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PET INDUSTRY JOINT
ADVISORY COUNCIL
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March 16, 2007

Ms. Mary Bender
Bureau of Dog Law Enforcement
Department of Agriculture
2301 North Cameron St.
Harrisburg, PA 17110-9408

Re: Proposed Rulemaking to Amend Dog Law Regulations

Dear Ms. Bender:

The Pet Industry Joint Advisory Council (PIJAC) hereby submits its comments on the proposed rulemaking amending 7 PA. Code 21 et Seq., published in Vol. 36, No. 50 of the Pennsylvania Bulletin (Feb. 15, 2007).

I. Statement of Interest

As the world's largest pet trade association, representing the interests of all segments of the pet industry throughout the United States, PIJAC counts among its thousands of members associations, organizations, corporations and individuals across the United States. More specifically, PIJAC represents manufacturers, distributors, breeders, boarding facilities and retailers throughout the state of Pennsylvania. Nobody cares more about healthy and safe pets, and the safety and welfare of the pet owning public, than does PIJAC. PIJAC has for many years provided a well respected animal care certification program that is widely utilized by not only persons in the commercial pet trade, but also shelters and humane societies as well. Our association has long been recognized as the voice for a responsible pet trade, and we routinely advocate legislative, regulatory and policy proposals that facilitate support by the pet trade for appropriate governmental mandates, whether they come from the international, federal or state level. PIJAC has worked with the USDA to ensure effective enforcement of the federal Animal Welfare Act since its inception, and regularly works with the Centers for Disease Control and other federal and state agencies to promote responsible pet ownership while protecting the public health and safety.

While PIJAC represents both breeders and retailers of dogs in the state, these comments will most specifically address the manner in which the proposed rule impacts retailers and boarding facilities, inasmuch as other organizations representing dog breeders are proffering their comments and we wish to eliminate redundancy to the degree practicable.

II. Introduction

PIJAC participated in the legislative process leading to adoption of the Dog Law (Act) in Pennsylvania, and served on one of the initial Advisory Boards that helped draft regulations implementing that statute. We recommended at that time that separate standards be crafted to address needs of animals in breeding facilities versus those in the short-term housing environment of a pet store. That approach was foregone in favor of an exemption in the regulations that would permit pet stores to utilize a different standard consistent with the needs of dogs in pet store facilities. Any changes to existing regulations should be approached in the context of this background. PIJAC has, since adoption of the original statute and regulations, supported effective enforcement of the Dog Law and desires to be a constructive and positive voice for appropriate regulatory standards consistent with the intent of the Act.

At the outset, we believe it is incumbent upon us to emphasize that persons selling pet animals are already well-regulated in this state. Indeed, through the Dog Law and other pertinent statutes (such as the pet warranty law), Pennsylvania regulates pet dealers as strictly as any other state in the United States. That said, PIJAC also recognizes that, while many licensees are exemplary in running their facilities, the standards embodied in these laws are not observed by all persons to whom they ostensibly apply. In that vein, we feel that many of the problems that may motivate this rulemaking result from inadequate enforcement of existing requirements and that adoption of new standards will not remedy such enforcement shortcomings. We would suggest that, absent objective evidence supporting the need to apply specific standards, rulemaking merely for the sake of adopting new standards is poor public policy, and we would urge the Department to exercise restraint in replacing requirements that have been in law for many years.

Specifically, PIJAC urges that any proposed new requirements which deviate in any substantive way from current requirements, and particularly if the change deviates from nationally recognized standards, be crafted using scientifically-based standards that have been objectively demonstrated to support a more humane result. Well-tested standards that have been in effect for years should not be discarded in favor of an arbitrary requirement. Further, performance standards that allow various effective means of ensuring desirable results should be given preference over overly restrictive engineering-style standards, and any changes in regulatory standards should be subject to practical implementation. Requiring substandard facilities to meet appropriate standards is a reasonable goal; establishing unrealistic requirements that would put sectors of the pet industry out of business is not.

In this regard, the Department's summary explanation of its proposal is exceedingly lax. In large part, the Department states as its intent "to clarify numerous provisions of the act" and to increase "awareness and understanding among the regulated community." We find, however, that many of the proposed provisions include substantive changes that dramatically depart from existing standards and that the Department, in advancing these revisions, fails to offer any meaningful justification. In some instances, proposed changes reduce, rather than enhance, clarity.

Thus, PIJAC is hopeful that, as the Department reviews comments addressing individual provisions of the proposal, it will be mindful of the need to assure final standards are well supported by an objective basis. In these comments, PIJAC will, where possible, endeavor to offer alternative language that meets such a standard when questioning a Departmental proposed provision. We must emphasize, however, that where the Department has not offered a supporting explanation for a change and none is otherwise apparent, PIJAC favors retention of the existing regulation. Further, we submit that any regulatory change must be pursuant to statutory authority and that where the legislature has spoken as to a given requirement it is the province of the legislature alone to revise the status quo.

