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August 13, 2010

Mr. Arthur Coccodrilli
Chairman
Independent Regulatory Review Commission
14th Floor, Harristown 2
333 Market Street
Harrisburg, PA 17101

RE: Commercial Kennel Canine Health Regulation

The following comments are offered by Versant Strategies both on behalf of our firm and on behalf of the Pennsylvania Professional Dog Breeders Association. Some of our comments reflect our firm's collective years of experience in the executive and legislative branches of government and our history and knowledge of the appropriate role of government in regulating businesses in the private sector.

At the outset we wish to convey our thoughts regarding some of the changes made by the Department of Agriculture to the proposed rulemaking. A number of the issues we commented about in the proposed rulemaking have been addressed, especially those related to the Department's attempts to exceed its authority provided in the Act 119 statute.

However, we hasten to point out that there remain in the final rulemaking several instances where, in our judgment, the Department proposes to adopt portions of the regulation, which continue to exceed its statutory authority.

Government Overreach

Based on the experience and impact of Act 119 of 2008, it is obvious that the legislation was hastily prepared and adopted without appropriate input of scientists and engineers to guide the development of workable and realistic legislation. In numerous instances the Department staff has stated that they recognize the shortcomings of the law but "the law is the law". Implementation of the statute to date has already resulted in the loss of nearly 70% of the licensed commercial kennels in Pennsylvania. The adoption of these regulations as currently written, again without sufficient input from animal scientists, will result in the loss of most, if not all, of the remaining commercial kennels.

It is important to note that the health of dogs is a very important issue and anyone in the business of raising dogs certainly knows that healthy dogs are one of the keys to economic success. What is disturbing to note is that the legislation and the regulations

focus on only 6% of the kennels that are raising or keeping dogs in the Commonwealth and which are expected to meet these very stringent and onerous standards.

A classic case of government overreach is found in Section 28a.4, Humidity Levels, where the use of a Heat Index is proposed to determine if temperatures exceed the limits established in the statute. We believe that this approach exceeds the Department's authority under the statute and presents requirements that will be impossible to achieve. For example, on days when the temperature exceeds 85 degrees and it is raining with the relative humidity nearing 100%, coupled with the new requirement of 30 CFM per dog of fresh air coming into the kennel from outside the kennel, achieving a Heat Index of 85 or lower will be impossible.

Further, the Department proposes to purchase monitors, which will be installed in the kennels and will be opened only by the inspector conducting a routine inspection. While on the surface such an effort to monitor what is taking place may seem to make sense to those who would attempt to close these important agricultural businesses, we submit that such an intrusion by government goes far beyond what is necessary and exceeds any normally accepted government regulation. We point out there is no similar intrusion in any other Department of Agriculture regulatory programs with which we are familiar.

For example, the Department is responsible for the regulation and inspection of eating and drinking establishments to protect human health. Standards for temperatures for cooking meats, deep frying, and dishwasher water are checked by the Department during routine inspections. However, there are no monitoring devices, to our knowledge, that are utilized by the Department to determine if the eating facility is meeting the standards between routine inspections. The same thing is true in milking parlors, the application of chemical pesticides, livestock sales barns, and other facilities regulated by the Department of Agriculture.

Similarly, the Department of Labor and Industry has standards adopted in regulations for nursing homes and day care facilities, which are licensed by the state. Even in these important areas of public health there are, to our knowledge, no attempts by the Commonwealth to install monitors to insure that all regulations are met all of the time.

We submit that this classic case of government overreach potentially opens the door to increased regulation of other aspects of the Commonwealth's number one industry, agriculture, and in numerous other regulatory programs administered by other state agencies. Reasonable regulation is necessary and appropriate and will be accepted by any regulated industry. This rulemaking, however, will not pass any acceptable "means" test, which determines "needs" and "appropriateness".

Another example of government overreach is the requirement in the proposed regulation in Section 28a2(b) that places an additional burden on the regulated industry to have a written certification from a professional engineer that the ventilation system meets all of the requirements in the regulation. We believe that this provision exceeds the Department's statutory authority. Further, this requirement ignores the fact that many

professionals in the area of heating and ventilation are certified to do that work but are not professional engineers. This requirement also places an additional economic burden on the kennel owner.

