



COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
RUSSELL C. REDDING

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IRRC

2010 AUG 18 P 3:38

2785

August 18, 2010

Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg PA 17120

Re: NOTICE OF FINAL RULEMAKING
Department of Agriculture
7 Pa. Code Chapter 28a.
Commercial Kennel Canine Health Regulation
#2-170

Dear Commissioners and Staff:

In an effort to prepare you as fully as possible to consider for approval the above-referenced regulation on Thursday, August 19, 2010, the Department of Agriculture (PDA) is submitting additional materials for your consideration. These materials have been generated in response to public and legislative comments submitted on the final form regulation over the last few days.

We hope the responses are of assistance in understanding the regulation more fully. We have prepared three separate attachments on the following topics:

- (1) Flooring in Puppy Enclosures under Section 28a.8(e) of the regulation;
- (2) Comments from Senator Mike Brubaker dated August 16, 2010; and
- (3) Compilation of Responses to Frequently-made Public Comments

We sincerely thank the Commission and its staff for the dedication and hard work expended in the last few months on this regulation. We appreciate the task with which you are confronted.

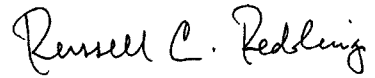
The subject matter of the regulation is a difficult and emotional one at times for interested parties. The fine details of ventilation, lighting and flooring in commercial kennels were difficult subjects for those involved in the legislative process of amending the Dog Law in 2008. Ultimately, those fine details were specifically left to be resolved by the promulgation of these regulations.

One of the primary reasons for this difficulty then, and now, is that much of this subject matter is simply uncharted territory, both for the regulated community, the animal health/veterinary profession and regulatory bodies. Pennsylvania is leading the way nationally in tackling some of these issues at the level of regulatory detail articulated in these regulations.

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Thank you again for your dedication and attention to these regulations.

Sincerely,

A handwritten signature in cursive script that reads "Russell C. Redding".

Russell C. Redding, Secretary

Enclosures

cc: Honorable Michael K. Hanna (w/encls., via e-mail only)
Honorable John A. Maher (w/encls., via e-mail only)
Honorable Michael W. Brubaker (w/encls., via e-mail only)
Honorable Michael A. O'Pake (w/encls., via e-mail only)

LIST OF ATTACHMENTS

1. ATTACHMENT #1:

Response to Comments on Flooring in Puppy Enclosures

This response addresses the particular issue under Section 28a.8(e) of flooring in puppy enclosures where mothers are temporarily required to be housed.

2. ATTACHMENT #2:

Responses to Comments of Senator Mike Brubaker, Chairman, Senate Agriculture and Rural Affairs Committee, dated August 16, 2010

These Comments are organized by subject matter, adapted from the same subject matter headings employed by Senator Brubaker. They are:

- Heat Index
- Humidity
- Volume of air movement over dogs
- Moving air stream
- Installation of measuring devices
- Cost of Compliance

3. ATTACHMENT #3:

Compilation of Responses to Frequently-made Public Comments

These comments are simply identified by the subject of the comment via a brief declarative statement of the frequently-made comment. This is followed by a response. Individual comments are not attributed to particular individuals or organizations but instead addressed generally due to the volume of comments and the fact that most of these comments were recurring in one form or another across many authors.

ATTACHMENT #1

Response to Comments on Flooring in Puppy¹ Enclosures

The reasons for Section 28a.8(e) have already been fully addressed on pages 8 and 25 of the Preamble to the Final Form Regulation. Despite this, Section 28a.8(e) has been the subject of many comments claiming, in one form or another, that this provision exceeds the statutory authority for these regulations.

The general theory advanced is that this provision permits mother dogs to be potentially² "exposed" to metal strand flooring while they are mandatorily, but temporarily, housed in enclosures designed and built for housing puppies. This potential temporary "exposure" is alleged to violate 3 P.S. § 459-207(i)(3)³ of the Dog Law.

- It is undisputed that this potential exposure to metal strand flooring would only ever entail 50% of the flooring in any such puppy enclosure. Section 28a.8(e) only permits such flooring in 50% of a puppy enclosure. Therefore, under Section 28a.8(e) no mother dog could ever be temporarily housed where flooring fully compliant with all aspects of subsection 207(i)(3) of the Dog Law is not available for that dog's exclusive use.

As noted in footnote 1 below, the Dog Law sets up a regulatory scheme establishing two kinds of primary enclosures in commercial kennels.

- **Puppy enclosures:** There are a general set of requirements for primary enclosures for all dogs under 3 P.S. § 459-207(h). Subsection 207(h) also requires that puppies never be housed with adult dogs -- except the nursing mother who is mandatorily required to be housed with them while nursing. Puppy enclosures are only subject to the requirements set forth in subsection 207(h).
- **Dogs over 12 weeks of age:** There are an entire supplemental and, in some limited instances, different set of requirements for primary enclosures for dogs over 12 weeks of age in 3 P.S. § 459-207(i).

¹ The Dog Law sets up general overall requirements for primary enclosures for "all dogs" in commercial kennels. 3 P.S. § 459-207(h). The Dog law then goes on to list a set of supplemental and sometimes different requirements for a subset of those enclosures consisting of primary enclosures for dogs over 12 weeks of age. 3 P.S. § 459-207(i). For purposes herein, primary enclosures not containing dogs over 12 weeks of age and therefore not subject to subsection 207(i) of the law are referred to as "puppy enclosures." Other terms used include "whelping pen," but that terminology will not be utilized herein.

² This is a potential exposure because no commercial kennel is ever required to use metal strand flooring for puppy enclosures. They may choose to build puppy enclosures with many other flooring materials.

³ Subsection 207(i)(3) of the Dog Law states an exception to the general rule that metal strand flooring is a fully permitted flooring option in commercial kennels. This exception is applicable to a subset of all primary enclosures defined as primary enclosures for dogs over 12 weeks of age. The exception states: "The floor of the primary enclosure shall. . . not be metal strand. . ." 3 P.S. § 207(i)(3).

The prohibition of metal strand flooring in subsection 207(i)(3) is one such differing requirement between the two types of primary enclosures. This prohibition is not only the exception to the broader general rules for "all dogs" in commercial kennels, but is also the exception to the general rule for primary enclosures in all other types of kennels contemplated by the Dog Law.

- There are approximately 2117 licensed kennels in Pennsylvania, all of whom are permitted by the general rules in the Dog Law and attendant regulations at 7 Pa.Code § 21.24(d)⁴ to use metal strand flooring.
- There are presently 111 commercial kennels licensed in Pennsylvania, or approximately 5% of all licensed kennels.
- The exception prohibiting metal strand flooring for primary enclosures for dogs over 12 weeks of age applies only to a portion of the primary enclosures in this approximate 5% of all kennels, i.e. those primary enclosures for dogs over 12 weeks of age in commercial kennels.
- In drafting and enacting the 2008 amendments to the Dog Law, it was, and remains, a well-established fact that metal strand flooring is and remains a permissible flooring option in the vast majority of all kennels licensed in Pennsylvania. The Pennsylvania Legislature consciously chose not to change that fact in the 2008 amendments the Dog Law and chose to simply prohibit that type of flooring material as an option in one limited subset of primary enclosures.

⁴ The permitted use of metal strand flooring in non-commercial kennels and in puppy enclosures in commercial kennels is subject to extensive requirements as follows:

From the Dog Law: at 3 P.S. §459-

- Structurally sound - §207(h)(1)
- Kept in good repair - §207(h)(1)
- No sharp points or edges that could injure the dogs - §207(h)(2)(i)
- Maintained in manner to protect dogs from injury - §207(h)(2)(i1)
- Enables the dogs to remain dry and clean - §207(h)(2)(v)
- Enables all surfaces in contact with dogs (inc. flooring) to be readily cleaned and sanitized or be replaceable when worn or soiled - §207(h)(2)(ix)
- Constructed in a manner that protects the dogs' feet and legs from injury - §207(h)(2)(x)
- Shall not permit feet of a dog to pass through any opening - §207(h)(2)(x)

From the previously existing Dog Law Regulations: at 7 Pa. Code §

- Metal strand flooring must be coated with a vinyl type coating §21.24(d)(1)
- Coated metal strand flooring shall be kept in good repair - §21.24(d)(2)
- Coated metal strand flooring shall be made of mesh construction - §21.24(d)(3)
- Mesh construction that does not allow the dog's feet to pass through any opening in the floor - §21.24(d)(3)
- Mesh construction that does not otherwise cause injury to the dog - §21.24(d)(3)
- Coated metal strand flooring shall be constructed of sufficient diameter (gauge) to provide a completely rigid floor area sufficient to support the weight of the dogs - §21.24(d)(4)
- Coated metal strand floor shall not bend or sag from the weight of the dogs - §21.24(d)(4)

It is significant to acknowledge that in enacting this exception/prohibition for one particular otherwise-authorized flooring material,⁵ the Pennsylvania Legislature made a knowing and conscious legislative decision not to extend that prohibition to puppy enclosures.