III. Definitions

The Department proposes to "clarify" the definitions in the regulations for the eight different types of regulated facilities set forth in Section 206 of the Dog Law (3 P.S. Sec. 459-206) by creating definitions for "Establishment" and "Temporary Housing."

The term "establishment" exceeds the scope of activities sought to be regulated under the Dog Law by incorporating such criteria as "kept," "harbored," "sheltered" "maintained," "given away," and "exchanges or in any way transferred." Existing terminology clearly define the types of activities by type of facility whether pet shop kennels, breeding kennels, boarding kennels, dealer kennels, nonprofit kennels, research kennels, out-of-state dealers or private kennels. Nowhere in the statute is the Department empowered to expand those definitions beyond the statutory definitions.

Nor does the Department provide definitions for what it means by "kept," "harbored," "sheltered" or "maintained." As crafted, any person owning the prescribed number of dogs would be compelled to be licensed even if they are not involved in breeding, selling, hunting, training, renting, research, vivisection, boarding, show "or any similar purpose." The mere fact they might "harbor," "maintain," "give away" or "otherwise transfer" a dog would compel licensure.

"Persons" as well as the classes of kennels are clearly defined in existing law and there is no need for creating a definition for an "establishment" clearly regulated by Section 459-102 of the Dog Law. The proposed "establishment" definition should be deleted.

The new "temporary home" classification is apparently designed to regulate any person who does not fall under the eight statutorily defined kennels. In essence, this is a catch-all for any person who harbors, shelters or maintains 26 or more dogs in the course of a year whether for 5 minutes or 12 months. The term "temporary" itself lacks clarity and definition. Does a grooming operation or a Doggy Day-Care operation have to become a licensed kennel because they harbor or maintain more than 26 dogs annually? Groomers are not providing boarding services but dogs do remain in their care until the owner retrieves their dog. And doggy day-care operations are, by definition, time limited. Therefore, the terms "harbor," "kept," "shelter," and "maintain" in themselves require definition. What are the elapsed time frames – 5, 10, 30 minutes or X number of hours – before such an operation becomes a regulated kennel?

The Act specifically sets forth the activities the Legislature desired to regulate pursuant to a licensure system. If the Department is seeking to regulate "rescue" activities as a "temporary home" under the Act, it should seek a legislative remedy rather than exceed its statutory authority by creating new classes of licensed activities not contemplated when the Dog Law was enacted or amended.

IV. Penalties

In its explanation of the proposal, the Department states that language was added to the penalty provisions "intended to clarify the Secretary's powers, duties and enforcement options" relative to persons failing to properly obtain a license and "clarifying language was also added to the revocation, suspension and denial language of the regulations." Far from serving as "clarifying language" these provisions actually would institute significant substantive changes to the Penalty section, which changes are wholly inconsistent with the underlying statutory authority of the Dog Law on which the Department relies.

Section 459-207 of the Dog Law states that operation of a kennel without licensure as provided in the act is unlawful, and that the Secretary may file suit in the Commonwealth Court "to enjoin operation of any kennel that violates any of the provisions of this act. In addition, the secretary may seek in such suit the imposition of a fine for every day in violation of this act for an amount not less than $100 nor more than $500 per day." No other provisions within the act exist relative to sanctions against unlawful operation of a kennel. No authorizing provisions grant the Department authority to go beyond this section to impose penalties against violators.

Yet, new subsection 21.4(1)(iii) of the proposed regulations purports to grant the Department authority to "impose a fine of not less than $100 and not more than $500 for every day the kennel has operated and continues to operate in violation of the licensure provisions of the act." While this language largely mirrors the underlying statute relative to the nature of fines that may be imposed, ***the statute only permits imposition of those fines pursuant to a judicial action.*** Curiously, the proposed regulation would strike existing regulatory language consistent with the statute and replace it with the new language establishing administrative enforcement powers (as well as additional new language on judicial action). In so doing, the Department relies upon "the general enforcement powers" set forth in Section 901 of the statute. However, that provision merely allows the secretary to "employ all proper means for the enforcement of [the] act." A general grant of power in statute is always superseded by specific statutory authority. Where, as here, the legislature has spoken to the specific question of what sanctions may be imposed for violation, the Department may not unilaterally adopt new authority unto itself that is inconsistent with that established by statute. Yet that is what these proposed regulations attempt to do.

A similar effort is being made with new requirements being proposed in Section 21.4(1) (iv), whereby existing permissive authority to revoke a kennel license or out-of-state dealer license would be expanded to include a mandatory revocation clause for cruelty violations. The new language includes a preface providing that this subsection is consistent with "the powers and authority established" by the Dog Law statute. In point of fact, however, the statute specifically provides for permissive authority to suspend or revoke a dealer license for any one or more of various cited acts (including conviction for cruelty to animals), stating that the "Secretary may revoke or suspend a kennel license or out-of-state dealer license" for any of the specified reasons, and does not allow for mandatory revocation or suspension.

