

2785

COMMENTS ON PROPOSED RULEMAKING

By the American Canine Association

on proposed changes to Dog Law Enforcement by the

CANINE HEALTH BOARD *for the*
PENNSYLVANIA DEPARTMENT OF AGRICULTURE

7 Pa Code Chapters 28 and 28a

Regulation No. 2-170

General Comments

There are several broad comments regarding the overall impact that the proposed regulations would have on dog breeding operations in Pennsylvania. Before analyzing the specific regulatory sections that the Department has proposed, the process of determining how to adequately address the issue of the inhumane treatment of dogs must start with an understanding of the problem.

For far too long, government has engaged in a “solution looking for a problem” public policy making position. Emotionally charged issues are given an emotional response, and unintended negative consequences emerge. It appears that this is precisely the issue in this instance.

When the General Assembly enacted Act 119 of 2008 (Act 119), it did so in response to Governor Rendell’s promise to “shut down puppy mills” in Pennsylvania. The Governor, alongside other animal rights activists, claimed that large breeding operations were detrimental to the health, safety and welfare of dogs and, as such, needed to be regulated into nonexistence. Using the moniker “puppy mills,” they declared war on large breeders and successfully enacted sweeping changes to Pennsylvania’s Dog Law.

Act 119 enacted severely restrictive requirements on Class C kennel operations, which were clearly targeted by the new law. Large breeding operations are now required to comply with a vast majority of new, extraordinary and costly mandates, and are subject to a myriad of additional requirements that are not imposed on other dog breeders. The American Canine Association (ACA) strongly believes that many of these requirements are invidiously discriminatory and violate both the Pennsylvania and United States constitutions.

The proposed regulations that have now been promulgated are a continuation of the efforts of the Rendell administration to “strangle” large breeding operations. Before the enactment of Act 119, the Department of Agriculture submitted Regulation No. 2-152 which went well beyond the Department’s authority and provided for unworkable, non-science based punitive restrictions.

So egregious were these regulations that they generated an unprecedented number of comments to the Independent Regulatory Review Commission (IRRC). Recognizing that it could not respond to all the valid concerns raised, the Department decided to pursue a legislative path to accomplish its goals. Unfortunately, it was successful.

Now, IRRC must consider Regulation No. 2-170, which represents the Department's further efforts to enact by regulation what it failed to achieve in the legislative process. These regulations contain much of the same deficiencies that Regulation No. 2-152 suffered from, and the ACA again raises legitimate concerns with the Department's proposal.

The ACA believes that public policy issues should be addressed reasonably, rationally, and logically. There is no dispute that dogs should be treated humanely; indeed, all reputable breeders believe that the care and attention to their dogs is of the utmost importance. However, when cases of abuse arise, breeders who deeply care for their animals are unfairly targeted.

It is the Department's duty to enforce the Dog Law, and it appears that the current approach used by the Department is flawed. The result of this is Proposed Regulation No. 2-170, under which the Department seeks to further regulate dog kennels and to criminalize certain aspects of breeding as well as implement punitive measures to ensure compliance.

While not expressly enumerated, there can be little doubt that these regulations are intended for one specific purpose: **to put legitimate dog breeding operations out of business**. In order to achieve this, the Department violated their statutory authority to impose restrictions not authorized by law, did not consider the financial impact to businesses, as required by the Regulatory Review Act (1982, P.L. 633, No. 181), and failed to consider proper animal husbandry practices and veterinary science standards.

Such efforts are so readily apparent that even the Attorney General's Office in reviewing Regulation No. 2-170 for form and legality noted in its reply to the Department:

This office notes, however, that there is some dispute regarding the Department's authority to enact certain provisions of this proposed regulation. Accordingly, we urge the Department to carefully consider all comments received for this regulation and, if appropriate, to make changes in response to those comments. We will revisit this issue once the regulation is returned for final-form review.

