken Council guidelines, and then they dropped that because we challenged that and so basically now it's, if the company violates its own voluntary guidelines regarding how birds are handled then they write them up.

But even if they didn't have their own voluntary guidelines, they would write them up if the inspector... It's totally at the inspector's discretion, if they think it's a violation of their own interpretation of good commercial practices, then they write them up. And we know this, so we FOIA-ed the records. There's two different types of records, noncompliance records, and that's for regulatory violation, which is pretty much just for, is going into the scald tank, everything else, all the other problems I mentioned: aggressive shackling that results in bruising, birds dying in the holding area, birds being buried under other birds, equipment malfunctioning. All of that is written up as a memorandum of interview and MOI. Which means it's non-regulatory, but they violated some industry standard and it's like a, "Hey, you did this, don't do it again" thing.

So it really is just a memo. But they release those to us and we have those and they write about, so of all these so-called violations of good commercial practice, about 80% are written up as non-regulatory memorandums of interview. And about 20% are non-compliance records.

Mariann: Okay. Well, I understand now why I was confused looking at this.

So let's finally, I mean, so they said, "no, we're not writing any regs. Don't be ridiculous. Everything's fine." So that brings us to the lawsuit and it's kind of exciting. It hasn't gotten very far yet, but the first decision is exciting, I think. Animal Welfare Institute and Farm Sanctuary are suing the USDA and FSIS and what is the cause of action specifically? It's under the Animal Welfare Act? I mean, under the Administrative Procedure Act?

Kelsey: Is that a joke, Mariann? (laughing)

Yes. Under the Administrative Procedure Act. Yeah, as we've been discussing the agency's decision making was arbitrary and capricious. They failed to examine the evidence, they made a decision that was contrary to the statute.

Mariann: And they moved to dismiss on standing, of course, also arguing that the order is non-reviewable and you're in the Western district of New York, right here in Rochester, where I am right now. And can you just tell us about your standing arguments and the courts?

Kelsey: So the plaintiff's alleged organizational standing, as Dena's been describing Animal Welfare Institute has been working on this issue for decades and has devoted- I wouldn't even attempt to quantify how many resources- to try to address this issue.

But nevertheless, the agency denied the petition causing AWI to have to expend more resources. Similarly, Farm Sanctuary has been working on this issue for years and years and has to continue devoting resources to it because the agency unlawfully denied these petitions. So the plaintiff's alleged organizational standing under *Havens Realty*. I believe they also alleged membership standing. Dena, because some of your members are poultry product eaters, is that correct? Am I remembering correctly? Yeah, essentially that the agency has failed to properly regulate adulteration, which increases the risk of food-borne illness to Animal Welfare Institutes members.

Mariann: I believe the court decided it solely on the *Havens* issue and solely for Farm Sanctuary, but that's all you need, right?

Kelsey: Yeah.

Mariann: As long as you're in on something, you're in. So you're in court, that's exciting after a rule-making petition, isn't it? It doesn't happen every day.

Kelsey: That's right.

Mariann: They also argued that it's a non reviewable order or decision. Can you explain that argument and the court's response?

Kelsey: I remember getting the same argument when I was litigating a petition, a rule-making petition under the Poultry Products Inspection act, and being very surprised by it then and surprised by it now. The argument is essentially, because the statute gives the Secretary of Agriculture discretion to promulgate regulations in order to effectuate the purposes of the act that a court is powerless to review the decision to deny these petitions because the agency action is committed to discretion by law. And so that's an exception in the Administrative Procedure Act to courts being able to review agency action. So it's amazing that even the denial of a petition for rule-making that agency may made the argument that it has the discretion to do that without a court being able to review. And thankfully the court denied that argument and said, "no, when you deny a petition for rule-making you take that action. That action is not committed to the agency's discretion by law. And so a court can review the denial." That was good.

Mariann: I was also very shocked by that argument. I don't know everything that's going on. But of course, a single enforcement decision, yes. Whether you're going to enforce a law against a single individual, that's totally discretionary. We know that you can't argue that discretion was abused. It's just up to them. But I've just never seen the argument before that a rule-making petition asking an agency whether or not they should make rules is completely within their discretion. As if it's impossible for them to abuse that! They could just not make any rules at all and, and whatever! Yeah. I was really pleased with the courts giving that somewhat short shrift.

Kelsey: It's amazing that they say that there's no law to apply. So no standard by which you can judge their conduct, which is just a shocking argument. They could decide not to regulate at all or decide to do something that was obviously increasing, food safety and there would be no power for a court to order otherwise.

Mariann: Yeah, so you're on your way! What're next steps in this case?

Kelsey: So right now we're discussing with the agency, the contents of the administrative record, and we'll be settling that issue soon. And then we'll be briefing a summary judgment in the case over the next few weeks. And months.

Mariann: Okay, great. We'll be looking forward to hearing more.

And Kelsey, you have recently come to Harvard and so you're probably taking over this case midstream.

Kelsey: Yeah. So I jumped into the case after the motion to dismiss was denied and I'm really excited to be working with Kathy Meyer and the students at the clinic. And this is just one of many exciting cases and projects that the Harvard Clinic is working on.

Mariann: Yeah, I'm really excited that Harvard took this up. I don't know whether you were part of the decision process, but I love this case and I love where it's headed. Well, I hope I love where it's headed. So thank you to both of you and thank you Dena for doing what sounds like years, literally, years of work paging through incredibly painful materials to come up with this information.

The amount of background work that goes into a case like this is unbelievable. So, thanks for sharing it with us. We'll be really excited to find out what happens next. Is there anything I should have asked either of you that I didn't?

Dena: No, but I did want to mention that the Animal Welfare Institute and other groups as well, they take a very comprehensive approach to this issue. I think a lot of people view poultry slaughter as one of the primary farmed animal welfare issues in the United States covering birds. And this is only one of almost a dozen different approaches that the Animal Welfare Institute has taken to poultry slaughter. And I do want to mention one other thing that we've done just in this last year that's rather exciting. So we're also lobbying Congress on this issue and we decided to try it through the appropriations process. And we were successful in the first year getting a direction from the ag appropriations committee to the USDA. They've been directed to brief them on the issue of a loss of process control involving bird handling at slaughter. And we're going to build on this. So we're not taking for granted we're going to have a positive outcome with this case. We're trying many other approaches, including Congress. Overall I'm optimistic. I think it, it always takes a variety of approaches to anything, to make any, major progress on an issue. And the lawsuit is just one of many things.

Mariann: That is very exciting news. And I'll be also looking forward to hear what's going on, on that legislative level and on any other level that you can work on this horrific, horrific issue. Which is just, I mean, it's a national disgrace. Thank you for telling us about it and for... I'm not sure you made everything clear, but you made me feel like I wasn't an idiot for not understanding it. So I appreciate that. And best of luck going forward.

Kelsey: Thanks Mariann.

Dena: Thank you.

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