- The prohibition was made only applicable to primary enclosures for dogs over 12 weeks of age.
- Accordingly, the Pennsylvania Legislature made a choice in the statute to continue to permit metal strand flooring as a specifically-allowed flooring option in puppy enclosures in commercial kennels.
- If the Legislature had wished to end the use of metal strand flooring completely in puppy enclosures, it easily could have done so by including the prohibition in subsection 207(h) instead of 207(i). It made a decision not to do so.
- That is the Legislature's choice and cannot be un-done by a regulation, or any other departmental action.
- Authors of comments who believe that either the department should enforce or interpret the law differently, or revise Section 28a.8(e), to prohibit metal strand flooring in all puppy enclosures because a nursing mother is temporarily present while giving birth and nursing, are seeking to have the Department reverse by regulation that which the Pennsylvania Legislature has already decided by statute.
- Another way to phrase the fallacy in many comments relevant to Section 28a.8(e) is that the exception cannot swallow the rule. Those who urge that metal strand flooring cannot be permitted in a puppy enclosure because of the mandatory temporary presence of the nursing mother, are advocating that the exception/prohibition in subsection 207(i)(3) on metal strand flooring in primary enclosures for dogs over 12 weeks of age should swallow the general rule for all dogs in commercial kennels in subsection 207(h).
- The effective result of the position urged by the aforementioned comments would completely prohibit metal strand flooring in puppy enclosures -- because a nursing mother is always temporarily required to be present by statute, i.e. when the puppies are born and still nursing.

Comments which urge the Department to negate the decision made by the Pennsylvania Legislature by inserting subsection 207(i)(3) into subsection 207(h) and banning metal strand flooring entirely in commercial kennels urge a course of action that is not within the Department's regulatory authority.

The Legislative choice made by applying the prohibition of metal strand flooring to primary enclosures for dogs over 12 weeks of age only cannot be overridden by these regulations and be still consistent with the statute.

⁵ 7 Pa. Code§ 21.24(d) states "A dog may be sheltered in a primary enclosure having metal strand flooring. . . ." and then goes on to recite the standards in the preceding footnote.

While it can be determined exactly what choice the Pennsylvania Legislature made with regard to metal strand flooring continuing to be a permissible option in puppy enclosures, it cannot be determined at all whether the Legislature contemplated any impact whatsoever on the flooring of a puppy enclosure by the mandatory temporary presence of the nursing mother.

The job of the promulgating agency is to act upon what can be determined about legislative intent, not guess at what cannot be determined. Yet despite this, it is urged by many comments that the statute is clear that metal strand flooring cannot be used in a puppy enclosure because of the temporary required presence of the mother. That result is not only far from clear, the evidence is to the contrary as recited above.

Another way to view the issue is by closely examining the claims being made about whether Section 28a.8(e) exceeds statutory authority, versus how the alternatives urged exceed statutory authority.

Section 28a.8(e):

- Does not violate deliberate choice made by legislature to allow puppy enclosures to continue to use metal strand flooring -- complies with subsection 207(i)'s directive that prohibition only applies to enclosures for dogs over 12 weeks of age.
- 50% can still be metal strand but 50% must comply with the standards for dogs over 12 weeks of age -- accommodates subsection 207(i)(3)'s intent to have an adult dog on material other than metal strand by never forcing a nursing mother into an enclosure that is entirely metal strand.
- Since the legislative intent cannot be clearly determined regarding what impact, if any, the presence of the nursing mother in a puppy enclosure would have on flooring requirements, the Department has not guessed at an intent and has forged a regulatory compromise that honors all aspects of the statute.

Interpretation that metal strand flooring is prohibited in all puppy enclosures due to the mandatory temporary presence of the mother:

- Violates the clear legislative choice not to ban metal strand entirely in commercial kennels.
- Speculates at a legislative intent that is not clear – there is no evidence that the Legislature even contemplated an impact on flooring in a puppy enclosure by the temporary presence of the mother.

ATTACHMENT #2

**Responses to Comments of Senator Mike Brubaker, Chairman, Senate
Agriculture and Rural Affairs Committee, dated August 16, 2010**

- Heat Index - The heat index is not based solely on human heat index values. The Department, as evidenced by the comment and response document and the attachments thereto, based the values on charts and data developed for cattle, equine, swine and fowl.

The Department with the assistance of the Canine Health Board (CHB), especially Dr. Simms and Dr. Overall, reviewed Heat Index charts for the various animals. The Heat Index charts for all those animals indicate that, at a Heat Index of 85, they are just in or just outside the caution zones for heat stress and heat stroke. Therefore, although Heat Index values generally are based on how humans feel at given temperature and humidity levels, they can be and are applied to other animals.

There are no specific Heat Index charts available for canines. Unlike humans, cattle and horses, dogs do not have sweat glands and only perspire through panting (evaporation of water off the tongue) and slight evaporation through the pads on their feet. In other words, they cool less efficiently than humans, cattle and horses. Therefore, as these requirements are implemented the Department may find that the Heat Index of 85 will need to be lowered because dogs cool their bodies less efficiently than humans and some other animals.

However, based on the scientific data and Heat Index values available, and the constraints of the Dog Law, the CHB and the Department felt that a Heat Index of 85 was the most appropriate and only standard it could establish at this time.

Establishing no standard is not an option, as the Dog Law, at section 207(h)(7) requires, "The relative humidity must be maintained at a level that ensures the health and well-being of the dogs housed therein. The appropriate...humidity...ranges shall be determined by the Canine Health Board." The Heat Index establishes the appropriate ranges for humidity when the temperatures inside the kennel exceed 85 degrees Fahrenheit.

The heat index values have to apply to all dogs in the kennel housing facility in order to carry out the Department's statutory duty. The veterinarians consulted by the Department with regard to the health of new born puppies with nursing mothers explained that a Heat Index or temperature of 85 will not be detrimental to the new born puppies. Any additional heat necessary will be provided by the nursing mother and can be assisted by adding additional bedding to the primary enclosure or whelping box. There is no need to jeopardize the health of the nursing mother by exposing her to heat index values over 85.

Based upon the consultations with veterinarians, and from a practical standpoint, the Department believes that reduced levels of humidity are, at the very least, much less detrimental than the lethal effect of high temperature and high humidity. With regard to reduced humidity levels when

temperatures in the kennel exceed 85 degrees Fahrenheit, the Department and the CHB, under the constraints of the statute (which, unlike the federal statute, does not allow for mandated temperature reduction) utilized the best controls it had available to protect dogs against heat stress, heat stroke and death.

Based on input from veterinarians, the Department believes the lower humidity levels required when temperatures rise above 85 degree Fahrenheit are not detrimental to the health of the dogs over the short period of time they may be utilized and are the only alternative to allowing humidity and temperature levels to rise to a level that scientific studies prove are lethal to dogs. The FAA study cited in the comment and response document is one such study. In addition, the kennel owner has a choice to utilize methods, including the natural cooling at night, some of the auxiliary ventilation techniques available or air conditioning, to reduce the temperature back down to 85 degrees Fahrenheit. At that point humidity levels must be maintained at the 30-70% range espoused by the animal scientists for temperatures of 85 degrees Fahrenheit and lower.

- Humidity - To allow temperature and humidity levels inside the kennel to be predicated on the temperatures outside the kennel is not the intent of the statute. The statute requires the Canine Health Board and Department to maintain relative humidity in kennel housing facilities "...at a level that ensures the health and well-being of the dogs housed therein. The appropriate...humidity...ranges shall be determined by the Canine Health Board." (3 P.S. § 459-207(h)(7)) A hot and humid day is exactly the type of day when canine health and welfare issues are at their peak and conditions inside the kennel housing facility must be regulated in order to provide for the health and safety of the dogs. The Dog Law does not set forth any exception to the duty imposed on the Canine Health Board and the Department on hot and humid days. A regulation cannot address only conditions which are ideal for the animals to be protected. Regulating humidity in a manner that protects the health and welfare of dogs would be abrogated by creating an exception on days when outside conditions put the dogs' health and welfare most at risk. Extreme conditions are not a reason to promote an exception to the standard. The Canine Health Board and the Department were charged with creating standards that accounted for canine health and welfare at all times, not just on days where such standard are easier to attain.
- Volume of air movement over dogs - Cubic Feet per Minute (CFM) is an overall volume rate of air flow in the kennel. The kennel will necessarily have primary enclosures for the dogs housed in the kennel. The regulation therefore addresses those primary enclosures, but it does not require that the air flow rate be adjusted for the number of dogs in each primary enclosure. It is the overall CFM rate based on the number of dogs housed in an area of the kennel or kennel housing facility. The Department has explained the CFM requirements apply to the overall number of dogs in any part of the kennel or kennel housing facility and the intent is not to require individual duct work for every primary enclosure.
- Moving air stream - Cubic Feet per Minute (CFM) per dog is an air *volume* circulation standard, not a *velocity* standard. According to the engineers 100 CFM per dog will not create a draft in the kennel housing facility or the

primary enclosures. The CFM rate is approximately that which is required in an auditorium or school assembly area. There is no discernable draft in such situations. The CFM rate for different situations takes into account the density of the animals or people confined in that area. Circulation of air at the height of the dog is necessary to ensure a system that provides proper ventilation at the level of the dogs and assures proper control of humidity, ammonia (a heavy gas that will be present at or near the level of the dogs) and disease. Circulation of air elsewhere, such as near the ceiling of a kennel, would not provide appropriate conditions for the dogs housed in the kennel facility.