This permissive language is what currently exists in the regulations as well. Perhaps the Department feels that a statement in its regulations authorizing statutory authority is sufficient to actually provide that authority. But it is the legislature, not the Department, that has the authority to adopt statutory law. Had the legislature intended to grant authority for the Department to adopt mandatory revocation requirements within its regulations, it could easily have done so. But the legislature declined. No reasonable inference from the statutory language could be contorted to suggest the Department was granted this authority. To the contrary, one must conclude from the statute's unambiguous extension of only permissive authority that the Department is barred from adopting a different standard.

From a policy perspective, there is a very good reason why revocation should not be mandatory. An evaluation of the nature and severity of a violation, as well as any surrounding circumstances, should be conducted before determining whether revocation is appropriate. It may be that the Department will determine in most, or even all, cases that revocation is appropriate; that determination is within its discretion. Adopting regulations mandating revocation, however, is not. In unequivocally imparting permissive authority in statute, the legislature has required that the Department exercise its discretion on a case-by-case basis. Until such time as the legislature, in its infinite wisdom, adopts a different standard, the Department may not unilaterally impose one.

Likewise, in this same section of the proposed regulations, the Department endeavors to establish a prohibition against issuance of a license to any person who has been convicted within the prior ten years of any violation of the cruelty statute. Again, the underlying statute is very clear: a decision to refuse issuance of a license may be made for any of several specified reasons (including conviction of "any law relating to cruelty to animals"). Such authority, however, is permissive. The Department must respond to requests for licensure on an individual basis and take such action is it deems appropriate at the time, consistent with the statutory authority.

The entire new proposal for amending penalties in Section 21.4 not only exceeds statutory authority but is in direct conflict with statutory dictates. This section of the regulations should remain unchanged in any final rulemaking, unless and until the legislature sees fit to amend the current Dog Law relative to penalty requirements.

V. Kennel Licensure Provisions

In establishing a new prohibition against "dealing with unlicensed kennels" the Department doesn't offer any explanation of its proposal, and does not appear to rely on any particular statutory authority. To the degree this provision prohibits persons who are required to obtain a kennel license from operating without one, it is merely redundant, restating the already established requirement to become licensed. Insofar as that is the case, the new language appears to be superfluous.

However, it additionally prohibits kennels that are otherwise in compliance with the law from accepting dogs from, or otherwise dealing with, other kennels that are operating without a required license. Again, there is no particular language in the act that would authorize this type of prohibition. Clearly, a provision such as this is intended to help facilitate enforcement of the Act. Less clear is whether such a provision is permissible. Certainly it is impractical from the standpoint of a regulated entity. Further, we would submit that it is entirely inappropriate for the Department, which is charged with enforcing this act, to place such enforcement duties upon the regulated entities themselves.

Kennels have no authority to conduct an inquiry into whether an unrelated entity is licensed by the Department or whether it is required to be so licensed. Because persons selling dogs, depending on the number sold, are not necessarily required to be licensed, someone buying dogs has no particular basis to know whether the person from whom they are buying them is required to be licensed. Further, there is no way that one may be certain whether or not the seller is in fact licensed, regardless of whether the law requires such licensure.

From a policy perspective, PIJAC questions why regulated parties should be charged with enforcing the law, and from a legal perspective whether the Department has the authority to mandate enforcement duties for regulated parties (absent a statutory grant of such authority). From a practical perspective, however, we believe this provision could be substantially remedied by simply inserting the term "knowingly" in front of the substantive proposition, so that the provision would read as follows:

> It shall be a violation of the Act and this Chapter for any kennel to <u>knowingly</u> keep, harbor, board, shelter, sell, give away or in any way accept, deal or transfer any dog from a kennel or establishment operating without a license in violation of sections 206, 207 or 209 of the Act [and] it shall be a violation of the Act and this Chapter for any kennel to <u>knowingly</u> keep, harbor, board, shelter, sell, give away or in any way accept, deal or transfer any dog from a kennel that has had its license suspended or revoked.

We believe that this should remove from licensees the affirmative duty to ascertain whether someone is licensed or required to be licensed, which would be a practical impossibility, while at the same time assuring that licensees are prohibited from dealing with someone whom they are aware is not licensed and who clearly should be.

VI. Dog Quarters

As with certain other provisions of the proposed regulations, the requirements of Section 21.21 seek to apply a universal standard to facilities possessing different needs. This one-size-fits-all approach is, again, ignoring the fact that breeding kennels, boarding kennels and pet stores are keeping animals under different circumstances and for different durations. While some of these requirements may be appropriate for certain types of kennels, they are not necessarily appropriate for a pet store kennel. Specifically, caging used in pet stores and boarding kennels is often custom built with a variety of drainage systems which, while different, are not necessarily less effective. Other caging is similar to caging found in veterinarian clinics with cages stacked or side-by-side in modular systems, including a variety of systems used to minimize cross contamination and facilitate air handling and cleaning. A highly prescriptive requirement such as the Department proposes here would require expensive and needless renovations that do nothing to advance the welfare of the animals.