The ACA, alongside many other organizations, strongly urges IRRC to exercise its independent judgment based on the law and the requirements under the Regulatory Review Act to take appropriate action on the proposed regulations. In an effort to assist IRRC, the ACA would like to make the following specific comments regarding Regulation No. 2-170.

Specific Comments

Section 28a.2. Ventilation.

This section is intended to address poor ventilation conditions that, “cause health and welfare problems in dogs,” by establishing specific ventilation standards, including a requirement that ventilation must be achieved through a mechanical system that will allow for 8 to 20 air changes per hour, keep consistent moderate humidity, institute auxiliary ventilation when the temperature rises above 85 degrees F, keep ammonia levels and particulate matter at established levels and keep odor minimized.

Section 28a.2, paragraphs (1), (2) and (3) set forth temperature requirements for Class C kennels. The specific requirements outlined in the regulation require the mechanical regulation of temperature and relative humidity. While Act 119 requires mechanical ventilation to be implemented if the temperature exceeds 85 degrees F, the Department’s mandates under these paragraphs go beyond that requirement by declaring that, “If the ambient temperature in any portion of the facility is 86 degree F or higher, despite mechanical ventilation utilized, dogs may not be present in those portions of the facility.” Clearly the statute does not allow the Department to enact such a rule.

Additionally, the Department’s requirements under these paragraphs fails to recognize that new born puppies cannot maintain their own body temperature until after 10 to 14 days of age. Supplemental radiant heat or infrared heat lamps are routinely utilized to create an average air temperature between 91 and 96 degrees F in the whelping pen area. This is done for the safety, health and well being of the young litter of puppies. Under the Department’s proposed rulemaking, providing this essential life support would constitute a separate violation for each puppy and the mother of the litter.

Finally, the costs of implementation of these three paragraphs alone would be extremely costly. In order to meet just these standards, without considering the remaining requirements, it is estimated that the cost to an average commercial kennel would exceed \$119,000 for installation of proper HVAC equipment and an ongoing operational cost of nearly \$35,000. Total first year installation and operational costs would run in excess of \$181,000 – just for this one requirement.

Section 28a.2, paragraph (4) sets forth an acceptable ammonia level of 10 ppm or less. The ACA questions the development of this standard, and recommends that the Department provide some scientific justification for how it arrived at this figure. Does the Department have appropriate justification that dictates that ammonia levels above 10 ppm are directly threatening to a dog’s health, safety or welfare? On what basis was this figure determined?

The ACA believes that section 28a.2, paragraph (5) relating to carbon monoxide levels is a reasonable standard and recommends its adoption.

Section 28a.2, paragraph (7) requires that, “The means of ventilation employed must ensure that particulate matter (PM) from dander, hair, food, bodily fluids, and other sources in a primary enclosure are below 10 milligrams per meter cubed.” Wood shaving or shredded paper is routinely used as bedding in kennels, and it is not possible to expect that a dog would not move within these areas or play; yet, the Department’s standard would make unlawful the natural movement of these shavings or paper, and even the natural shedding of certain breeds of dogs. Simply put, the standard is not achievable.

Section 28a.2, paragraph (8) provides detailed mandates for air changes. The ACA notes that at temperatures below 40 degrees F, three complete air changes per hour is sufficient. Further, the enumerated requirements under subparagraph (C) may violate the Federal Animal Welfare Act, which mandates that dogs must be protected from drafts while in the primary enclosure. Subparagraph (C) sets forth that the 8 to 20 air changes must be measured in the primary enclosure, at the shoulder of the dog. A 40 foot by 100 foot building having 10 air changes an hour would be required to circulate 5,300 cubic feet of air per minute through the facility, resulting in a violation of the federal statute.

