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July 14, 2010

### Commercial Kennel Canine Health Regulations [#2-170 (#2785)] Pennsylvania Federation of Dog Clubs Comments

This is submitted on behalf of the Pennsylvania Federation of Dog Clubs. We start by noting that the final form regulations are a significant improvement over the draft regulations. In our opinion, they are generally within the scope of authority of the Canine Health Board as provided in the revised dog law.

Many comments below raise issues with areas of the regulations, not because they are *ultra vires*, but because they do not address the requirements of the law in a consistent and rational way.

It is unfortunate that the Regulatory Review Act permits only an approval or refusal of the final form regulations in whole, since these newly introduced issues could be easily addressed without significant changes to the structure or thrust of the regulations, but the changes will have a significant beneficial impact on the welfare of the dogs and the regulated community. Perhaps the legislature should consider amending the Regulatory Review Act to permit limited input regarding newly added or significantly revised regulations resulting from the review process. Designated members of the regulated community could be permitted to comment prior to the issuance of the final form regulations. In cases where there is an appointed Advisory Board, as with the Dog Law, this might be more appropriate than to have significantly altered regulations put forward as final form regulations containing issues that could be easily addressed.

Our specific comments are on the following five pages.

Sincerely,

Julian Prager  
Legislative Chair

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We understand that the Department believes it has the authority to define the means of achieving the standards as discussed in the Comment/Response document. We still respectfully disagree in these cases.

**Section 28a.8(d)(5)** prohibits the use of radiant heat flooring or a floor cooling system as the primary heating or cooling mechanism. This is new language that we have not have had a previous opportunity to review. The proper attention of the Canine Health Board and the Department is the health and welfare of the dogs, not to the particular method used to achieve their health or welfare. Preventing injury to the dogs is a valid concern and is adequately addressed by the redaction suggested below. The temperature achieved by the radiant heating or cooling depends on a number of factors, including the mass of flooring. The wording of the regulation would make illegal the use of flooring that achieved the required heating and cooling levels even though it otherwise met the safety concerns of the Canine Health Board. This type of heating and cooling typically covers the entire floor area of the building, not just the primary enclosures. This creates a more significant mass for temperature control, resulting in less fluctuation in the temperature of the floor and greater safety from significant heat rises or drops. It may also be separated into different zone to provide different levels of heat to particular areas. With sufficient floor mass, the indoor temperature minimums can be achieved with this type of heating without reaching levels endangering the health or safety of the dogs.

The regulation should eliminate the wording restricting the use of radiant flooring or a flooring cooling system as the primary mechanism. The regulations would then read: "Radiant heat flooring, or a floor cooling system, may be utilized to temper the dogs' primary enclosure. The temperature of such flooring shall be able to be regulated in a manner that assures it will not rise or fall to levels that would cause injury to a dog's skin, feet or pads or cause hypothermia, hyperthermia, heat stress or heat stroke." This language adequately protects the health, welfare and safety of the dogs without unnecessarily restricting the method of heating the kennel.

Adding a section on definitions is a desirable change from the preliminary regulations. They serve to clarify the meaning of the standards that are set. However, two of the definitions present minor issues. The definition of **commercial kennel**, taken from the statute, encompasses shelters, humane societies or rescues that take in pregnant bitches, whelp the litter and transfer over 60 dogs in the course of a year. The law requires in Section 206(a) that a "separate license shall be required for each type of kennel." Therefore a strict reading of the law would require that these rescues, shelters and humane societies be licensed both a nonprofit kennels and as commercial kennels since they would meet the definitions of each. It might be preferable, consistent with the authority of the Department to interpret unclear or conflicting statutory language (as it recently did with respect to flooring in Section 28a.8(e) and exercise issues for nursing mothers) to specifically exclude these groups from the reach of the regulations.

The definition of **diurnal light cycle** violates the statute and common sense. It provides that the "daily lighting cycle must be 12 hours of daylight and 12 hours without light and must be

natural, artificial or both. This is not what the law requires. The law authorizes natural or artificial lighting in commercial kennels. It does not require the use of both.

First, we believe this confuses the meaning of the requirement of section 207(h)(8), which states in relevant part that animal areas in commercial kennels must “be provided a regular diurnal cycle. . . .” The Board has apparently interpreted “regular” to mean “even.” However, the better interpretation would be that the light cycle would approximate the regular seasonal diurnal cycles throughout the year. Daylight varies from about 9 hours at the winter solstice to about 15 hours at the summer solstice. The variance in daylight effects hormone values in dogs, resulting in normal hormone fluctuations over the course of the year as the amount of daylight changes. By eliminating the variation in light over the course of the year, the regulations impair normal hormonal fluctuations of the dogs in commercial kennels and potential harm the welfare of the dogs. This will also cause kennels using natural lighting, a desirable outcome supported by the Canine Health Board, to increase lighting (and associated costs) in the winter months and to cover windows to reduce natural lighting in the summer months (possibly negatively impacting natural ventilation).