VII. Housing Requirements

The proposed regulations under proposed Subsection 21.22(d) would require that all new puppies entering a pet store, boarding kennel, or "other establishment" be:

> "quarantined for 14 days or for the time period necessary to allow for treatment of any disease, prevent the spread of parasites or new strains of bacteria or viruses and to allow the puppies to acclimate to the new kennel environment, whichever is longer."

The proposed isolation period of 14 days for new puppies coming into a facility (including a pet store) is inconsistent with any other federal or state standard anywhere in the country. There is no explanation by the Department as to how this 14-day period was come by, what it represents, or why it should be deemed an appropriate standard. This unprecedented requirement is both impractical and unnecessary. The economic impact on pet stores would be substantial, indeed untenable. Pet stores generally don't have the space requirements to house all puppies for this period of time, nor should they be expected to.

It is unclear why the Department applies this proposed restriction specifically to puppies; however, it does not provide a definition for a "puppy" anywhere in its proposed regulations. Pure conjecture would be required of licensees attempting to comply. Further, the Department fails to identify the basis for this standard. Assuming the proposed quarantine requirement is intended to support the health and welfare of the animals, from what research or analysis does the Department derive a 14-day standard? Is it based in science? In seeking to quarantine apparently healthy puppies for extensive, unprecedented periods of time, the Department is actually acting to the dogs' detriment. While offering no justification for how this would potentially benefit the animals, it is certain that it would deprive them of socialization opportunities that are indubitably in the puppies' best interest.

Even more perplexing is the requirement that "each group of puppies [must] be quarantined together." While the 14-day quarantine requirement has no apparent rational basis, this mandate is clearly harmful to the quarantined animals because it would mean that in the unusual instances where sick animals are

brought into the facility licensees would be compelled to continue housing them with healthy animals thereby ensuring to a near certainty that otherwise healthy animals will become ill.

Though the Dog Law is not a consumer protection statute, and should not be employed as such a vehicle, current Pennsylvania law does require pet stores and others selling dogs to the public[1] to "provide to the purchaser a health certificate issued by a [licensed Pennsylvania] veterinarian within twenty-one days prior to the date of sale for the dog or a guarantee of good health issued and signed by the seller." (73 P.S. Sec. 201-9.3) This health certificate/good health guarantee certifies and warrants that the dog is:

> "apparently free of any contagious or infectious illness and apparently free from any defect which is congenital or hereditary and diagnosable with reasonable accuracy and does not appear to be clinically ill from parasitic infestation..." at the time of examination/sale.[2]

The seller is further required to advise the customer verbally of these facts. PIJAC supports this warranty requirement as a protection for buyers of dogs from pet stores. We also support appropriate quarantine of any dog that does show symptoms of contagious disease. But PIJAC opposes a capricious quarantine requirement that subjects healthy animals to unnecessary isolation and which would, additionally, have the effect of putting pet stores out of business. This quarantine requirement should be stricken from the proposal.

VIII. Space Requirements

In proposing new space and exercise requirements under Section 21.23, the Department states that new standards are intended to "address the health and welfare of dogs housed in kennels," presumably pursuant to the statutory authority in Section 207 of the Dog Law providing that kennels be maintained "in a sanitary and humane condition in accordance with standards and sanitary codes promulgated by the secretary through regulations."

Of course, the Department promulgated such requirements many years ago by establishing regulations under which licensees operate today. Little is offered to justify a change in existing requirements, other than to make "the Department's regulations more consistent with Federal regulations" under the Animal Welfare Act (AWA). Curiously, the proposed standards radically depart from federal regulations under the AWA by mandating twice the space as is necessary pursuant to the federal code.

Unfortunately, commenters are in no position to evaluate the justification for the specific space requirements, as the Department provides none. However, while arguing for the need to make regulations consistent with the federal standard, the Department specifically discards USDA criteria for primary enclosures that have been in effect for years and that are consistent with national standards in the industry. We find it further perplexing that the Department continues to employ precisely the same formula for determining floor space requirements as is set forth in federal regulations, but merely adds language mandating "twice the minimum amount" as would be required under such formula. How can

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[1] The Act defines a seller as a pet store or kennel or other individual selling dogs directly to the public and who is required to be licensed under the Dog Law. Nonprofit kennels are exempted from these requirements.

[2] The "apparently free" language is commonly accepted terminology found in interstate and international health certificates as prescribed by USDA and the Federal Animal Welfare Act.

the Department have reached a reasoned determination as to the amount of floor space necessary for assuring humane care of dogs without even doing the calculations necessary to determine what that floor space is? And what criteria did the Department utilize in making its proposal to mandate "twice the minimum amount" as is now required for long-term kennels nationwide pursuant to federal law? Apparently, the requirement for floor space appearing in the proposed regulations is merely an arbitrary standard. As such, PIJAC urges that it be discarded and suggests that the federal standard the Department claims to be striving for is precisely the one that should appear in the final regulations.

