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October 27, 2009

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

Re: Proposed rulemaking by Pennsylvania Department of Agriculture and Canine Health Board governing standards for commercial kennels [Regulation ID # 2-170 (#2785), published in the September 12, 2009 issue of the *Pennsylvania Bulletin* at 39 Pa.B. 5315]

Dear Chairman Coccodrilli:

Enclosed is a copy of the comments to the aforementioned proposed rulemaking submitted by Pennsylvania Farm Bureau.

Please do not hesitate to contact us if you or your staff has any questions regarding our comments.

Sincerely,

John J. Bell
Governmental Affairs Counsel

Enclosure
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October 27, 2009

Jesse L. Smith, Special Deputy Secretary
Dog Law Enforcement
Pennsylvania Department of Agriculture
Room 102, Agriculture Building
2301 North Cameron Street
Harrisburg, PA 17110-9408

RE: Proposed rulemaking for commercial dog kennels, published in the September 12, 2009 Issue of the *Pennsylvania Bulletin* (39 Pa.B. 5315)

VIA EMAIL TRANSMISSION (*jlsmith@state.pa.us*)

Dear Ms. Smith:

Pennsylvania Farm Bureau submits the following comments to the Department's proposed rulemaking governing minimum standards of ventilation, lighting and flooring for dog kennel operations regulated as commercial kennels under Pennsylvania's Dog Law, as amended by Act 119 of 2008. The provisions of Act 119 direct the Department to establish minimum standards for ventilation, lighting and flooring for commercial kennels. Pennsylvania Farm Bureau is a statewide farm organization with a membership of nearly 47,000 farm and rural families in the Commonwealth.

Many farm families who are members of Farm Bureau operate commercial kennels as a means of earning the family's principal livelihood or as a means of providing the family with needed supplemental income to sustain their farms. Without this opportunity to operate and receive income from operating commercial kennels, these farm families will struggle to viably maintain their farms. This is especially true in the wake of the extreme economic downturn, in which traditional farm commodity prices paid to farmers, such as milk prices, have been slashed to levels where farmers are now operating at a severe economic loss.

We are disappointed with the Department's failure in its proposed rulemaking to make any meaningful changes to the standards proposed in the temporary guidelines that were developed and issued by the Canine Health Board.[1] Although the Department is directed in Act 119 to promulgate regulations after CHB's development of temporary guidelines, Act 119 does not require the Department to adopt or substantially endorse the standards that the CHB established temporarily for commercial kennels.

[1] Hereinafter, we will refer to the Canine Health Board as the "CHB."

We had hoped that the Department would make a conscious effort than the CHB did to understand that the proposed standards will establish unfair and unworkable mandates for kennel operations, will likely have repercussions beyond the canine industry, and may have serious adverse impacts on agriculture and the future existence of numerous family farms in the Commonwealth. Unfortunately, so far, the Department in its proposed rulemaking has decided to rubber stamp the CHB's unworkable guidelines and the seriously flawed process of fact-finding and decision-making in which the guidelines are based. Because of this, many of the same criticisms we offered to the CHB in February will again be restated in these comments.

We recognize that some revisions in the Dog Law and in standards applicable to regulated kennel operations were needed to deter the seriously irresponsible conduct of some commercial kennel operators in the industry. We do not condone the inhumane treatment of dogs by commercial kennel operators. We particularly denounce the type of substandard care in kennels sporadically reported in newspaper accounts. Such conduct should have been violative of the Dog Law, and was in fact violative of the Dog Law even before the enactment of Act 119's statutory amendments.

But fundamental fairness, as well as statutory and constitutional principles, also requires that standards to be established by the Board not be arbitrary or based on what an individual may subjectively believe to be "good" for the animals. Animal husbandry standards should be based on sound and objective scientific analysis, and should provide a consistent and definitive way for those subject to regulations to measure and determine they are complying or not complying with the standards. Standards that essentially make it impossible for responsible commercial kennel operators to feasibly comply or to reasonably determine whether or not they are in compliance are not acceptable.

The Department's proposed rulemaking suffers from the same afflictions as many of the mandates adopted by the CHB, including:

(i) failure to meet basic statutory and constitutional obligations provided to persons who will be subject to the regulations' standards;

(ii) establishment of standards that are not supportable by reasonable or verifiable scientific study or empirical justification;

(iii) failure to make a reasonable attempt to verify or quantify the accuracy or reliability of the few sources of information that were heavily relied upon as the supporting basis for the standards proposed;

(iii) virtually no effort to analyze the practical ability or feasibility of regulated persons to comply with the standards proposed; and

(iv) extreme failure in the proposed standards to establish any clearly defined method to be applied by enforcement personnel in determining "compliance" with standards which will avoid arbitrariness in determinations of compliance and ensure the standards will be measured and enforced in an objective and consistent manner.