Under the requirements established by the Dog Law, the existing Dog Law regulations and the Federal Code of Regulations for federally licensed kennels, drafts must be minimized. However, it would make no sense to eliminate all air flow. The Dog Law, at section 207(h)(7) states, "Housing facilities for dogs must be sufficiently ventilated at all times...**to minimize odors, drafts,** ammonia levels and to prevent moisture condensation." The Department's regulations at §21.26 state: "Indoor housing facilities for dogs shall be sufficiently ventilated when dogs are present to **minimize drafts**...Ventilation shall be provided by means of windows, doors, vents or air conditioning..." The Federal Code of Regulations for USDA-licensed kennels states: "Indoor...facilities for dogs...must be sufficiently ventilated...to provide for their health and well-being, and **to minimize odors, drafts,** ammonia levels, and moisture condensation (9 CFR, Sections 3.2(b) and 3.3(b)). Ventilation must be provided by windows, vents, fans or air conditioning." These standards require ventilation and contemplate air movement created by windows, doors, vents, fans or air conditioning.

- Installation of measuring devices - Constitutional issues are to be within the authority of the Office of Attorney General to review. The Independent Regulatory Review Commission is not in a position to decide or disapprove a regulation based on such allegations. However, commercial kennels are part of a heavily regulated industry and different constitutional analysis exists than that applicable to a personal automobile. This is more analogous to a black box required in a commercial airplane or train to record certain operational data.

The Department nevertheless will address some constitutional issues generally.

First, the Department's right to do warrantless searches of kennels has been litigated, and was affirmed on 9/11/09 in an opinion authored by Judge Sylvia Rambo of the US District Court, Middle District of PA in the case of Professional Dog Breeders Advisory Council v. Wolff, et al. The Court held that "dog breeding is a pervasively regulated industry and has been the subject of state and federal regulation since at least 1976 and 1982 respectively...Furthermore, the kennel industry has been subject to random inspections and searches since at least 1982." (Opinion p. 17). The Court went on to state that warrantless inspection of a pervasively regulated activity survives 4th Amendment constitutional scrutiny and that warrantless unannounced inspections of kennels by state dog wardens are constitutional. The Department can thus conduct a warrantless search and, during that search, can utilize devices to record humidity and temperature. There is no reasonable expectation of privacy in the kennel building. The Department

may monitor for potential violations of regulatory criteria. In addition, other PDA regulations have similar requirements. For example, the Milk Sanitation Law regulations require that data recording thermometers be installed on farm bulk milk tanks and batch pasteurizers. DEP also has regulations requiring installation of monitoring devices at wastewater and municipal water supply facilities, as well as and radon monitoring devices.

Second, the right against self-incrimination is the right against being compelled to *speak* and thereby incriminate oneself. The information collected by the monitors is a record of compliance with the regulatory standards for humidity and temperature. The Department has the authority and duty to regulate and require such compliance. The Department could require written records on Department-supplied forms be kept on an hourly basis. The regulation at issue chose a less burdensome manner of assuring compliance.

Compliance with regulatory standards is required at all times, not just while a physical inspection is being conducted by the Department. The wall-mounted monitor is no different than the hand-held monitors that will be used by State dog wardens to monitor compliance during inspections. These raise no issue of self-incrimination. The monitors evidence both compliance and non-compliance.

Ample authority is available on any constitutional questions and will be furnished to the Attorney General while reviewing the regulation on such purely legal questions, if requested.

- Cost of compliance – The Department is under a statutory duty to establish regulatory criteria that account for the health and welfare of dogs, by establishing ventilation, auxiliary ventilation, humidity, ammonia, lighting and flooring standards. The Department in drafting this final-form regulation has attempted to carry out that duty and has consulted experts in the fields of engineering, architecture, animal science and veterinary medicine, as well as, researching literature related to these areas of regulation, which pertain to canine health (where available) and the health of other animals. The Department has set forth very conservative levels of humidity control (heat index values) and has made significant amendments to the ventilation, auxiliary ventilation, lighting and flooring provisions in response to comments submitted on the proposed regulations. These amendments in most cases reduce the cost and burden on the regulated community and provide for objective and attainable standards. The final-form regulation carries out the duties imposed by the statute in a manner that is least intrusive and costly to the regulated community.

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ATTACHMENT #3

Compilation of Responses to Frequently-made Public Comments

1. Reject the Department regulation, consider Canine Health Board proposed regulations instead

Response:

Section 221(g) of Dog Law establishes the authority and duty of the Canine Health Board (Board) and the Department. The Board is to issue Temporary Guidelines the Department is then given the authority and duty to promulgate the regulations. That section reads as follows:

(g) Temporary guidelines and regulations.--The board shall issue temporary guidelines under this section within 45 days of their first meeting, which shall take place within 30 days of the effective date of this section. The temporary guidelines shall be published in the Pennsylvania Bulletin. The department shall promulgate the temporary guidelines as a regulation concurrently with publication in the Pennsylvania Bulletin.

This section, as well as, section 902 of the Dog Law, makes it clear that only the Department has the authority to promulgate regulations under the Dog Law. Once the Department promulgates a regulation it goes through the process prescribed by the Regulatory Review Act for all agencies, which includes review of public comments and revision of the proposed regulation based on comments to arrive at a final-form regulation. The Department took that duty very seriously as can be seen in the detailed comment and response document. In addition, the Department did engage Board members while drafting the final-form regulation, soliciting from them both information and responses to comments submitted. This input was helpful in drafting and questioning various experts consulted by the Department.

IRRC, Legislative and Attorney General comments were critical of the proposed regulations – thus changes were required and made.

The issue of the promulgation process followed by the Department was also one issue before the court in the case of Professional Dog Breeders Advisory Council v. [former Secretary of Agriculture Dennis C] Wolff, affirmed on 9/11/09 in an opinion authored by Judge Sylvia Rambo of the US District Court, Middle District of PA. In that case the Court expressed its opinion that the language of the Act was not specific enough and therefore showed no intent to abrogate the Commonwealth Documents Law and the Regulatory Review Act. The Department therefore had to follow the regulatory process.

2. The final-form regulation differs significantly from the proposed regulation, so process should start over:

Response: Once the Department promulgates a proposed regulation it goes through the process prescribed by Regulatory Review Act for all agencies, which includes review of public comments and revision of the proposed regulation based on comments to arrive at a final-form regulation. So long as the final-form regulation covers the same general topics set forth in the proposed regulation (does not expand its scope) the final-form regulation is proper. Nothing in the Regulatory Review Act requires that a regulation that has been substantially changed from the proposed to the final-form stage start through the entire process again.

3. Requiring Carbon Monoxide (CO) be monitored and filtration of air exceeds authority

Response: First, the Department looked very closely at the comments of IRRC and the legislature related to statutory authority issues they had with the proposed regulation. The Department has addressed those issues in the final-form regulation. The final-form regulation is confined to the specific areas of the law for which the Canine Health Board was charged to draft Guidelines and the Department to promulgate regulations: 1. Ventilation, within which CO monitoring and filters as necessary for proper ventilation are properly addressed; 2. Auxiliary Ventilation; 3. Ammonia Levels; 4. Lighting; and 5. Flooring for adult dogs.

CO monitoring specifically: The definitions of ventilation includes carbon monoxide. Expelling carbon monoxide, a pathogen, and replenishing oxygen is part of ventilation. Carbon monoxide is an odorless and deadly gas. The Department has the duty and authority to protect the health, safety and welfare of dogs in kennels and to set regulatory standards for ventilation. Carrying out this duty requires monitoring for carbon monoxide. The Department did so with the lightest touch, requiring inexpensive monitors that can be bought at any home supply store and requiring them only in areas of the kennel that utilize carbon fuel (coal, diesel, gasoline, natural gas, propane) for heating or cooling. These monitors also protect human health.

4. Requiring mechanical ventilation and 24/7 operation of ventilation system not necessary. Performance standards better than specific equipment requirements – non-mechanical ventilation should be permitted

Response: According to the engineers consulted, there is no other manner by which the proper ventilation standards can be assured. Natural ventilation is unreliable and cannot assure proper circulation of air in the kennel. It would lead to the equalization of pressure between the inside and outside air, then inverse convection will occur, resulting in stagnant air and no ventilation.