Second, **Section 28a.7(a)(4)** refers to the 12-hour diurnal lighting cycle discussed above. The law permits natural lighting in kennels and the Canine Health Board has previously taken the position that natural lighting is preferable. However, this section takes the apparently antithetical positions that you can have natural lighting, but when the natural lighting falls below certain levels during the day you must at all times have artificial lighting to supplement the natural lighting. We do not believe that is a correct interpretation of the law – natural lighting is, as a tautology – natural, not artificial. Clouds, rain, snow and other natural weather phenomena can alter the levels of natural light produced during the regular diurnal lighting cycle, but still provide regular diurnal lighting. While there clearly must be sufficient lighting to perform the necessary feeding, cleaning and other animal care tasks in the kennel, this is an area akin to the variation in humidity levels subsequent to cleaning. As long as the level of natural light is sufficient to perform these tasks while they are being undertaken, a requirement for artificial lighting to supplement natural lighting at other times violates the clear directive of the law to permit natural lighting. Where natural lighting is used to achieve compliance during daylight hours, a reasonable standard should be set to permit periods when the natural lighting falls below the specified levels for brief periods and during the period of sunrise and sunset, even when animal care tasks are being performed.

In **Section 28a.2(a), (c)(1)(i), (e) and (f)(3)** the use of a mechanical ventilation system is required in several places. **Section 28a.3(a)** requires the use of an auxiliary ventilation system under specified circumstances. Section 221(f) of the statute authorizes the Canine Health Board to “determine the standards based on animal husbandry practices to provide for the welfare of dogs under 207(h)(7) and (8) and (i)(3).” Section 207(h)(7) provides that facilities must be “sufficiently ventilated at all times when dogs are present to provide for their health and well-being and to minimize odors, drafts, ammonia levels and to prevent moisture condensation.” It further grants the Canine Health Board the authority to “determine auxiliary ventilation to be provided if the ambient temperature is 85 degrees F or Higher.”

We agree that the Board may set standards to ensure that ventilation is provided to meet the health and welfare of dogs in commercial kennels. The Board has properly set standards

that must be achieved above 85 degrees F and it has the authority to set standards to be achieved below 85 degrees F to provide for the health and welfare of the dogs.

However, we raise two issues. First, although the statute provides the Canine Health Board with the authority to require auxiliary ventilation under specified conditions, we do not believe the Board can require an auxiliary system to accomplish this. That they are requiring two systems is seen in the statement that the auxiliary system may be used in the event of primary system failure or malfunction. What they can require is that any system used be able to comply with the regular and auxiliary ventilation requirements under the regulations. This is one danger of specifying the method of achieving the standards. Introducing two systems is significantly more costly for the regulated community and we do not believe that the legislature contemplated requiring redundant heating and cooling systems in commercial kennels.

Second, the regulatory process is complex and time-consuming. Regulations should be written to provide flexibility in meeting standards in ways not presently achievable. As long as the reasonable performance standards set by regulation are met, by whatever legal means, the kennel has complied within the regulatory authority granted to the Board under the law and no violation should exist. Should a way to use non-mechanical ventilation to meet the standards set forth be discovered, the wording of the regulation would unnecessarily delay the use of any such new method.

**Section 28a.2(b)(2)** refers to “the highest total number of dogs kept, held or present. . . .” Since kennels are licensed, in part, by the number of dogs kept, the section should be modified to refer to the “number of dogs kept at one time . . .” to distinguish the requirement from the number kept over the course of the year. This is clearly the intent of the language and comports with the usage in Section 28a.2(b)(1)(v).

**Section 28a.2(f)(6)** requires that every dog be in the airstream provided by the ventilation. While we generally support the new language in the ventilation regulations, this language presents several practical unanticipated problems both for implementation and for the welfare of the dogs. Among them is that it is apparently in conflict the provision of Section 207(h)(7) that facilities “minimize . . . drafts.” Placing dogs in the airstream provided by ventilation does not minimize drafts as required by the law. It may also have more severe consequences for puppies or dogs that are ill compared to healthy, adult dogs.

In some cases, solid partitions may be desired for cleanliness, for health reasons or for the protection of dogs in adjacent primary enclosures. If there are solid partitions, each primary enclosure would have to contain a separate vent or fan situated at the height of the dog blowing across the enclosure. This would require vents or fans either on the wall containing the door providing for unfettered access to the exercise area, on the entrance to the primary enclosure or on the walls between enclosures.