Section 28a.2, paragraph (9) sets forth a listing of conditions (or signs of illness or stress) that dogs may not exhibit for the purposes of determining whether poor ventilation conditions exist. Based on the conditions listed, the ACA believes that the violations, fines, civil penalties and a potential lifetime criminal record would result from any of the following:

1. A dog is playing outside on a warm day and comes into the primary enclosure to get a drink of water and the dog is panting heavily from playing;
2. A dog receives an inoculation booster and develops an elevated temperature;
3. A dog becomes agitated or nervous when inspectors enter the kennel and engages in an avoidance of an area of the kennel, temporary shivering, or grouping with other dogs – all of which are very typical occurrences;
4. Despite being under a veterinarian’s care, a dog has a runny nose, redness of an eye or a dog sneezes. Unbelievably, the Department seeks to make these “conditions” prima facie evidence of a violation of the ventilation requirements, yet all mammals, including humans, occasionally develop a cold, allergy or sinus infection.
5. A dog develops cataracts, which is a normal occurrence;
6. A dog licks themselves and then plays with their water; or
7. Despite being under a veterinarian’s care, a dog develops a loose stool due to a simple change of diet, despite the fact that all mammals, including children and adults develop an upset stomach or gastrointestinal irritation.

The ACA believes that the ventilation regulations as outlined under section 28a.2 exceed the Department’s authority under Act 119, are being imposed without consideration to their practical implementation and do not conform to veterinary science standards.

Section 28a.3. Lighting.

The Department declares that, “Natural lighting is important to the development of dogs.” As such, it requires that, “Each kennel shall have a mix of natural and artificial light,” and sets forth how a kennel operator must provide lighting.

In section 28a.3, paragraph (1), clauses (i) and (ii), the Department details how natural light must be provided. However, Act 119 clearly provides that dogs must be provided *either* natural light or artificial lighting to allow for inspection of the facility and for the dogs housed in the facility. Indeed, the statute plainly says:

* * *

Housing facilities for dogs must be lighted well enough to permit routine inspection and cleaning of the facility and observation of the dogs. Animal areas must be provided a regular diurnal lighting cycle of **either** natural or artificial light. Lighting must be uniformly diffused throughout housing facilities and provide sufficient illumination to aid in maintaining good housekeeping practices, adequate cleaning and observation of animals at any time and for the well-being of the animals. Primary enclosures must be placed so as to protect the dogs from excessive light. **The appropriate lighting ranges shall be determined by the Canine Health Board.** (Sec. 207 (h)(8), *emphasis added*).

As is clearly outlined in the statute, the Canine Health Board is limited in its ability to regulate lighting except to establish lighting ranges, so long as those ranges conform to the other requirements of Act 119. Section 28a.3, paragraph (1) violates the statute by requiring both natural and artificial lighting.

Additionally, the ACA estimates that the costs to design, permit, inspect and provide for glazing of windows for diffraction of direct sunlight for a 40 foot by 100 foot facility (which would require approximately 40 windows to comply with these requirements) would exceed \$32,000.

Section 28a.3, paragraph (2), clause (i), requires that artificial, indoor, daytime lighting must provide full spectrum lighting between 50 to 80 foot candles at standing shoulder level of the dogs for daytime lighting. The ACA believes that such excessive amounts of light are not appropriate, considering that the average residential home’s lighting is 12 to 20 foot candles. The average commercial facility’s lighting is 15 to 25 foot candles.

Further, the ACA alleges that the Department’s extreme lighting requirements are a direct violation of the Federal Animal Welfare Act, which expressly prohibits that dogs shall not have

excess exposure to lighting. As a proponent of the humane treatment of dogs, the ACA believes that forcing dogs to endure the intensity of 50 to 80 foot candles of lighting is patently inhumane and runs contrary to the purpose of Act 119 and the federal statute.

Finally, the ACA again raises the financial implications of such an excessive requirement. Using the 40 foot by 100 foot facility example above, in order to purchase light fixture units, have them installed, make necessary electrical upgrades through an electrical engineer, comport with zoning permitting and inspections, and procure full spectrum florescent tubes to have a diurnal light cycle of 50 to 80 foot candles during the day and 1 to 5 foot candles during the night would exceed a cost of \$18,500.