The engineers and architects consulted stated that a consistent CFM rate of 100 is necessary to assure proper ventilation standards in commercial kennels, and cannot be achieved on a consistent basis without a mechanical ventilation system. With no mechanical system to circulate air in a kennel, there is risk of: 1. Inverse convection when inside and outside temperatures and pressures equalize; 2. Stale and stagnant air; 3. Inability to assure a uniform or adequate circulation of air throughout the kennel facility no matter how you build or locate it, due to wind direction, walls, partitions etc. These experts could identify no other technology that would achieve the appropriate ventilation rates. If new technology becomes available that has this capability, the Department can amend the regulation to add it. Until then, a mechanical ventilation system must be utilized to meet the standards of the regulation.

5. Engineer certification – can't require engineer to learn the Dog Law, difficult and expensive to get certification

Response: The Department has been assured by both engineers consulted for this regulation that interpretation of statutes, regulations and building codes are exactly what engineers do on a daily basis. They cannot design a building or facility without knowing the applicable mechanical, federal, state and local codes and regulations.

They routinely certify their designs and structures to meet the applicable codes and regulations in place. Both engineers consulted also indicated that there are enough PA-licensed professional engineers to carry out the certification process. There are currently 111 licensed commercial kennels in PA, and there are 32,406 licensed Professional Engineers in Pennsylvania.

6. 100 CFM per dog – noticeable air flow, goes against Dog Law requirements for draft protection

Response: Cubic Feet per Minute (CFM) per dog is an air *volume* circulation standard, not a *velocity* standard. According to the engineers 100 CFM per dog will not create a draft in the kennel housing facility or the primary enclosures. The CFM rate is approximately that which is required in an auditorium or school assembly area. Common residential bathroom fans create 80 CFM of air circulation and the CFM office buildings is usually 200 CFM and higher. The CFM rate necessary for different facilities, rooms and buildings takes into account the density of the animals or people confined in that area. Circulation of air at the height of the dog is necessary to ensure a system that provides proper ventilation at the level of the dogs and helps to control humidity, ammonia (a heavy gas that will be present at or near the level of the dogs) and disease. Circulation of air elsewhere, such as near the ceiling of a kennel, would not provide appropriate conditions for the dogs housed in the kennel facility.

Also, with regard to the requirements established by the Dog Law, the Dog Law regulations and the Federal Code of Regulations, drafts must be minimized, not completely eliminated. It would make no sense to eliminate all air flow. The Dog Law, at section 207(h)(7) states, "Housing facilities for dogs must be sufficiently ventilated at all times...**to minimize odors, drafts, ammonia levels** and to prevent moisture condensation." The Department's regulations at §21.26 state: "Indoor housing facilities for dogs shall be sufficiently ventilated when dogs are present to **minimize drafts**...Ventilation shall be provided by means of windows, doors, vents or air conditioning..." The Federal Code of Regulations for USDA-licensed kennels states: "Indoor...facilities for dogs...must be sufficiently ventilated...to provide for their health and well-being, and **to minimize odors, drafts, ammonia levels, and moisture condensation** (9 CFR, Sections 3.2(b) and 3.3(b)) . Ventilation must be provided by windows, vents, fans or air conditioning." These standards require ventilation and contemplate air movement created by windows, doors, vents, fans or air conditioning.

7. The Cubic Feet Per Minute per Dog standard should be based on the size and weight of the dogs in each kennel.

Response: While this may be the most objective standard by which the industry could be regulated it would be an overly burdensome and onerous approach and would make enforcement of the regulation and design of the kennel ventilation system nearly impossible. Kennels do not breed and whelp one type or size of dog and dog numbers and weights are constantly changing as new puppies are born and sold, new breeds are brought in to breed and sell, adult dogs are sold and so forth. The kennel owner would have to continually calculate the size and weights of the dogs in the kennel on any day in order to assure he is providing the appropriate CFM rate for that breed and size of dog and the overall numbers and weights of dogs in the kennel. The Department, in order to enforce would have to weight each dog in the kennel on the day of the inspection (which it may or may not have the statutory

authority to do) and then calculate whether the CFM rate on that day, with that number, size and weight of dogs, meets the regulatory standard. In addition, engineers would be placed in a nearly impossible situation to design and certify a system that would meet such standards. Given those issues, discussions with Dr. Kephart about similar suggestions in his comments and assurances from the engineers that a 100 CFM per dog standard was an appropriate overall standard to assure proper ventilation, the Department chose the less onerous and more readily enforceable over all standard of 100 CFM per dog.

8. Department should conduct research in order to develop standards

Response: This commentator points out that there is very little actual canine research. The Department did find the research there was related to the condition of dogs in kennels and utilized that to set forth the Humidity provisions in the final-form regulation. Ventilation standards are based on standards currently being utilized in designs – by Learned Design Corporation – for breeding kennels, boarding kennels and shelter kennels. The Board and the Department were tasked with the duty to promulgate regulations setting standards for ventilation, auxiliary ventilation, humidity, ammonia, lighting and flooring. In so doing, the Board and the Department did extensive research and consulted with experts in the fields of engineering, architecture, animal science and veterinary medicine. Although the standards may not be perfect, they are based on the best information and expertise available at this time. With regard to conducting research in these kennels, the Department has no statutory authority to be able to conduct such research. The Department would welcome any private research that could be conducted and if that research provides information that would require changes to the standards going forward, the Department, as with any regulation, will amend the standards. The standards in this regulation are based on the best information and expertise available to the Department at this time.

9. The regulation requires 30% fresh air – should allow 100% re-circulated air – rural pollutants

Response: This is inconsistent with comments above that seek and espouse the use of natural ventilation. In addition, the regulation sets a minimum (not maximum) standard for “fresh air” flow. The regulated community commented that 100% fresh air, as was originally proposed by the veterinarians on the Canine Health Board (Board), would be a difficult and expensive standard, and the engineers and architects consulted agreed that a system moving 100% fresh air would be too expensive to operate in winter. It was the strong opinion of the Board and Mr. Scott Learned an engineer that designs and builds kennels across the country (including in Pennsylvania) that some fresh air is needed for the health, safety and welfare of the dogs in kennel housing facilities.

10. Performance standards better than specific equipment requirements such as filters.

Response: The charge of the Canine Health Board and Department was to develop specific standards. Specific equipment is not prescribed for the ventilation system. The filters are limited in only one way – they must have a minimum efficiency reporting value (MERV) of at least 8 – MERV is a performance standard.

11. Kennel veterinarian or Department notified of ventilation failure – better to require dogs be removed

Response: The kennel veterinarian can direct dogs to be removed from the kennel, or a variety of other things to ensure their welfare during this ventilation failure period. This provides more flexibility for the regulated community than a forced move. In addition, the proposed regulation had a similar provision and the Independent Regulatory Review Commission, Legislators and regulated community all commented regarding the Department's authority to require removal of dogs and as to how this would be feasible in actual application. That is, where could the dogs be moved that would meet the standards for the kennel? The provision was removed from the final-form regulation, because the Department agreed with the comments related to the removal of dogs from the kennel and that it was not a workable solution.

12. Heat index issues – difference between human and canine physiology, respiration tests for heat and cold tolerance for canines must exist, no consideration of acclimation

Response: Heat Index is applicable to animals as well as humans as is evidenced by the Heat Index charts that were attached to the comment and response document (which set forth HI standards for cattle, equine, swine and fowl). The Department with the assistance of the Canine Health Board, especially Dr. Simms and Dr. Overall, reviewed Heat Index charts for the various animals set forth previously. The Heat Index charts for all those animals indicate that, at a heat index of 85, they are just into or just outside the caution zones for heat stress and heat stroke. So the heat index values are available for animals other than humans and were utilized to come up with the appropriate Heat Index values. Therefore, although Heat Index values are based on how humans feel at given temperature and humidity levels, they can be and are applied to other animals. There are no specific Heat Index charts available for canines. It could be the numbers may have to be lower for dogs because of their physiology compared to humans, equine and cattle. Unlike humans, cattle and horses, dogs do not have sweat glands and only perspire through panting (evaporation of water off the tongue) and slight evaporation through the pads on their feet. They cool less efficiently than humans, cattle and horses. Therefore, the Department may find as these requirements are implemented that given that dogs cool their bodies less efficiently than humans and some other animals, the Heat Index of 85 will need to be lowered. However, based on the scientific data and Heat Index values available, and the constraints of the Dog Law, the Board and the Department felt that a Heat Index of 85 was the most appropriate and only standard it could establish at this time.

Acclimation is discussed in the Department's current regulations for all kennels, see §21-22(d), however it is a very subjective standard and the Act requires the Department to set more specific and objective standards for commercial kennels, by requiring it to establish acceptable humidity levels. Acclimation does not apply in this setting. It is a conservative standard and provides the industry with a standard that is consistent with the federal code of regulations, which requires temperatures in the kennel to be maintained at 85 degrees Fahrenheit. An 85 Heat Index makes the kennel feel like it is 85 degrees Fahrenheit.