Placing vents in those locations would result in drafts on the dogs and would have an inordinate cost to the kennel owner to retrofit existing systems. It may be impossible and would probably be unsafe to place auxiliary ventilation or fans on the same wall as the door to the exercise area so that it is at the height of the dog, since the door needs to be at that

height. If placed on the door to the kennel, wiring for fans may create a potentially hazardous condition and vents would be difficult to install since the doors necessarily open and close. Vents or fans could not be placed on the walls between kennels since they would not comply with the requirement that the dogs be in the airstream provided by the ventilation unless the entire wall surface at the height of the dog was the source of the ventilation. In any of these locations, there is the danger that male dogs would urinate on the fans or vets exposing them to potential electric shock or, being soaked with urine, or increased concentrations of airborne ammonia.

The only potential solution remaining would be to retrofit the heating and cooling systems to place vents or forced air heaters or fans in the ceiling above each enclosure with an air spread covering the entire enclosure. This would be a significant new cost, not detailing in the Department's regulatory Review submission and does not, in our view, comport with the intent of the legislature. Therefore, having solid walls between primary enclosures would not be permitted in commercial kennels as a practical result of this requirement.

**Section 28a.3(b)** should strike the word "may" in the first line since it can lead to confusion. The purpose of a regulation is to inform the regulated entities of required, prohibited and permissible behavior. As such, in further defining the term auxiliary ventilation, the intent of the section must be interpreted to advise the regulated entities that the following types of auxiliary ventilation **are** permissible. It serves no purpose for a regulation to inform what **may be** permissible, but may later be found impermissible. Since this is not meant to be an all-inclusive list, the proper wording should be "Auxiliary ventilation devices and techniques include, but are not limited to:"

**Section 28a.4(a)(1)** restricts the humidity level when the temperature is below 85 degrees F. This is within the authority granted to the Canine Health Board. However, it ignores the effect of washing and sanitization efforts in the kennel that may raise humidity levels for short periods of time. This effect is recognized in Section 28a.4(a)(5) and its effect is implicitly recognized with respect to ammonia levels in Section 28a.5(a). Therefore, it would be preferable to provide a timeframe similar to the time frame provided for the heat index under Section 28a.4(a)(3) to bring the humidity level within the desired range after washing or sanitization of the kennel, equipment or bedding.

**Section 28a.4(b)** establishes measurement procedures for temperature and humidity. However, since the regulations permit condensation during times of cleaning and sanitizing, it is unclear what the interaction is between the heat index standards and normal cleaning activities in the kennels. May heat index levels rise temporarily during and for a short time after cleaning and sanitization activities or are the heat index levels absolute? The answer to this issue will affect the validity of measurements of humidity made concomitant with cleaning activities.

**Section 28a.7(b)(1)** provides that windows be of transparent materials. In our previous comments to the proposed regulations, we pointed out that the more appropriate word is translucent since the Board is governing levels of lighting, not the view through the windows,

and the law and regulations specifically require that there be protection for excessive light. The term translucent encompasses glass or hard plastic, but is more inclusive. Translucent windows can provide greater flexibility in achieving the lighting standards by varying the transmission of light to prevent excessive lighting. Furthermore, some translucent window materials also can present a significantly lower chance of breakage and resulting injury to the dogs. We understand that this language adopts the language of the Animal Welfare Act regulations, but recognize that the states are free to provide better standards than the Federal government in developing state laws and regulations. Where better language is available, it would be an error to tie the state to federal language that is less protective of animal welfare, especially where the state would want to revise its regulations to match improved federal regulatory language should it occur.

**Section 28a.8(e)** is a valuable addition to the regulations clarifying the Department's interpretation regarding housing of nursing mothers. However, it needs further clarification. Neither the law nor the regulations specify what is acceptable flooring in the other half of the whelping box or enclosure. The failure to address this issue leaves everyone without guidance as to what is acceptable. Furthermore, this section does not clarify the exercise requirements for nursing mothers. Having unfettered access to exercise for the mother during the nursing period creates a hazardous situation for the puppies that may be trapped by a closing door or be unable to open the door to return inside. If a puppy were trapped in the door, the maintenance of appropriate temperatures and ventilation in the kennel might be impaired. During period of extreme weather conditions – both cold and heat – this could be life threatening to young puppies. The issue of exercise for the nursing mother should be addressed in this regulation to provide for the health, welfare and safety of both the mother and puppies.

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**From:** Julian Prager [Pennfedlaw@verizon.net]  
**Sent:** Wednesday, July 14, 2010 9:54 PM  
**To:** IRRC  
**Subject:** CHB Reg #2-170 (2785)  
**Attachments:** CHB - Final-Form Comments.pdf; ATT499042.htm

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Attached are the Pennsylvania Federation of Dog Club's comments on the Commercial Kennel Canine Health Regulations.

Julian Prager  
NAIA Legislative Coordinator  
PFDC Legislative Chair

"Right is right, even if everyone is against it, and wrong is wrong, even if everyone is for it."  
William Penn