Further, when discussing the appropriateness of space requirements for dogs, there is a need to draw the further distinction between breeding kennels and pet stores, because the needs of these two populations differ significantly. As the Department well knows, the space requirements for primary enclosures set forth under AWA regulations are intended to apply to long-term breeding kennels. Pet store enclosures, by contrast, are intended for puppies subject to short-term housing and the same space requirements are not necessary. This is the reason an exemption for pet stores is provided in existing regulations. The distinction between long-term housing needs for dogs in breeding facilities versus the needs of puppies in the short-term housing environment of a pet store is recognized in states throughout the U.S. as well.

Unfortunately, the Department's proposal would eliminate the current exemption for pet store space requirements found in Subsection 21.23(e). That exemption applies only to pet stores and includes minimum space requirements for dogs being offered for sale at retail. Again, no rationale is offered for elimination of the exemption; indeed the Department fails to even allude to it in its explanation of the proposal. However, in discussions with the Department, PIJAC was led to believe that elimination of this exemption in the proposed regulations was inadvertent and that the intent was to retain the exemption. We fervently hope this to be the case. In addition to the fact that pet store puppies do not need the same space requirements as dogs in long-term housing environments, the mandate to provide comparable space would place a burden on pet stores that is likely too cumbersome to meet and could effectively put pet stores out of business. Thus, the elimination of this exemption is unnecessary, impractical, and contrary to the health and welfare of the dogs that the regulation is intended to promote. PIJAC urges that the existing pet store standard in Subsection 21.23(e) be retained in the final regulations.

Interestingly, the Department proposes a new exemption from space requirements under Section 21.15 for dog control facilities. The rationale offered for this exemption is that these facilities "perform a government service" and subjecting them to the new requirements "would limit the space available to provide those services." Assuming that the proposed standards are intended to be essential for humane care of dogs, then the Department is effectively contending that the public service provided by such facilities is such as would justify keeping the animals in inhumane conditions. Inasmuch as these facilities are responsible for housing dogs that have been removed from facilities that may not be meeting regulatory requirements, PIJAC finds the argument particularly unpersuasive. Taking dogs from substandard facilities in order to place them in substandard facilities strikes us as a poor use of resources and dubious public policy. Nevertheless, to the degree that the animals going into dog control facilities are being placed into temporary housing, a standard akin to the one currently applying to pet stores may be appropriate.

IX. Exercise Requirements

Section 21.23 of the proposal also includes new exercise requirements within a new subsection (e), replacing the existing subsection (e) containing the pet store exemption. Again, the Department does not enlighten prospective commenters as to the basis for a requirement to provide every dog with "20 minutes of exercise per day." This one-size-fits-all standard, however, fails to take into account the varied needs of dogs depending upon age, breed and physical condition. A requirement to exercise new-born puppies who are barely capable of standing, for example, is ludicrous on its face. Such a standard makes no more sense than would a requirement to feed all dogs the same precise type and amount of food according to a precise timetable to which all dogs are equally subject. Not only does the standard not serve the health of the animals, it is inimical to that goal.

Ignoring arguendo, however, the varying exercise needs of different dogs, what is the basis for a 20 minute standard? The Department simply offers cursory reference to a statement that requirements are being imposed. There is no scientific or other justification for the strict 20-minute exercise regimen being proposed. What reason does the Department have for believing that this is even a preferred regimen for *any* dog, much less an ideal standard for dogs generally? Is this merely an arbitrary suggestion?

As with the space requirements, the proposal also ignores the distinction between pet store puppies and adult dogs in breeding facilities. In addition to the fact that young puppies require substantially more sleep than do older dogs, and can be stressed by over-exercising (thereby compromising their health), many pet stores are designed to provide segregated areas where customers may socialize with a puppy they are considering purchasing. As a result, these puppies are effectively exercising periodically throughout the day and could be adversely affected if subjected to an additional specified exercise time period.

PIJAC agrees with the Department that an exercise regimen should be incorporated into a facility's standard operating procedure for the humane care of dogs. However, in order to assure appropriate exercise for individual dogs, the specific regimen must be customized to the dogs in question, depending on prevailing circumstances. There is not a single standard that applies to all dogs, regardless of age, breed and physical condition. Accordingly, PIJAC recommends that the language in proposed Subsection 21.23(e) be stricken and replaced with the following:

> "A plan shall be provided to assure dogs an opportunity for exercise. This plan must be approved by the attending veterinarian. The plan must include written standard procedures to be followed in providing the opportunity for exercise of the various dogs within the facility."

This standard would accommodate the exercise needs of all dogs, and be consistent with federal requirements (something for which the Department has stated it strives).

Within Subsection 21.23(e)(ii), which applies to all facilities, several exercise criteria are set forth, among which are included cross-references to Subsection 21.24(b) controlling outdoor facilities. Thus, the proposal would subject all facilities, including indoor facilities such as pet stores, to standards intended to apply only to outdoor facilities. PIJAC suspects this is due simply to poor drafting, but suggests that these references be qualified to explicitly state that their application under Section 21.23 is to outdoor facilities only.