13. Data collector issues – no brand specified (not true), dog licensees should not have to pay for this operational cost, warrantless search and self-incrimination

Response: The brand is specified in the Regulatory Analysis Form as quoted, and the cost is moderate: "The Department has chosen the Omega data logger, at a cost of \$149, for this purpose...The Omega was chosen because it is battery operated and meets the data storage capacity and accuracy standards established in the regulation. These devices are easily installed, run on batteries that last up to three years and are relatively tamper-proof. The battery replacement cost is \$2.50 per battery or \$277.50 total. The equipment is self-calibrating, and any calibration malfunction can be remedied by the user consulting the manual and or calling the manufacturer's toll-free hotline. The cost of this equipment for 111 commercial kennels would be \$16,539."

From the authority to regulate necessarily flows the authority to require certain reporting or recordkeeping requirements necessary to properly effectuate and enforce the regulations established. The Act requires compliance and that the Department establish ventilation and humidity levels that protect the health and safety of the dogs housed in the kennels, at all times, not just on days and times a kennel is inspected.

The information will not be downloaded routinely - it is for enforcement purposes - and the information recorded on the monitor may not be utilized as the sole evidence or reason to issue a violation or impose a civil or criminal penalty. The Department has limited enforcement staff and this helps to assure continued compliance with the required standards. It also helps to insure that ventilation systems in the kennels are not simply shut off when state inspectors are not around. Veterinarians, engineers and animal scientists have all agreed that continuous operation of these systems is necessary to assure health, safety and welfare for the dogs.

4th Amendment to US Constitution – Warrantless search and expectation of privacy specifically:

The Department's right to do warrantless searches of kennels has been litigated, and was affirmed on 9/11/09 in an opinion authored by Judge Sylvia Rambo of the US District Court, Middle District of PA in the case of Professional Dog Breeders Advisory Council v. [former Secretary of Agriculture Dennis C] Wolff. No appeal was pursued. The Court held that "dog breeding is a pervasively regulated industry and has been the subject of state and federal regulation since at least 1976 and 1982 respectively...Furthermore, the kennel industry has been subject to random inspections and searches since at least 1982." (Opinion p. 17). The Court went on to state the law that warrantless inspection of a pervasively regulated activity survives 4th Amendment constitutional scrutiny if the government has a substantial interest in regulating the industry, the searches – meaning the warrantless inspections - further this interest, and the owner is advised that the inspections are pursuant to a law, defined in scope, and the owner cannot help but be aware of these inspections. The Court held that warrantless unannounced inspections of kennels by state dog wardens meet all of these criteria and are constitutional. The Department can thus conduct a warrantless search at any time, and during that search can utilize devices to record humidity and temperature. There is no reasonable expectation of privacy in the kennel building. The Department may also monitor for such violation, as long as the kennel owner is aware of this.

Other Department regulations have similar requirements. For example, the Milk Sanitation regulation requires that recording thermometers be installed on farm bulk milk cooling and holding tanks and batch pasteurizers. DEP also has regulations requiring installation of monitoring devices at wastewater and water supply facilities, and radon monitoring devices.

Self-incrimination (5th Amendment to US Constitution) specifically: The right against self-incrimination is the right against being compelled to *speak* and thereby incriminate yourself. The information collected in this case is akin to a record of compliance with the regulatory standards. The Department has the authority and duty to regulate and require such compliance. The Department could require written records on Department forms on an hourly basis. This is a less onerous manner of assuring compliance. The Department has the authority and duty to require certain humidity levels, and thus the right to monitor compliance and require recording of those levels for regulatory purposes. The monitor on the wall is recording Heat Index data - air temperature and humidity levels. The Department has the authority to do unannounced inspections at any time to assure compliance with Dog Law and its regulations. Compliance is required at all times, not just while a physical inspection is being conducted by the Department. The wall-mounted monitor is no different than the hand-held monitors that will be used by State dog wardens to monitor compliance during inspections, which raise no issue of self-incrimination. The monitors evidence both compliance and non-compliance, and may serve as a mitigating factor (showing any violation of the Heat Index on the day of inspection was an anomaly since the kennel has otherwise been in compliance) or a defense. In fact, the information on the monitors, per subsection 28a.4(b)(8), cannot be utilized as the sole basis for a criminal or civil penalty or as a violation of the provisions of that section - there must be another indication of a problem. Ample case law is available to support the Department's position and will be furnished to the Attorney General, who reviews the regulation for such purely legal issues, if requested.

14. Ammonia level of 15 ppm is too low

Response: The Canine Health Board originally proposed that the ammonia level had to be less than 10 ppm. There was a concern expressed in comments that this level may be too low to accurately measure. Veterinarians and animal scientists, including the commentator, were consulted. The experts opined that long term exposure to levels of 20 ppm would have detrimental effects on the dogs' health (respiratory systems and eyes), but agreed that 10 ppm may be too low to accurately measure. They advised the Department that 15 ppm was the proper compromise to allow for dog health and accurate measurement. In addition, engineers consulted believe that a proper ventilation system, properly operated, will achieve such levels and assure compliance. Scott Learned from Learned Design will be available to assist in any technical questions the Commission may have regarding this or any other ventilation issue.

15. Lighting of primary enclosure should not be required - dogs seek dark

16. No definition of excessive light

Response: The diurnal cycle defined will give dogs darkness for 12 hours each day. The lighting levels are necessary and appropriate - according to the experts consulted - to meet the standards imposed by section 207(h)(8) of the Act. The Department with the assistance of its own veterinarians and members of the Canine

Health Board, animal husbandry scientists at the Pennsylvania State University, and an engineer who designs kennel buildings, researched illumination levels needed to meet the requirements of the Act. The consensus was that 40-60 foot candles of light is necessary to assure proper animal husbandry practices, including the ability to monitor the dogs, which are contained in the primary enclosures and assure sanitation and cleanliness of the kennel and primary enclosures as required by the Dog Law.

Primary enclosures, under the standards established by the Act, are protected from excessive lighting at all times. The definition of excessive light can be found in the definition section of the regulation - § 28a.1. – and is defined as: “Excessive light— Direct, undiffused light from either the sun or artificial light, such as from a lighting fixture of an intensity that is twelve foot candles or more greater than the maximum foot candles of light required by this chapter, which is placed or directed in a manner such that the light is allowed to or is shining directly into a primary enclosure of a dog.”

The standard that light must not be “excessive” and must be “uniformly diffused” is a standard imposed by the Dog Law itself (3 P.S. § 459-207(h)(8)), and reiterated in the regulation. Kennels regulated by the United States Department of Agriculture (USDA) must comply with a similar excessive lighting ban under the Animal Welfare Act regulations, sections 3.2 and 3.3 (9 C.F.R. §§ 3.2(c) and 3.3(c)).

17. Flooring section restates Dog Law, does not provide for alternative types

Response: At the behest of comments submitted by the Commission, the Department added the first two provisions to the flooring section. These sections reiterate the specific standards of the Act (at sections 207(i)(3)(i) and (i)(3)(ii)) and add the clarity the Commission requested. Section 221(f) provides the authority for the latter subsections which set forth additional flooring standards.

18. Radiant heat should be permitted to be primary heating or cooling means.

Response: This does apply only to the radiant heating or cooling systems in the primary enclosure itself. It was added because of the potential that the radiant heating/cooling coils in flooring could be located only in the primary enclosures of the dogs. This would create potential health and welfare issues during extreme weather conditions, because the heating or cooling in the floors may have to be increased (to heat or cool the kennel housing facility to compliant levels) to a point that it would cause harm to the dogs housed in those enclosures (the floor would be too hot and cause burns or heat stress or too cold and cause hyperthermia or frost bite to the pads, and it could also result in condensation and a wet slippery surface on which the dog is housed). This concern led to requiring that radiant floor systems in the primary enclosure could not be the primary source of temperature control. If radiant floor heating and cooling systems are located in areas other than the primary enclosures, and zoned so that the flooring in the primary enclosures does not have to be turned up or utilized as the sole source of compliance with the heating and cooling requirements, then there is no problem. The intent of this subsection is specific to the primary enclosures, to ensure that systems within these enclosures are not the sole source of heating or cooling the entire kennel housing facility. The second sentence of the regulatory provision evidences the overall intent of the provision, as stated above, that the radiant systems in the primary enclosures are

not the sole source of heating or cooling to comply with the standards of the Act or regulations.

19. Definition of commercial kennel should be clarified to exclude humane societies.

Response: This issue arises because the definition of commercial kennel includes both the breeding and whelping of dogs. A humane society or nonprofit kennel may receive a pregnant dog that then whelps (gives birth) at its kennel, arguably causing it to fit the definition of commercial kennel as a result. This result is unintended. However, the definition is set forth in and established by the Act and the Department may not change a statutory definition through or in a regulation.

