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Rec'd
8/17/10
August 17, 2010
9:54

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

**Re: Revised 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 revised comments regarding the amended final-form regulation proposed by the Department of Agriculture (I.D. No. 2-170, IRRC No. 2785).

The 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).

Specifically, the HSUS fully supports the portions of the regulations that provide standards for proper ventilation, humidity levels, ammonia levels and adequate lighting. These provisions address critical issues related to the health and well-being of dogs housed in Pennsylvania's kennels. Clear, enforceable regulations are critical to ensuring proper care of dogs.

Ventilation and humidity controls do more than provide a more comfortable environment for dogs. A well-ventilated kennel helps reduce the spread of disease.

Controlling ammonia levels ensures that dogs will not be subjected to the effects such as chronic discomfort of the lungs and eyes that can occur when ammonia levels build up.

Ensuring properly working equipment to measure air quality levels is critical and we commend the Department for including this important aspect in the regulations.

Adequate lighting and cycles of lighting provide a more natural environment for dogs. Too often, animals are housed in buildings that do not allow normal light cycles to be experienced and relegate dogs to living in near total darkness. We again commend the Department for including this critical piece and providing clear guidance for licensees.

However, the recent amendment (Section 28a.8(e)) regarding flooring for nursing female dogs is contrary to statutory authority and does not reflect the clear language, nor the intent, of the Dog Law as it relates to flooring for dogs over the age of 12 weeks

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)) 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 in the last week of pregnancy through the weaning of their puppies, which may be up to 16 weeks per 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.

Although the statutory language is already abundantly clear and prohibits nursing mothers from being housed on any amount of wire strand flooring, including when they are nursing puppies, the legislature may wish to act to further specify that very young puppies must be housed on solid or slatted flooring for their protection. Such an act would ensure that the original intent of the legislature, and the citizens of Pennsylvania, is carried out; namely that dogs not be housed on wire flooring.

Additionally, the proposed regulation could be amended further as stated below.

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 bulk of the proposed regulations put forth by the Department do much to help provide a safer and healthier environment for dogs kept in commercial kennels. 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 its current form this portion of the proposed regulation is clearly contrary to law. In the future, 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
Humane Society of the United States

2785

Rec'd
8/17/10
9:49

From: Stephanie Shain [sshain@humanesociety.org]
Sent: Tuesday, August 17, 2010 9:49 AM
To: IRRC
Subject: Revised comments on Amendment to Final Form Rulemaking (I.D. No. 2-170, IRRD No. 2785; Commercial Kennel Canine Health Regulation)
Attachments: PA dog law regulation comments REVISED.docx

Good morning,

Attached please find revised comments on the Amendment to Final Form Rulemaking (I.D. No. 2-170, IRRD No. 2785; Commercial Kennel Canine Health Regulation) from the Humane Society of the United States.

Thank you,
Stephanie Shain

Stephanie Shain
Senior Director, Puppy Mills Campaign
sshain@humanesociety.org
t 301.258.3121 f 301.721.6414

The Humane Society of the United States
2100 L Street NW Washington, DC 20037
humanesociety.org

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