Within Subsection 21.23(e)(iii), the proposed rule mandates strict segregation of "small," "medium" and "large" dogs, as designated by the Department, in exercising dogs. While the Department does not explain the rationale for this rule, one may infer that it is intended to protect smaller dogs from over-aggressive dogs, a reasonable goal. However, aggressiveness is not derived by size, per se. There is nothing inherent in a dog's size that makes it unsuitable for socialization with other dogs of different sizes. Indeed, dogs of varying sizes are frequently exercised together with positive effect. And even were it desirable to segregate dogs by size, the arbitrary weight categories proposed by the Department are completely nonsensical. They would permit a 65 pound dog to be exercised with a 90 pound dog, but prohibit the same 90 pound dog from being exercised with a 91 pound dog. It would make far more sense to establish categories based on *the difference* in size or weight of the respective animals. PIJAC suggests that Subsection 21.23(e)(iii) A through D be stricken altogether.

Record requirements found in Subsection 21.23(e)(v) suffer similar shortcomings as the record requirements being proposed in other sections of the regulations and so PIJAC addresses them accordingly under the heading dealing with records generally.

X. Shelter, Housing Facilities and Primary Enclosures

In proposed revisions to Section 21.24 the Department, again, fails to distinguish between appropriate standards for outdoor versus indoor facilities and breeding kennels versus pet stores. Throughout this section, there are various requirements that are being mandated for all facilities alike.

Some of the most conspicuous examples include the following:

- Subsection 24(f)(11)(i) requires both a gutter and drain for sluicing wastewaters during kennel cleaning. Retail pet store kenneling systems are not normally designed to provide for sluicing wastewaters and don't typically have gutters. The cleaning process is entirely different from that utilized in a breeding kennel environment.
- Subsection 24(f)(11)(ii) requires drains and gutters to be at least 6 inches in diameter. Such a standard is inconsistent with building codes in commercial retail space and would require expensive, major renovations which in most, if not all, cases would violate lease provisions and therefore could not be accomplished.
- Subsection 24(f)(11)(v) mandates that drains and gutters be "sanitized" at least once daily. It is questionable what the Department envisions in creating this requirement. What would qualify as adequate sanitization of a floor drain? Is this a practical possibility?
- Subsection 24(f)(11)(vi) requires that the floor or surface of the indoor kennel must be sloped at least 1/8 inch per foot to the gutter or drain. Kenneling systems in retail pet stores are normally a self-contained kennel unit and do not have sloped flooring or sub flooring and are not designed for all of the waste materials to flow to a gutter or drain. This requirement would compel complete renovation and remodeling of the pet store.

In establishing new standards such as these, the Department should take care to apply the requirements to facilities to which they are practically applicable, and not merely adopt universal standards.

XI, Temperature and Ventilation

The proposed temperature standards applicable to indoor and outdoor "slabs" illustrate the problem of adopting engineering styled standards that are unsupported by any studies or evidence showing the particular ranges are appropriate for a given type of facility. Absolute limits such as these fail to accommodate the realities of running a facility or the welfare requirements of the animals themselves. Appropriate temperature ranges should be set by the attending veterinarian and regulated through usage of HVAC systems designed to ensure maintenance of such ranges. Similar requirements are seen in state and local mandates as well.

The Federal Animal Welfare Act temperature standards, while similar in nature, provide for allowances at each end of the range to accommodate licensees taking necessary steps to bring the temperatures into the permissible range in circumstances where unanticipated changes may occur. USDA Regulation Section 3.2(a) reads in pertinent part:

> "...When dogs or cats are present, the ambient temperature in the facility must not fall below 50 [deg]F (10 [deg]C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50 [deg]F (10 [deg]C). The ambient temperature must not fall below 45 [deg]F (7.2 [deg]C) for more than 4 consecutive hours when dogs or cats are present, and must not rise above 85 [deg]F (29.5 [deg]C) for more than 4 consecutive hours when dogs or cats are present."

Likewise, USDA Animal Welfare Act ventilation standards may be found in various state statutes and ordinances around the country. USDA Regulation Section 3.2(b) pertaining to ventilation reads as follows:

> "Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 [deg] F (29.5 [deg] C) or higher."

In its proposal to mandate air flow of 0.8 to 1.0 cubic feet per minute per square foot of floor area, and to mandate a minimum of 6 air changes per hour,[3] PIJAC queries whether the Department refers to the floor area of the primary enclosure or of the entire building. The language of Section 21.26 does not specify which.

PIJAC would urge less prescriptive requirements for both temperature and ventilation in facilities. With regard to temperature requirements, we suggest consideration of a standard consistent with the federal law that employs time windows within which licensees may bring temperatures back within normal ranges. For ventilation, the specific amount of air flow and ventilation types should be consistent with building code standards, and the advice of the attending veterinarian.