20. 12 hour diurnal cycle too rigid – daylight varies seasonally from 9-15 hours – less cost, also less hormonal fluctuation in dogs which affects welfare

Response: The Act requires that a diurnal light cycle be provided for dogs housed in kennels. The regulation mirrors that provision and defines a diurnal cycle as a 12 hour cycle. The change was made in response to comments submitted by Dr. Ken Kephart and Mr. John Gibble. Those comments suggested there should be a more definitive standard for kennel owners to follow. The thought was that by providing a specific time period the regulated community would have a definitive standard for compliance as opposed to a vague standard of the light cycle of that particular day, which is a very subjective standard. Under that standard, what time of each day is the end of the diurnal cycle? – 1. Sunset (as determined by whom) 2. Dusk? In addition, it would give some leeway for cleaning or feeding or carrying out additional tasks in the kennel after early sunset in the winter hours.

Mr. Michael Glass made this very point in his comments to IRRC, saying that if the normal light cycle were utilized the industry would not want it to be specifically enforced with regard to lights out in the winter months.

The definition may not be perfect, but it is precise and clear, sets a defined standard and allows more flexibility than if the alternative definition were utilized.

In addition, according to the Department and Canine Health Board veterinarians and animal scientists consulted, there is no known adverse effect of a 12 hour cycle. Specifically, Cornell University SOPs for Dog facilities recommend 12-14 hours of light in a 24-hour period. This also provides the kennel owner with the flexibility in late fall and winter to carry out necessary tasks (cleaning, feeding and care of the dogs) over a longer period of time.

21. Artificial lighting should not be required during daylight despite light level

Response: Artificial lighting is not specifically required on every day. The regulations states, natural or artificial lighting. If the lighting levels can be met on any particular day, without employing artificial lighting there is not requirement artificial lighting must be utilized. With regard to the lighting level required, 40 to 60 foot candles, or 430-650 lux, in all areas where dogs are kept, those levels are based on expert advice and standards already in use. The Department, with the assistance of its own veterinarians and members of the Canine Health Board, animal husbandry scientists at the Pennsylvania State University, and an engineer who designs kennel buildings, researched illumination levels needed for kennels. The consensus was that 40-60

foot candles of light is necessary to assure proper animal husbandry practices, including the ability to monitor the dogs, assure sanitation and cleanliness of the kennel as required by the Dog Law and its regulations, and provide for the health and welfare of the dogs. Dogs need either natural sunlight or full spectrum lighting to promote health - for vitamin D levels and eye development as examples. National Institutes of Health (NIH) policies and guidelines related to biomedical and animal research facility design, not specific to dogs, require average lighting levels in animal facilities to be between 25-75 foot candles, or 279-800 lux, but state that the exact lighting levels should be based on species. The 40-60 foot candle level is further supported by NIH standards for office, study and administration areas, and the Pennsylvania State University standards for classroom lighting, which is 50 foot candles. A lower lighting level does not ensure that the various outcomes for which lighting is needed can be met.

22. Exceeding authority by requiring separate ventilation system

Response: A separate ventilation system is not required. The kennel owner may have two separate systems, but may also install one system capable of meeting both the standard and auxiliary ventilation system requirements. One system would have to have the capacity to generate 200 CFM per dog when auxiliary ventilation is required, and to comply with the other provisions of the auxiliary ventilation section of the regulation such as the HI and ammonia levels.

23. Primary enclosures separated by partitions would require separate fan, duct work and vents for each dog this will be costly to retrofit

Response: This is not true. The regulation sets forth the overall CFM rate based on the number of dogs housed in any area of the kennel or kennel housing facility. The Department has explained the CFM requirements apply to the overall number of dogs in any part of the kennel or kennel housing facility and the intent is not to require individual duct work for every primary enclosure. The regulation refers to primary enclosures within commas, intending that they be included as part of the overall kennel or housing facility, thereby not allowing a kennel owner to argue he has only primary enclosures and therefore the ventilation provisions may not be applied to him. The Department has experienced similar arguments with even the current regulations and statutory standards. The reason primary enclosure was included was to assure that kennel owners did not try to claim they had only primary enclosures, not a kennel housing facility and therefore, the regulation did not apply to them. The Department wanted to assure it was clear that a primary enclosure would be included under such a circumstance and thereby preclude the argument. It is the overall CFM rate based on the number of dogs housed in any area of the kennel or kennel housing facility. The Department has explained the CFM requirements apply to the overall number of dogs in any part of the kennel or kennel housing facility and the intent is not to require individual duct work for every primary enclosure.

24. Need time period exception for humidity levels for cleaning

Response: When temperatures are below 85° F the kennel owner has a wide humidity range - 30%-70%. Animal scientists consulted opined that 70% humidity should be the maximum permissible level for the dogs' well-being, and engineers consulted opined that a 70% humidity level can be maintained even during cleaning. During the 4-hour window the regulation gives, when temperatures are above 85° F, to reduce the heat index or bring temperatures back down to 85° F, dogs are in

danger of heat stress and heat stroke, and the only way to minimize this danger is to reduce humidity levels. Allowing humidity levels to rise for any reason when temperatures exceed 85 F would defeat the purpose and necessity of the Heat Index requirements and would be counter to the very reason the heat index was established – to protect dog health under extreme conditions.

25. Windows should be required to be translucent, not transparent only

Response: The language mirrors the Federal Code of Regulation standards (the Animal Welfare Act (9 CFR § 1.1), definition of indoor housing facility, part (3) with regard to the coverings that must be on windows or openings that provide natural sunlight) and the Department tried to be consistent where possible.

26. Regulation should specify flooring for 50% nonsolid area of whelping area

Response: This is done in Section 207(h)(1) and (2) of the Dog Law, most specifically (2)(x), setting these performance standards:

- (1) Primary enclosures must be designed and constructed so that they are structurally sound and must be kept in good repair.
- (2) Primary enclosures must meet the following requirements:
 - (i) Have no sharp points or edges that could injure the dogs
 - (ii) Be maintained in a manner to protect the dogs from injury...
 - (v) Enable the dogs to remain dry and clean...
 - (ix) Enable all surfaces in contact with the dogs to be readily cleaned and sanitized in accordance with paragraph (14) or be replaceable when worn or soiled.
 - (x) 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.

Current regulations for all kennels also set these standards for flooring, which apply to dogs 12 weeks of age and under in commercial kennels:

§ 21.24. Shelters...

(d) A dog may be sheltered in a primary enclosure having metal strand flooring provided the following conditions are met:

- (1) The metal strand flooring is coated with a vinyl type coating.
- (2) The coated metal strand flooring shall be kept in good repair.
- (3) The coated metal strand flooring shall be made of mesh construction that does not allow the dog's feet to pass through any opening in the floor and does not otherwise cause injury to the dog.
- (4) The coated metal strand flooring shall be constructed of sufficient diameter (gauge) to provide a completely rigid floor area sufficient to support the weight of dogs housed in the enclosure so that the metal strand floor does not bend or sag from the weight of the dogs.
- (5) The dogs shall be provided with a draft free area that protects the dogs from inclement weather and is large enough to hold all the occupants of the primary enclosure at the same time comfortably.

27. Exercise for nursing mothers should be addressed

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Response: Exercise standards, unlike ventilation, auxiliary ventilation, humidity, ammonia, carbon monoxide, lighting and flooring standards, were not addressed by or included in the proposed regulation and therefore may not be included in the final-form regulation. In addition, there is no authority in the statute for the Canine Health Board to address such standards in the Guidelines and therefore the Department may not address those standards in this particular regulation. The Department has addressed the issue in a Statement of Policy published in the PA Bulletin in 7/31/2010.

28. The regulations cannot require temp to be under 86° - exceeds authority

Response: Nothing in the regulation dictates temperature. The Heat Index regulation is based on humidity levels. Temperatures in the kennel may increase and be above 85° F as long as the humidity standards are met. The Board had the absolute authority to address humidity - the Department has the absolute authority to promulgate a regulation addressing humidity.

In some extreme weather instances the kennel owner may have to take additional measures, but at those temperature and humidity levels dogs would be in danger of heat exhaustion or heat stroke without additional reductions in temperature and humidity. The Department is required to set standards that account for the health and safety of the dogs in the kennel at all times and under all conditions and to do so within the statutory authority. The Department has done that by regulating humidity levels.

29. Four hour window to bring temperature down (same as USDA) too short

Response: First, the kennel owner may compensate by bringing humidity levels down to a point that an 85 Heat Index is achieved or may elect to bring temperature down, depending on the type of system installed in the kennel. Second, the 4-hour window is based on the Federal Animal Welfare Act regulations and on protecting the health and welfare of the dogs. Where temperatures go above 85° F dogs are in danger of heat distress (exhaustion, heatstroke, death). Therefore, the 4 hour window and the 90 Heat Index cap is proper to assure dog health and welfare. In addition, the kennel owner has a monitoring device installed by the Department that can be checked on a regular basis. If the temperature is approaching 85 degrees and the relative humidity in the kennel is approaching 70%, the kennel owner has the ability to start implementing measures to reduce the humidity or the temperature before the "window" point is hit.