The ACA concurs with the Department's proposals as outlined under section 28a.3, paragraph (2), clauses (ii) and (iii).

Under section 28a.3, paragraph (2), clause (iv), the Department mandates that, "All lighting must comply with the latest edition of applicable codes." While the ACA understands the Department's intent, it is more appropriate to detail specifically what "applicable codes" the Department is referring to so as to avoid confusion over this vague reference.

Section 28a.4. Flooring.

The Department's requirements for solid flooring under section 28a.4, paragraph (1) raise serious concerns for the ACA.

While Act 119 does give the Canine Health Board the authority to permit additional flooring options that (1) are strong enough so that the floor does not sag or bend between structural supports, and (2) is not able to be destroyed through digging or chewing by the dogs housed in the primary enclosure and, (3) does not permit the feet of a dog to pass through any opening and, (4) is not metal strand (without regard to coating), and (5) allows for moderate drainage of fluids and, (6) is not sloped more than 0.25 inches per foot, clearly the General Assembly specifically believed that flooring that allows for the passage of feces and other urine through slats was a preferable approach. (*see* Act 199, Section 207 (i)(3)(ii)).

Flooring requirements were a major debate during the passage of Act 119 and the ACA strongly advocated a position against solid flooring, as the ACA believes that solid flooring, no matter how well constructed, represents an unsanitary flooring environment for dogs. Indeed, solid flooring in many respects promotes health problems that could result in further violations of the act.

Section 28a.4, paragraph (2) requires that if solid flooring is utilized, that it, "...must be sloped to a drain that is free of debris and in good repair." This is simply unachievable. A dog may naturally track bedding particles, hair follicles, food, feces, nose or mouth residue, dander or other materials on a regular basis and it is not possible to maintain a drain that is continuously free of debris.

The ACA supports section 28a.4, paragraph (3).

Section 28a.4, paragraph (4) requires that, “Flooring may not be metal or any other material with high thermal conductance.” The ACA believes that such a broad prohibition has no rational basis and is not based in any verifiable animal science data. In fact, Pennsylvania’s own bio-security labs and the United States’ licensed inspected research labs would all fail to meet these exorbitant and unreasonable standards set by the Department. The ACA questions under what provision of Act 119 does the Department make this rule?

Like the observations we made concerning section 28a.3, paragraph (2), clause (iv), the ACA believes that section 29a.4, paragraph (5)’s reference to “applicable codes” is vague and should include more appropriate detail.

The ACA concurs with the Department’s provisions outlined in section 28a.4, paragraph (6).

Section 28a.4, paragraph (7) requires that, “Flooring be cleaned in accordance with section 207(h)(14) of the act and may be subject to microbial assessment.” The provision that flooring “may be subject to microbial assessment,” is troubling, particularly given commonplace activities that happen in nearly all kennel operations. Consider that if the flooring is properly sanitized under the requirements of the law, but afterwards a dog urinates or defecates on the flooring, it will likely show positive signs based on the digestive tract of the dog. Should a kennel operator be subject to fines, the suspension of his license or even criminal charges because of this natural occurrence? While a kennel operator may meet the requirements of floor cleaning to the letter of the statute, this regulation may result in a violation.

Finally, the ACA believes that section 28a.4, paragraph (8) may, in fact, be in conflict with the requirements of paragraph (6). The Department should not create multiple conflicting standards.

Conclusion

As previously stated, the debate over the humane treatment of dogs in large kennel operations has been an emotionally driven, politically difficult course. The ACA, along with many other interested parties, has attempted to maintain civil discourse and science-based policy making as the foundation to the reforms that became necessary after a number of celebrated kennel cases were highlighted.