[3] PIJAC recognizes that these criteria are often found in building codes applicable to pet stores, Different building codes may already apply to other types of kennel facilities.

XII. Lighting Systems

The Department proposes different minimum lighting in terms of "foot candles" for separate parts of a facility (bathing, grooming, toilet areas, kennel housing areas, and support buildings, including food preparation and storage areas). It is unclear how a licensee is expected to ascertain foot candle lighting. Normally, lighting may be provided by both natural and artificial means. But how would a licensee determine the foot candle light in a given area lit by natural lighting? Are foot-candle measurements to be made at the light source or on the targeted area to be lighted, such as the floor, table top, etc.? Will the Dog Wardens be trained on how to measure foot candles? This appears to be another area in which the Department is overly prescriptive, resulting in an impractical standard the compliance with which would be difficult to determine by regulated entity and enforcement officer alike. PIJAC recommends a more realistic standard which should, again, be consistent with existing building codes and based on the advice of an attending veterinarian

XIII. Water Requirements

Section 21.28 of the proposed regulations would delete an existing provision requiring that water be available to dogs a minimum of six hours during the day and replace it with a requirement that "potable water shall be available to the dogs at all times..." Such a requirement is impractical and unnecessary. Under the proposed language, removal of a water container for cleaning and refilling would constitute a violation. Should a dog consume the contents of a water container, the licensee would then immediately be in violation. For any number of reasons, there may be intervals in the provision of water. No recognized authority asserts that dogs need constant access to water for their health and welfare.

Federal AWA regulations require simply that water "must be offered to [the animals] as often as necessary to ensure their health and well-being, but not less than twice daily for at least 1 hour each time, unless restricted by the attending veterinarian." PIJAC believes the requirements under existing regulations are fully adequate. However, should the Department be concerned about frequency, we recommend that it employ similar language regarding the dogs' "health and well-being" as well as reasonable required intervals for provision of water. An extreme requirement that water be available "at all times" is neither reasonable nor practical, nor is it necessary for the health and welfare of the animals.

XIV. Record Requirements

The proposed regulations include a number of record-keeping requirements in various sections. These requirements in a number of cases exceed statutory standards as well as the dictates of common sense. Section 207(c) of the Dog Law specifically and clearly sets forth the types of records to be maintained by each licensed kennel. Nowhere does the governing statutory language suggest that this is a list of examples or that the Department should impose such other record-keeping requirements as it deems fit.

Where, as here, the controlling statute is unambiguous and limited in imposing requirements on licensees, standard rules of statutory construction dictate that the administering agency may not take it upon itself to embellish these standards. Yet the requirements for keeping of kennel records in the proposed regulations far exceed those specified in statute.

The proposed language in Section 21.14(5) incorporates the very list found in the statute and then goes on to include myriad other record-keeping requirements, many of which would place an undue burden on various classes of kennels or even require licensees to obtain information that is irrelevant to its operations.

Under existing regulations, a kennel operator is required to identify in its records the source of the animal, irrespective of whether it comes from another licensed kennel (either in-state or out-of-state) or an individual who is not required to be licensed under the Dog Law. If the licensee is required to provide information as to the source of the animal, the purpose it is in the kennel, and to whom the dog is "dispensed," why should the licensee be required to also identify the name of breeder "if applicable" or "where applicable" and the name and address of the "owner or keeper?" What does "where" or "when" applicable mean in regards to information about the "individual" breeder, owner or keeper?"

Nowhere in the governing statute is there a requirement that every licensed facility provide the data proposed by the Department in subparagraphs (C) and (D) with respect to information on the spay/neuter status of the dog or the medications administered. Moreover, the proposed regulations would require a licensee to maintain medical records not only while in the custody of the kennel but "any previous history of diseases treated for and past veterinary protocol of vaccinations or medication administered to the dog." As crafted, this proposal would make a kennel responsible for providing information prior to its owning, harboring, keeping, maintain, sheltering, etc. each dog.

Requiring every kennel class to provide information regarding spay/neuter in Subparagraph (C) clearly exceeds the Department's statutory authority. Section 902A (Section 459-902A) of the Act specifically provides that such information is a condition for the release of animals by a "releasing agency" as defined in Section 901-A, but does not extend this requirement to other licensees. Again, where the statute establishes a specific and unequivocal requirement, the Department lacks the discretion to modify that requirement in regulation.

With regard to other record-keeping requirements discussed, infra, PIJAC emphasizes again that these requirements are not provided for by statute. Besides the question of statutory authority, however, these provisions present a number of problems relative to compliance.

Subparagraph (D) requires all kennels to maintain data on medical treatments and medications administered not only while in the custody of the kennel, but also "any previous history of diseases treated and vaccinations administered prior to the animal coming into the possession of the licensee." While requiring a licensee to keep such records for treatments performed while in their custody is not inherently unreasonable, there is no way that a licensee can with any degree of confidence ensure that prior medical history information is obtainable, accurate or complete. This is an excessive and unrealistic requirement that places upon licensees a burden of compliance not effectively attainable, and subjects a licensee to liability for inaccurate information provided by a third-party. This requirement should be amended to limit data retention to activities occurring while the animal is in the custody of the licensee.