Where a break down occurs and temperatures rise above 85 degrees Fahrenheit, the 4 hour window to restore the system or call a veterinarian and the edict to take immediate action to restore proper ventilation and humidity levels is imperative. This standard is not arbitrary. The Department mirrored the Federal Animal Welfare Act's 4-hour window in this regulation and it is also based on the FAA heat index study supplied by Dr. Karen Overall and the Tufts animal study, which set forth survivability standards for dogs exposed to high heat and humidity.

After the 4 hours, if the system cannot be restored, then the kennel owner must take certain other steps, such as notifying their veterinarian and consulting on what measures they need to take to protect the dogs, and must record the actions they take, which demonstrates their attempts to comply with the regulation.

30. Humidity must be 30-70% - 4-hr window allows lower, inconsistent

Response: To the extent the comment refers to Heat Index requirements when the temperature in the kennel housing facility exceeds 85 degrees Fahrenheit, the Department did consider this issue and believes that levels below 30% for the limited window of time necessary to maintain an 85HI or to reduce kennel temperature to 85° F is a better solution than allowing heat and humidity levels to rise to a point where the dogs are in danger of heat distress (exhaustion, heatstroke, death). From consultations with veterinarians and from a practical standpoint, the Department believes that reduced levels of humidity are at the very least much less detrimental than the lethal effect of high temperature and high humidity. With regard to reduced humidity levels when temperatures in the kennel exceed 85 degrees Fahrenheit, the Department and the Canine Health Board, under the constraints of the statute (which unlike the federal statute does not allow for absolute temperature reduction) utilized the best controls it had available to protect dogs against heat stress, heat stroke and death. Based on input from veterinarians, the Department believes the lower humidity levels required when temperatures rise above 85 degree Fahrenheit are not detrimental to the health of the dogs over the short period of time they may be utilized and are the only alternative to allowing humidity and temperature levels to rise to a level that scientific studies (the FAA study cited in the comment and response document) prove are lethal to dogs. In addition, the kennel owner has a choice to utilize methods, including the natural cooling at night, some of the auxiliary ventilation techniques available or air condition, to reduce the temperature back down to 85 degrees Fahrenheit, at which point humidity levels must be maintained at the 30-70% range espoused by the animal scientists for temperatures of 85 degrees Fahrenheit and lower.

31. Can't regulate efficiency – filters, AC BTU

Response: These are sections of the regulation employing performance standards. Other commentators expressed the view that performance standards are superior to specific equipment or brand requirements. An engineer consulted by the Department, Scott Learned, recommended a minimum efficiency reporting value (MERV) of at least 8. MERV is a general performance standard, and the actual efficiency of a particular filter over time will relate to age and use rather than MERV. The minimum 35 BTU of cooling capacity, if air conditioning is included as part of humidity reduction, was recommended to the Department by engineer Rodger Lease. This was not based on efficiency, but on a minimum standard he believed was necessary ability to attain standards in a 1500 square foot kennel. The Department included this standard because the engineer believed it offered needed guidance.

32. Windows "shall remain unobstructed" – outlaws shades

Response: Shades do not typically obstruct windows. The only limitation on shades would be if they are used to interfere with the diurnal cycle requirements by blocking daylight or result in lighting levels that do not meet the foot candle requirements of the regulation.

33. Flooring – not clear that slatted permissible

Response: The regulation itself, at 28a.8(b) specifically allows slatted flooring. In addition, slatted flooring is specifically permitted by section 207(i)(3)(ii) of the Dog

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Law itself – this regulation thus cannot limit the use of that type of flooring. Slatted flooring will not typically cause the actual injuries to foot, pads and toes that is prohibited by section 28a.8(d)(4) of the regulation.

34. Need longer compliance time

Response: Compliance time was increased from 90 days in the proposed regulation to July 1, 2011 in the final-form regulation. The final-form regulation, if approved by the IRRC and Office of Attorney General, would be published in the PA Bulletin in late September or early October 2010, allowing a 9-month period for compliance. This is a reasonable period of time for design and installation of ventilation and lighting systems in a dog kennel. The time period for compliance also assures compliance with ventilation, auxiliary ventilation and humidity standards so necessary to assure dog welfare by the hottest months of the summer.

35. Lack of input from animal scientist and engineers

Response: This is just not true. The initial draft of the Guidelines came from the Canine Health Board (Board) that is composed of nine veterinarians, some of whom are researchers and animal scientists of varying backgrounds and all with small animal experience and expertise. The Board in drafting the Guidelines consulted animal scientists, veterinarians and researchers. The proposed regulations received comments from animal scientists (Dr. Kephart and Dr. Mikesell, as well as others). Dr. Kephart and Dr. Mikesell both brought forth issues that were addressed in the final-form regulation. Those issues were only addressed after the Department contacted both of them and had discussions regarding the comments and possible ways to sufficiently address their concerns. As set forth in detail in the Comment and Response Document and the Regulatory Analysis Form, the Canine Health Board members were again consulted on the comments and their expertise contributed to the final-form regulation. Public comments received from approximately 43 professionals were reviewed in crafting the final-form regulation.

36. The regulation focuses on only 6% of kennels in state

Response: The Department is confined to the authority given to it by the legislature through the statute. Act 119 amended the Dog Law and specifically defined a commercial kennel and required it to be regulated in a more stringent manner than other kennel classes. A commercial kennel is a kennel that breeds or whelps dogs and either sells a dog to a dealer or pet store, or sells or transfers more than 60 dogs a year. The legislative intent was to raise the bar for this specific type of kennel, and to set higher standards than those imposed on other kennels. This is a permissible legislative purpose and these higher standards have withstood constitutional challenge in Professional Dog Breeders Advisory Council v. [former Secretary of Agriculture Dennis C] Wolff, in a 9/11/09 opinion authored by Judge Sylvia Rambo of the US District Court, Middle District of PA. No appeal was pursued. The legislature authority for these regulations is limited to certain aspects of commercial kennels.

37. The regulation exceeds authority the authority of the Act - Heat Index, certification by engineer requirement, nursing mothers flooring section & exercise Statement of Policy

Response: *Heat Index specifically:* Section 221(f) and 207(h)(7) of the Act provide the authority to regulate humidity. Standards based on the Heat Index are the specific means chosen to regulate humidity.

Certification by engineer requirement specifically: This was answered earlier in this document. In short, the Department was responding to industry concerns when it implemented the objective standard of requiring a professional licensed engineer – of the kennel owners choosing – to certify the kennel meets the ventilation, auxiliary ventilation, humidity and ammonia level criteria of the regulation. It is a compliance issue and is well within the authority of the Department to require. The Department requires similar certification under the Rides and Measurement Standards Act regulations.

Nursing mothers flooring section specifically: The Department has answered this question in a very specific letter that accompanies this document. In general, the Department has the authority to address flooring for adult dogs, under section 221(f) and (g) of the Act. It is appropriate for an agency, through regulation, to bridge a gap or inconsistency in the statute on which the regulations are based. That is exactly what 28a.8(e) does. It harmonizes Sections 207(h) and (i) of the Dog Law by allowing an adult dog, as a nursing mother required to be with her puppies, to be afforded at least 50% flooring meeting the exception standard in 207(i)(3)(solid or slatted), and allowing her puppies to have flooring permitted by 207(h)'s general rule requirements.

Exercise Statement of Policy specifically: This issue is not properly before the Commission because it is not part of the regulation that is being reviewed.

38. Heat index will be impossible to achieve when over 85° and humid, especially given 30% fresh air requirement

Response – The engineers consulted do not agree and assert a system can be designed (and gave the Department cost estimates of \$12-\$25 per square foot to design a system that would meet all of the requirements of the regulation) to meet the Heat Index criteria of the regulation. The 30 CFM fresh air standard is part of the reason such a system can be designed. The 100% fresh air requirements of the proposed regulations would have made compliance nearly impossible, but the 30 CFM fresh air minimum helps to assure the re-circulated and fresh air can be dehumidified to attain the proper standards. Engineer Scott Learned will be available to address any specific questions the Commission has regarding this issue.

39. Department should have allowed HVAC professionals to certify and not have limited it to engineers

Response: The requirement that the ventilation system be certified by an engineer is a protection for the kennel owner. Professional engineers are trained in the very requirements necessary to design and certify a system to regulatory standards. They must have work experience, post-graduate training and go through stringent testing to achieve their engineer degree, and must then be licensed by the Commonwealth. No similar quality control and accountability system exists for HVAC professionals.