And we firmly believe that if the proposed rulemaking is adopted without serious change, the standards to be established will make it practically impossible for any responsible commercial kennel operator to meet, thereby prompting the elimination of commercial kennel operations altogether in the Commonwealth. The irony of such a result would be the proliferation of commercial dog breeding operations in states with far fewer regulatory standards than Pennsylvania – a scenario that is likely to seriously hurt the "well-being" of dogs in the long run.

In development of its temporary guidelines, it was readily apparent that the majority of the members of the CHB believed that the "well-being" of the dogs was the only legal consideration to be made. Throughout the process, several CHB members continuously and exclusively referenced the "well-being" of kennel-housed dogs as the sole purpose for establishment of its temporary guidelines. Such a belief by the CHB majority that "well-being" of dogs is the CHB's sole consideration constitutes an abuse of the CHB's discretionary authority. Action by the Department to blindly ratify the CHB's standards would equally constitute an abuse of the Department's discretionary authority. Statutory provisions and caselaw clearly require regulatory agencies to make a legitimate effort to address reasonable concerns of those persons to be regulated in promulgation of regulatory standards, and to develop and promulgate regulatory standards that are not unduly vague and provide a genuine opportunity for the regulated community to comply.

Section 5.1 of the state Regulatory Review Act specifically requires governmental agencies in development of regulatory standards to consider and demonstrate consideration of:

- The need for the regulation;
- The costs that the agency's regulatory standards will cause the private sector to bear;
- Any special provisions that meet the particular needs of small businesses and farmers;
- Alternative and less-burdensome regulatory measures that the agency considered but rejected;
- Development of the least burdensome regulation alternative.

And our courts have also recognized where the Commonwealth exercises regulatory power that is not reasonably necessary to accomplish a public purpose or that is unduly oppressive, such exercise of power is invalid. The Commonwealth may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. *See, Department of Environmental Resources v. Pennsylvania Power Company*, 490 Pa. 399, 416 A.2d 995 (1980), citing *Nebbia v. New York*, 291 U.S 502 (1934).

Nothing on the record shows any effort made by the CHB to identify or consider any feasible alternatives to the standards it adopted in its temporary guidelines or shows the regulatory scheme that the CHB did adopt is not unduly oppressive or arbitrary or represents the least burdensome means to accomplish the Dog Law's purposes.

Kennel operators will not only face extreme costs in construction and reconstruction of buildings and structures and in designing, purchasing and installing coordinated climate control systems for these facilities. They will also face oppressive energy costs in operating the climate control systems within these facilities. The guidelines standards for atmospheric control, together with the Dog Law's requirements for "unfettered access" of dogs within these facilities to the outside, will severely compromise the ability of commercial kennel operators to devise or operate systems that manage temperature, humidity and air exchange with any feasible degree of cost-efficiency. Kennel operators will not be able design or operate cost-efficient systems in kennel buildings that will require multitude of openings in the building walls to provide outside access for dogs.

The CHB should have been able, and the Department should have been able by now, to get at least some understanding of the degree of economic hardship that the guidelines' standards would impose by reviewing cost-estimates submitted by commercial and noncommercial kennel operators in their comments to the Department's proposed rulemaking of December 2006 (later rescinded) to augment regulatory kennel standards. But the process leading to the CHB's adoption of guidelines, which the Department is suggesting in its proposed rulemaking to be finally adopted without change, is totally devoid of analysis or consideration of these comments or any other quantified analysis of adverse economic impacts likely to result from the regulatory standards to be permanently established.

We particularly object to the regulatory posture in proposed regulation 28a.2 to require commercial kennel operators to **separately** meet each condition of temperature, humidity and air flow prescribed. During the period in which the CHB's temporary guidelines were being developed, several veterinarians serving on the CHB offered supportable evidence of scientific study of other species of animals that animals' climate control needs can be met through a holistic consideration of conditions of temperature, humidity and air flow together, even though one of these conditions was not individually meet the prescribed standard for that condition. But this evidence was summarily rejected by the CHB majority, without any scientific analysis, meaningful consideration or legitimate explanation.

The CHB's flat and unexplained rejection of the information and evidence that some CHB members tried to bring to the table exemplifies the arbitrariness that the CHB majority applied in the consideration and development of its temporary guidelines. By blindly adopting CHB's guidelines without meaningful consideration and analysis of the empirical evidence that the knowledgeable and experienced veterinarians on the CHB tried to bring forth in development of regulatory standards, the Department would be equally culpable of acting arbitrarily and abusing its regulatory discretion.