Again in proposed Section 21.41 the Department seeks to impose a significant administrative burden on licensees by requiring seven new record reporting requirements for every dog, as follows:

- Date, time and detail of daily feedings, cleaning of kennel, and changing and refreshing potable water
- Date, time and detail of exercise activity of the dog
- Date, time and detail of any medication administered to a dog
- Any accident or incident in which the dog is injured
- Date and time of any veterinary care administered

- Records of veterinary care for each dog
- Any veterinary ordered or voluntary protocol for vaccination, medication or other recommendation for medical treatment of the dogs.

Section 21.24 mandates that records be kept on the following:

- Date and time of day that the housing facility was cleaned
- Date and time of day that the housing facility was sanitized
- Date and time of day that each individual cage, dog box or primary enclosure was cleaned
- Date and time of day that each food and water bowl was sanitized
- Date and time new food wand potable water was provided each dog

The presumed purpose of mandating such detailed records is to identify that the required activities have been accomplished. But the same result could be achieved merely by requiring a checklist of completed activities for a given date.

As proposed, these recordkeeping requirements would impose a substantial financial burden on licensees, often necessitating the hiring of additional employees just to follow behind the caretakers and record their activities. While providing no appreciable benefit to the Department in administering the Act, they would represent substantial disincentives to continue a licensed activity. While basic recordkeeping serves the legitimate administrative purpose of tracking compliance, mandating the recording of specific times and detailed information on types of exercise does not. The measure should be the condition of the dog, its general housing conditions and the overall condition of the facility, rather than paperwork minutia.

XV. Bills of sale

Section 21.42(b) of the proposed regulations create a new violation in the event a licensee purchases, accepts, sells or transports a dog from a kennel that is unlicensed but is required to be licensed under Section 207 or 209 of the Act without obtaining prior written permission from the Department.

The nexus between this subparagraph and a "bill of sale" is questionable. Similar prohibitions appear in Section 21.14(b) imposing an enforcement burden on licensees, as discussed, supra.

The Department already has access to significant amounts of transaction data regarding each dog sold, transferred, adopted or given away. A departmental analysis of such existing data would identify those people dealing in more than 26 dogs annually. It is the Department's enforcement responsibility, not a licensed kennel's responsibility, to ferret out unlicensed facilities. This subparagraph should be deleted.

XVI. Conclusion

As had been evidenced by the voluminous public comments submitted in response to this rulemaking, as well as testimony delivered at a legislative hearing, and even comments of advisory board members, there are myriad concerns among the regulated community and the public alike about the potential impact of these proposed regulations. PIJAC has attempted, where possible, to offer constructive suggestions about the manner which some of these provisions might be more effectively crafted. Other provisions are more problematic, reflecting substantive changes that exceed statutory authority, represent impractical and over-burdensome requirements, are unnecessary or inappropriate and in some

cases appear to simply be arbitrary. As such, those proposed revisions should be deleted from any final rule. PIJAC notes, though, that objections among the commenting public are numerous, involve nearly all sections of the proposed regulations, and include myriad substantive provisions that would have a dramatic impact on the regulated community.

Accordingly, PIJAC believes the Department and the regulated community alike would be best served by a thorough rewrite of the proposed regulations with true participation of the regulated community, followed by publication of proposed regulations subject to a new comment period. We are convinced this approach will enhance the likelihood that the final product will properly reflect the substantial and significant concerns raised about the proposed rule, and question whether the final regulations will otherwise properly remedy the many problems with this proposal.

Respectfully Submitted,
Pet Industry Joint Advisory Council

N. Marshall Meyers, Esq.
Executive Vice-President and General Counsel

Michael P. Maddox, Esq.
Director of Legislative Affairs

#2559

Gelnett, Wanda B.

From: Jewett, John H.
Sent: Wednesday, March 28, 2007 9:49 AM
To: Gelnett, Wanda B.
Cc: Stephens, Michael J.; Wilmarth, Fiona E.; Wyatte, Mary S.; Leslie A. Lewis Johnson
Subject: FW: PIJAC Comments on the Dog Law Rulemaking.pdf

Wanda: Please file these under "proposed comments" for #2559. Thanks

-----Original Message-----
From: Megan [mailto:Megan@puglieseassociates.com]
Sent: Wednesday, March 28, 2007 9:50 AM
To: Jewett, John H.
Cc: Rocco Pugliese; Mary Keenan; Mike Maddox; mmeyers@meyersalterman.com
Subject: PIJAC Comments on the Dog Law Rulemaking.pdf

Hi John,

As requested, attached please find a copy of PIJAC's comments submitted to the Department of Agriculture regarding the Dog Law proposed regulations. Please let us know if you have any questions or need additional information.

Thank you.

Megan

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