40. Pennsylvania standards should not exceed USDA standards

Response: The legislature amended the Dog Law to require that commercial kennels be more heavily regulated than other kennels. The statute itself imposes standards that go beyond the standards imposed by the Federal Animal Welfare Act and its attendant regulations. In some areas, such as cage size, flooring and exercise, the

legislature determined that federal standards were inadequate to ensure humane treatment for dog in Pennsylvania commercial kennels. The Federal Animal Welfare Act contains not prohibitions against state regulations and no language that would denote it is intended to occupy the entire field of regulation to the exclusion of State and Commonwealth regulation of the industry. Pennsylvania, under the amended Dog Law, clearly has authority to set standards exceeding federal standards.

41. Economic impact of regulation underestimated

Response: As part of promulgating this regulation, the Department prepared a detailed cost estimate which is found in Section III of the Regulatory Analysis Form, "Cost and Impact Analysis." Estimates were obtained from engineers and other experts on energy costs and maintenance, and using R. S. Means' cost estimating guidebooks. This comment gives no specifics of where or how costs were underestimated. However, the Department utilized the highest cost numbers quoted to it in setting forth the estimated cost to the industry. The Department did its due diligence to attain cost estimates from the engineers, electric companies, service companies and to attain the proper cost of equipment. With regard to the claim the Department did not take into account an estimate presented by the industry (\$181,000) that estimate was based on a 4000 square foot kennel that was a two story design and the estimate was based on the requirements of the original Guidelines, not the final-form regulations. The Department therefore, attained its own cost estimates related to the new provisions of the final-form regulation. The industry did not provide any cost estimates to the Department based on the final-form regulation standards.

42. Ventilation standards not appropriate for newborn puppies, need to allow Heat Index or Temperatures of at least 90 degrees Fahrenheit

Response: The Department did explore this claim. However, neither the Canine Health Board veterinarians nor other veterinarians consulted in the drafting and refining of this regulation stated that newborn puppies require for their welfare temperatures of over 85 ° F, or more specifically a Heat Index over 85. The information found by the Department on this issue, shows that ambient temperatures of between 80-85 degrees Fahrenheit are sufficient to maintain a puppies body heat. The veterinarians asserted the nursing mother would provide any additional necessary warmth and additional bedding could be added if kennel owners were concerned to help retain the puppies body temperature. In addition, such temperatures or Heat Index values would not be conducive to the mother's health. Given this, ventilation standards that allow the Heat Index to rise to 85 would seem appropriate for these newborns.

43. Subsection 28a.8(e) (related to nursing mothers flooring) was added without consent or knowledge of Canine Health Board

Response: The addition of section 28a.8(e) was requested by the Governor's office to provide harmonization of Sections 207(h) and (i) of the Dog Law, which contain conflicting provisions on the flooring required when nursing mothers (adult dogs) must be housed in the same primary enclosures as their puppies. The question of whether the Dog Law addressed that issue was a legal question and outside the scope of expertise of the Canine Health Board. In addition, the Canine Health Board only has authority to draft and publish Guidelines. It has no authority to promulgate regulations. Only the Department under sections 221(g) and 902 of the Act has the

authority to promulgate regulations. In addition, although the Department did rely on the expertise of the Canine Health Board (Board) and did consult its members with regard to the comments received, there is no requirement that the Department promulgate the regulations only with the advice and consent of the Board.

44. Department has no authority to draft and submit proposed regulations on behalf of the Canine Health Board

Response: To the contrary, only the Department has the authority to promulgate regulations under the Dog Law (sections 221(g) and 902). The Canine Health's Board's authority and role was to develop temporary guidelines, which occurred at an earlier point in the process (See section 221(f) of the Act). Once the Department promulgates a regulation it goes through the process prescribed by Regulatory Review Act for all agencies, which includes review of public comments and revision of the proposed regulation based on comments to arrive at a final-form regulation.

45. "Wire" flooring is uncomfortable, painful and causes injuries such as splayed feet, cysts on paws, and painful abrasions

Response: What could actually be present in these whelping pens and primary enclosures if the kennel owner chose not to use all solid flooring is a coated metal strand flooring that has opening so small the puppies' feet cannot pass through,. Both Section 207(h)(1) and (2) of the Dog Law, most specifically (2)(i), (ii), (v), (ix) & (x), set performance standards for this flooring, and so do the Dog Law current regulations, Section 21.24(d)(1-5). These standards were set forth in detail earlier, but do not allow for rusted or jagged edges or for flooring that sags under the weight of the dogs in the primary enclosure.

46. The nursing mother dog cleans up after her puppies

Response: This is true, but only for the first 2-3 weeks of life before the puppies start walking and eating solid food as a step towards weaning.

47. There is no evidence of puppies being trapped in outside runs

Response: The Department submits that this is because breeders do not currently provide unfettered access to mother dogs with nursing puppies. Therefore, there has been no instance where a puppy had access to an adult dog door. Some humane societies that receive pregnant dogs and place them in enclosures with access to outdoor runs have had to take measures to avoid such problems.

48. The Department would permit kennel owners to put pregnant dogs into the whelping pen area at least 2 weeks before giving birth, wardens will not know how close pregnant dogs are to giving birth, and piuppies are weaned at 6-8 weeks

Response: Each of these statements is false. The Department has stated that pregnant dogs will be permitted to enter the whelping pen one week before giving birth, as recommended by MLAR Board member and dog breeder Mary Remer, so they can prepare to give birth. There are obvious teachable signs that a dog is close to giving birth such as swollen abdomen and mammary glands, and the Dog Law or kennel veterinarian can easily determine this. Puppies are weaned at 4-6 weeks and can be sold at 8 weeks – they would not stay with their mother for 12 weeks.

Nursing mother dogs or nursing dams or foster dams must be removed and put back into adult primary enclosures as soon as the puppies are weaned. Nursing mothers will be in the whelping pen area an absolute maximum of 14 weeks a year, not 8 months.

49. Compliance is too expensive - \$65-70,000 for AC, with labor \$100-125,000, electric will go from \$350 to \$2000 per month.

Response: With regard to this specific commentator, the comments are inconsistent with the cost estimates received by the Department for a 1500 square foot kennel housing 100 dogs (\$12-\$25/square foot - which included a price quote from Paragon Engineering who does design work for Morton Buildings). In 12/15/09 this commentator had 56 dogs in his kennel; on 3/12/2010 that number was 47 dogs. The Department's estimate for ventilation and electricity costs, based on estimate received from electric companies regarding operation of the systems 24/7 and 12 hour per day lighting costs is \$699-767 annually for a dog kennel with 100 dogs. The Department has information to suggest this commentator's current kennel already includes an HVAC system and air conditioning.

50. Data collector issues - should be agreement with the Department and certificate of accuracy.

Response: This would be a policy, not regulation issue. The Department can enter into agreements without stating it in a regulation. Accuracy will be an issue of proof for the Department and a defense for the kennel owner in any proceeding regarding a violation or civil or criminal penalty. As to accuracy, this is covered in Section 28.a.4.(7): (7): "The Department will remove and have the device checked for proper calibration and accuracy according to manufacturer specifications. The Department will replace any removed device with an accurate and properly calibrated humidity and temperature gauge or thermo-hygrometer."

51. Trying to put us out of business.

Response: No. The Department is under a statutory duty to establish regulatory criteria that account for the health and welfare of dogs, by establishing ventilation, auxiliary ventilation, humidity, ammonia, lighting and flooring standards. The Department in drafting this final-form regulation has attempted to carry out that duty and has consulted experts in the fields of engineering, architecture, animal science and veterinary medicine, as well as, researching literature related to these areas of regulation, which pertain to canine health (where available) and the health of other animals. The Department has set forth very conservative levels of humidity control (heat index values) and has made significant amendments to the ventilation, auxiliary ventilation, lighting and flooring provisions in response to comments submitted on the proposed regulations. These amendments in most cases reduce the cost and burden on the regulated community and provide for objective and attainable standards. The final-form regulation carries out the duties imposed by the statute in a manner that is least intrusive and costly to the regulated community.

Cooper, Kathy

From: Smith, James M.
Sent: Wednesday, August 18, 2010 3:27 PM
To: IRRC
Subject: FW: Final Form Commercial Kennel Canine Health Regulation - I.D. No. 2-170
Attachments: Ltr.IRRC.8.18.10.Final.pdf

Importance: High

#2785 – Submitted by the Department of Agriculture

From: Black, Angela M. [mailto:anblack@state.pa.us]
Sent: Wednesday, August 18, 2010 2:28 PM
To: Smith, James M.
Cc: DHain@pahouse.net; Mhanna@pahouse.net; jmaher@pahousegop.com; Kerry Golden; kcrawford@pasen.gov; mbrubaker@pasen.gov; mopake@pasenate.com; WGEVANS@pasenate.com; Duer, D. Holbrook; Kennedy, David C. (AG)
Subject: Final Form Commercial Kennel Canine Health Regulation - I.D. No. 2-170
Importance: High

Hello Mr. Smith,

Attached please find a letter with enclosures from Secretary Redding regarding the above captioned final form regulation for consideration at tomorrow's meeting. Please circulate as appropriate. Thank you very much.

Angela M. Black | Paralegal
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Governor's Office of General Counsel
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