We also strongly object to the rulemaking's proposed establishment in regulation 28a.2 of an absolute maximum temperature of 85 degrees for kennels, without exception. While the proposed rulemaking has made some cosmetic changes to the language adopted by the CHB in its temporary guidelines, the practical and legal effect of the standard will be no different from the standard established in the guidelines.

It is clear from amendments made by the General Assembly to the version of House Bill 2525 originally introduced that Act 119 was not intended by the legislature to establish a static maximum temperature of 85 degrees for commercial kennels. The enacted version of House Bill 2525 (Printer's Number 4524) amended the bill's original provision, which did prescribe an absolute maximum of 85 degrees. The amended version of Section 207(h)(6) enacted by the legislature in Act 119 provides that the ambient temperature in commercial kennel housing facilities could not be above 85 **unless auxiliary ventilation is provided**. Furthermore, the amended version of Section 207(h)(7) specifically directed and required the CHB to establish standards for auxiliary ventilation **when** the ambient temperature in the housing facility is 85 degrees or higher. The common meaning and understanding of these provisions clearly establishes that kennel areas my operate at temperatures above 85 degrees with proper auxiliary ventilation.

Especially in light of the amendments to Sections 207(h)(6) and 207(h)(7) made by the General Assembly in the course of House Bill 2525's legislative process, no one can reasonably read these provisions in any other way than to conditionally allow the ambient temperature of a facility to be above 85 degrees if auxiliary ventilation is being used. The Department's establishment an unequivocal and absolute standard of 85 degrees and disregard of the General Assembly's clear statutory direction to provide and establish a standard for conditional allowance of housing facilities to be operated at temperatures above 85 degrees upon use of auxiliary ventilation systems is an abuse of the Department's discretionary authority.

We also take serious issue with proposed provisions for "measurement" of whether a commercial kennel is in compliance with the guidelines' prescribed minimum standards. There was no conscious effort made by the CHB, and apparently none was made by the Department in its proposed rulemaking, to identify any empirical or historical basis on which the "measurement" formula is based. Neither CHB's guidelines nor the Department's proposed regulations attempted to identify, standardize or regulate the calibration of devices that Dog Law wardens will use, or that regulated kennel operators may use, in determining whether kennel facilities are meeting or failing to meet the minimum atmospheric and other standards prescribed in the guidelines. Furthermore, no effort was made to consider or adopt safe harbor provisions which would provide commercial kennel operators with some assurance that they will be considered to be in compliance upon the performance and maintenance of specified climate control measures. And Dog Law wardens will be able apply a multitude of methods to "measure" compliance, any one of which can individually doom a kennel operator who is making a responsible effort to comply and whom the overwhelming majority of reasonably minded persons would conclude should be treated as being in compliance. The measure formula itself is arbitrary, and the lack of clarity in the measurement provisions of the guidelines will inherently lead to inconsist and arbitrary application among enforcement officers, and will provide ample opportunity for abuse of enforcement authority.

We expect other organizations to describe in greater detail the gravity of economic hardship that responsible commercial kennel operators will face in complying with the standards prescribed in the guidelines. But we would offer comments we received from a reputable and responsible kennel operator who described in detail the impacts the CHB guidelines are having and proposed rulemaking will have on his kennel operation.

His insightful comments noted, among other things, the impracticality (and we would describe as impossibility) in complying with the rulemaking's proposed carbon monoxide standard. Under this standard, a kennel would be required to be maintained "below detectable levels" of carbon monoxide. Yet the atmosphere in the county where the operator is located by its very nature has "detectable" levels of carbon monoxide. Even under optimum conditions of climate control, the operator will need to further purify the air within kennel areas to meet this "below detectable level" standard. But with the additional requirement imposed under Act 119 for each housing area within a kennel to have unfettered access to the outside, it is practically impossible for a responsible kennel operator providing dogs with "unfettered access" to fully comply at all times with the carbon monoxide standard in any area where carbon monoxide exists in the atmosphere. And it is our understanding that the areas where detectable levels of carbon monoxide normally exist in the atmosphere is far more the rule than the exception.

He also noted the impracticality with the guidelines' and proposed rulemaking's standard for ammonia. Levels of ammonia will be required to be at all times below 10 parts per million. But kennels are most often located on farms or in rural areas in very close proximity to farms, where levels of ammonia commonly exist because of storage and use of manure as fertilizer. Kennel owners have no real control over what neighboring farmers do and how they operate their farms. When a neighboring farmer spreads manure on land or is storing manure in large quantities in close proximity, chances are high that the levels of ammonia will be exceeded. As with the carbon monoxide standard, kennel operators will need to design air control systems in housing structures that reduce ammonia levels. But the additional need to provide a multitude of openings in these structures in order to meet Act 119's requirement for "unfettered access" of dogs to the outside makes nearly impossible and definitely infeasible for an air system to be designed that will fully comply with this standard.