Finally, it is important to note that the Regulatory Analysis Form prepared by the Department of Agriculture indicates, on page 8 of that document, that approximately 45% of those commercial kennels still existing in Pennsylvania are required to be licensed by the United States Department of Agriculture (USDA). It is the USDA that should establish the standards that are applicable to all kennels to assure uniformity of regulation across state lines. Pennsylvania now has the most stringent law and regulations of any state and our standards exceed those of the USDA. If this regulation is approved, and the remaining commercial kennels in Pennsylvania go out of business as we predict, increased supplies of those puppies from other states will meet the public demand for puppies in Pennsylvania. The puppies will be coming from those states which have program standards that are less than or meet but do not exceed USDA standards.

Economic Impact

We believe that the economic impact of these regulations on the commercial kennels has been significantly underestimated. On pages 8, 18, 22, and in a cost summary on page 23 of the Regulatory Analysis Form, the Department of Agriculture provides its estimates of the cost of meeting these new standards. It is important to note that the estimates they have provided are less in most cases than those included in the proposed rulemaking and ignore the information provided by the industry from professionals in the business of constructing kennels. The Department justifies this discrepancy by stating “the final form regulation has reduced the cost of compliance”. We disagree with this assertion.

Many kennel owners invested significant sums of money in the last several years to bring their kennels into compliance with USDA and PDA requirements and the requirements included in Act 119 of 2008. The final rules and regulations will place a significant additional financial burden on the industry and will, if adopted, put commercial kennels out of business.

Finally, on page 32 of the Regulatory Review Form, the Department states “commercial kennels did have the opportunity to defray some of the costs associated with meeting standards imposed by the Act itself” by requesting a waiver as provided under the law. It is important to point out that this is not a permanent “defrayal” but rather a postponement or phasing in of those costs.

Ventilation and Humidity

In our comments under Government Overreach we address to some extent the proposed effort by the Department to monitor temperature and humidity by placing monitoring devices in each kennel. In addition to this effort, which will put our farms under closer scrutiny, the proposed regulation ignores other scientifically based data provided by the industry and animal scientists during the public comment period. The industry and animal

scientists provided ample justification on the need for the whelping pens to be maintained at a higher temperature than the other areas in the kennel. Newborn puppies require additional heating during the first few weeks after birth. The ventilation requirement contained in this regulation will expose newborn puppies to lower temperatures and extreme drafts thereby increasing the risk of disease and death.

In our judgment the Department ignored this important aspect of breeding kennels by requiring all dogs, regardless of age, to meet the same requirements for temperature and humidity. This jeopardizes the health of newborn puppies and thus the economic livelihood of this important industry.

Department Exceeds Statutory Authority

As previously indicated, we believe that the Department has exceeded its regulatory authority in a number of instances.

In addition to those previously noted, on July 14, 2010 the Department recalled the final regulation and resubmitted it with some additional changes on that same date. The changes made by the Department were an attempt to address a weakness in the statute as it relates to kennel flooring requirements for nursing mothers and their newborn puppies. While this issue does require attention, we believe that the statute does not authorize the Department to address the issue in this manner. We believe that the Department has exceeded its regulatory authority in this instance.

On July 16, 2010 the Department issued a Statement of Policy regarding Exercise for Nursing Mothers. In this instance it appears that the Department is attempting to address another issue on which Act 119 is silent. We submit that the Department has here again exceeded its authority by attempting to address an issue, which was not adequately addressed in the Act, by issuing a Statement of Policy.

Summary/Recommendations

Summary - We believe that the Department has: 1) Exceeded its authority under Act 119 in a number of instances; 2) Seriously underestimated the costs of compliance; 3) Attempted to establish by policy something that should be done by statute; and, 4) Embarked on an effort which can only be described as government overreach and which will ultimately place state government in a position that it will find untenable and unacceptable to any regulated industry.

Recommendations - We recommend that the final rules and regulations be returned to the Department with a letter of transmittal that: 1) requests that the Department initiate a request to the legislature to open Act 119 and provide needed amendments which will address some of the shortcomings in the current statute; 2) directs the Department to revise the regulations to address only those issues for which the authority is given to the agency by the statute until the statute is amended; 3) reevaluates the economic impact of

the rulemaking to assure that it reflects reality; and, 4) refrains from putting state government in a position that will ultimately cause all regulated industries to reject any overzealous regulatory program.

We appreciate the opportunity to offer these comments on the final rulemaking.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Walt Peechatka". The signature is written in a cursive, slightly slanted style.

Walt Peechatka
Senior Consultant

cc: Hon. Russell Redding
Members, House Agriculture & Rural Affairs Committee
Members, Senate Agriculture & Rural Affairs Committee