



**THE HUMANE SOCIETY
OF THE UNITED STATES**

2785

August 2, 2010

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101
irrc@irrc.state.pa.us

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Re: Comments on Amendment to Final Form Rulemaking (I.D. No. 2-170, IRRC No. 2785; Commercial Kennel Canine Health Regulation)

Dear Commissioners,

The Humane Society of the United States (HSUS), on behalf of its eleven million members and constituents, including over 671,000 in Pennsylvania, hereby submits these comments regarding the amended final-form regulation proposed by the Department of Agriculture (I.D. No. 2-170, IRRC No. 2785). While HSUS strongly supports the Department's efforts to regulate the housing and care of dogs in commercial kennels (see attached comments submitted on October 23, 2009), the recent amendment (Section 28a.8(e)) regarding flooring for nursing female dogs is contrary to statutory authority and must be further amended or stricken prior to final approval.

Pursuant to Pennsylvania's Regulatory Review Act (71 P.S. §§ 745.1 *et seq.*), the Independent Regulatory Review Commission (IRRC) is charged with evaluating proposed agency regulations before they are finalized.

In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.

71 P.S. § 745.5b(a) (emphasis added). Pennsylvania courts have consistently held that "regulations promulgated by an administrative agency pursuant to a statutory directive are invalid if they are contrary to the legislative intent of statutory provisions to which they relate." *Johnson v. W.C.A.B. (Sealy Components Group)*, 982 A.2d 1253, 1259 (Pa. Cmmw. Ct. 2009).

Unfortunately, as currently drafted, the Department's proposed amendment to the final-form regulations (Section 28a.8(e)) patently contradicts the unambiguous intent of the legislature that commercial kennels not house adult dogs on metal strand flooring.

Pennsylvania's Dog Law (3 P.S. §§ 459-101 *et seq.*) establishes requirements for housing dogs in commercial kennels and directs the Department to adopt regulations to implement the law. The statute provides that all primary enclosures in commercial kennels must, regardless of the age of the dog, "have floors that are constructed in a manner that protects the dogs' feet and legs from injury. The floor shall not permit the feet of a dog housed in the primary enclosure to pass through any opening." 3 P.S. § 459-207(h)(2)(x). In addition, for all dogs over twelve weeks of age in commercial kennels, the Dog Law explicitly provides that "the floor of the primary enclosure . . . shall not be metal strand whether or not it is coated . . ." *Id.* at § 459-207(i)(3)(i) (emphasis added). Thus, all dogs in commercial kennels must be kept on non-injurious flooring, and all dogs over twelve weeks in commercial kennels must not be housed on metal strand flooring. The statute does not provide any exceptions to this prohibition of metal strand flooring for adult dogs, evidencing a clear legislative intent that adult dogs never be kept on such flooring, even temporarily.

The only instance when adult dogs may be kept on non-solid flooring is when that flooring is slatted, as detailed in Dog Law Section 207(i)(3)(ii). *Id.* at § 459-207(i)(3)(ii). While the Canine Health Board has the authority to approve additional flooring options, such options must be consistent with Section 207(i)(3)(i), *i.e.*, must not contradict the mandate that adult dogs not be kept on metal strand flooring. *Id.* at § 459-207(i)(3)(iii).

When female dogs in commercial kennels are nursing puppies, which is at least four months of each year, their primary enclosures must include "an additional amount of floor space . . . in accordance with generally accepted husbandry practices . . ." *Id.* at § 459-207(h)(3). Further, "puppies under 12 weeks of age may not be housed in the same primary enclosure with adult dogs, other than the dam or foster dam." *Id.* at § 459-207(h)(4). Therefore, in commercial kennels, newborn puppies and their mothers must be housed in an area by themselves that includes additional space, often called a whelping box.

On July 14, 2010, the Department amended its proposed regulations to include Section 28a.8(e) regarding the flooring requirements for these whelping boxes:

(e) *Nursing mothers.* Primary enclosures, including whelping boxes, housing bitches with nursing litters or housing dams or foster dams with puppies under 12 weeks of age shall be constructed so that at least fifty percent (50%) of the flooring of the primary enclosure shall comply with the standards established by section 207(i)(3) of the Dog Law (3 P.S. § 459-207(i)(3)).

On its face, this amendment proposes to allow commercial kennels to only partially comply with the statutory mandates regarding flooring, *i.e.* the regulation by definition is inconsistent with the legislative mandate that no adult dogs be housed on wire flooring. Moreover, while there is no statutory prohibition of housing dogs under twelve weeks on metal strand flooring, the statute also does not prohibit puppies from being kept on solid or slatted flooring. Instead of elevating the puppies to the statutory standard required for adult dogs (*i.e.*, solid or slatted flooring), the Department proposes to circumvent the legislative intent and allow adult female dogs to be kept on metal strand flooring while nursing puppies.

While the intent of this amendment may simply be to allow metal strand flooring in half of the primary enclosure, which alone is an unlawful objective, the proposed amendment has broader implications that would create substantial confusion for the regulated community. Section 207(i)(3) includes additional flooring requirements aside from prohibiting metal strand and regulating slatted flooring – for example, the “floor of the primary enclosure shall be strong enough so that the floor does not sag or bend” – it is unclear whether the amended regulation would allow for a floor that sags half way and how that would be enforced.

In order to ensure that the Department’s proposed regulations are consistent with statutory authority and the intent of the General Assembly, Section 28a.8(e) must either be stricken from the proposed regulation or amended further, as follows. See 71 P.S. § 745.8 (providing that final-form regulations may be changed by the agency prior to IRRC approval).

28a.8. Flooring.

(e) *Nursing mothers.* Primary enclosures, including whelping boxes, housing bitches with nursing litters or housing dams or foster dams with puppies under 12 weeks of age shall be constructed so that ~~at least fifty percent (50%)~~ one hundred percent (100%) of the flooring of the primary enclosure shall comply with the standards established by section 207(i)(3) of the Dog Law (3 P.S. § 459-207(i)(3)). Bitches

with nursing litters shall not be housed in a primary enclosure with metal strand flooring.

The HSUS greatly appreciates the Pennsylvania Department of Agriculture's efforts to implement and enforce the Dog Law, one of the nation's strongest laws to combat the abuse and mistreatment of dogs in commercial kennels; however, we have serious concern regarding the proposed addition of Section 28a.8(e). In the event that the Department of Agriculture promulgates this regulation, which in its current form is clearly contrary to law, the HSUS will consider all available remedies, including litigation, to ensure proper implementation of the Dog Law. Thank you for your consideration.

Sincerely,

Sarah Speed

Pennsylvania State Director

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From: Sarah Speed
To: Kaufman, Kim; Johnson, Leslie A. Lewis
Sent: Wed Aug 04 17:18:25 2010
Subject: Regulation 2-170

Attached please find comments regarding the Department of Agriculture Commercial Kennel Regulations.

Sincerely,

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