He also offered some significant insights with respect to the guidelines' and proposed rulemaking's heat, humidity and air flow standards. He estimates that the "most economical" design of a structure housing approximately 50 dogs with a heating, cooling and air flow system having a chance to comply with the proposed rulemaking's 8-to-20-exchanges-per-hour requirement and Act 119's "unfettered access" requirement would add nearly $200,000 to the total cost of a more commonly designed structure that provides fewer rates of air exchange, bringing the total cost of this structure to well over $1 million. In addition, this structure would need to operate heating and cooling systems at settings of 105 degrees F during much of the winter and at minus 10 degrees F during much of the summer in order to come close to complying with the guidelines' and proposed rulemaking's temperature requirements. The system would also have to include dehumidifiers to significantly reduce humidity during summer periods to meet the below 50% humidity requirement and humidifiers to significantly add humidity during winter periods to meet the 40%-60% humidity requirement that the guidelines and proposed rulemaking would impose.

We have also heard anecdotally from what we consider to be reputable and experienced veterinarians. Ironically, these veterinarians have offered opinions that the objectives of "health and well-being of dogs" in commercial kennels will not be achieved but will be diminished by the excessive air flow and other atmospheric requirements the guidelines and proposed rulemaking will impose.

Conclusion

Anyone who has had any experience with Pennsylvania Farm Bureau knows that we are an organization that does not blatantly reject legislative or regulatory proposals, even those that may place additional responsibilities on our industry. Some burdens that legislation or regulations attempt to impose make reasonable sense, and in the long run, benefit the industry by strengthening public confidence in the quality and propriety of the production practices and the resulting product. And we consistently offer constructive criticism of proposed regulatory standards and suggest solutions to concerns we have on regulations to accomplish legitimate public goals in an effective and feasible manner.

But with respect to the proposed rulemaking, it is impossible for us to begin to offer constructive criticism. Like the regulatory embodiment created by the CHB in its temporary guidelines, the Department's proposed rulemaking utterly fails to identify which empirical data, study or analysis – or any empirical data, study or analysis for that matter – that materially forms the basis and justification for the standards proposed. From the Department's continued and pervasive silence in identifying the whats and whys of the decisions leading to the prescribed regulatory standards, we can only conclude – as we did with the CHB's actions – that the Department either had no legitimate basis or is totally indifferent toward providing any justification for the regulatory standards devised.

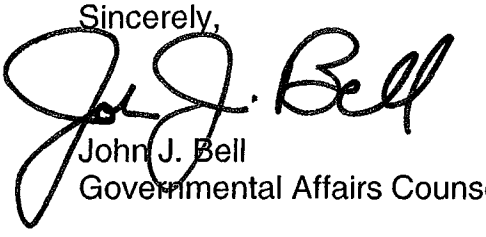
The Department in its proposed rulemaking has singled out commercial kennels, is attempting to establish atmospheric standards for dogs that far exceed that standards that are required to be provided to humans, has failed to seek or provide meaningful input from those persons who will be directly affected, and is attempting to establish standards that knowledgeable and reputable professionals have serious questions of validity and effectiveness. The totality of the Department's actions and inactions strongly supports our belief and conclusion that the proposed rulemaking violates the obligations that rulemaking bodies are legally required to meet in promulgation of regulatory standards.

Our recommendation today is the same as the recommendation we made to the CHB per its published guidelines, and is the same as the recommendation that the Independent Regulatory Review Commission (IRRC) made in 2007, in response to the arbitrary and unworkable regulatory standards for kennels that the Department proposed. IRRC's suggestion was essentially for the proposed regulations to be scrapped and for the Department to conduct a process of meaningful dialogue to develop a more definitive, effective and balanced set of standards that materially accomplish the goals of animal welfare without doing so in a manner that shuts down reputable and responsible kennel operators.

We would urge the Department to rescind its proposed rulemaking, and reopen its consideration of minimum kennel standards, and devise new standards that reflect a serious and good faith effort by the Department to have discussions with and to meaningfully consider and incorporate input provided from the regulated community.

We are willing to help the Department develop more sensible and scientifically supportable standards for commercial kennels that effectively accomplish the objectives of maintaining the health and well-being of dogs in kennels in a manner that is not punitive to responsible kennel operators and is reasonably responsive to the economic realities and climate uncertainties of kennel operation.

Sincerely,



John J. Bell
Governmental Affairs Counsel

Susan West (via email)
Denise Doughterty (via email)