However difficult, state government agencies cannot and should not be used by any organization(s) or group(s) to legislate and/or regulate legitimate businesses out of existence. Many of the commercial kennels targeted by the proposed regulations have longstanding positive records with the United States Department of Agriculture. Furthermore, many kennels never had issues under Pennsylvania’s Dog Law prior to the adoption of Act 119. Now, despite these reputable breeders following the law, they bear the burden of significant, additional rules.

Regulation 2-170 fails on its face to make meaningful legal arguments as to how it works in conjunction with Act 119; instead, it takes the restrictions enacted by the General Assembly and greatly expands and adds to them. Such action is not permitted by law and should be summarily rejected by IRRC. Agencies which cannot achieve policy objectives through the General Assembly should not then attempt to enact those failed objectives by regulation.

Regulation 2-170 also clearly ignores the requirement under the Regulatory Review Act, section 5(a)(10), which requires agencies to identify the financial, economic and social impact of the regulation on individuals, business and labor communities and other public and private organizations. The reason for the Department's failure to adequately meet this standard is because of the extraordinary costs that it knows kennel operators will face in attempting to meet the unlawfully promulgated standards. Again, it appears that the goal is to drive commercial kennel operations out of business.

Finally, the Department fails to give appropriate attention to animal science. Regulations without context are arbitrary, and many of the provisions of Regulation 2-170 have no scientific basis for their enactment. In some instances, the requirements run afoul of modern veterinary standards.

For these reasons and more, the ACA strongly encourages IRRC to consider the forgoing in its review of the proposed regulation, giving particular attention to the standards that must be weighed under Section 5 of the Regulatory Review Act, and to reject Regulation No. 2-170 based on the arguments presented here.

Bob Yarnall, Jr.
President and CEO
American Canine Association, Inc.

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September 8, 2009

NATHAN MYER
170 W BRUBAKER VALLEY RD
LITITZ PA 17543-9401

Quotation N11-666Y
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Attention Nathan Myer:

We are pleased to quote you providing a HVAC system for your kennel design. The Kennel will be built with the following requirements:

- Inside dimensions of 40' by 100' with 8' high ceilings
- Walls insulated to an R-value of 19 or higher
- Ceiling insulated to an R-value of 30 or better
- Up to 100 dogs in Kennel with an average weight of 15lbs.
- Up to 2 people in Kennel
- 8 to 10 air changes per hour continually
- Temperature is not to go below 50°F or above 85°F
- Relative humidity will be 40% to 60% when temperature is between 50°F and 75°F
- Relative humidity will be 1% to 50% when temperature is between 76°F and 85°F
- All mechanical air movement will be filtered for particles

HVAC system will be built to the following specifications:

- Energy recovery ventilator sized to give 5,300 cubic feet of air per minute (10 air changes per hour)
 - Ventilator will exchange 70% of heat being exhausted and will exchange some humidity also
- Energy recovery ventilator will be located on cement pad directly beside kennel
- ERV will be connected to a custom, cooling coil with four 5-ton circuits. Outdoor ductwork will connect equipment. Coiling coil will be 8-rows deep with 10 fins per inch to better dehumidify incoming air.
- Four 5-ton single-phase outdoor condensing units will serve the cooling coil. They will be staged to control temperature and humidity
- Cooling coil will be mounted to a pad mounted Cambridge direct fire gas heater
- Conditioned air will be distributed evenly over the 100' length of kennel thru ductwork system. There will be one common return/exhaust directly adjacent to the ERV
- To control summer time heat load of building and occupants, we will install two separate 5-ton air conditioning systems with individual air handlers and minimal ductwork

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Quotation N11-666Y

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- To keep relative humidity above 40% during heating season, we will install 15 commercial humidifiers evenly spaced thru out the length of the kennel. The humidifiers will be capable of providing 120lbs of water per hour. Humidifiers are self-flushing to prevent bacteria growth.
- We will quote as an option to install additional fans as an option to keep the air velocity at the shoulder height of the dogs at an acceptable level.

Base Bid: *(price includes all freight and Pa use taxes)*

Our installed price for the HVAC system is: \$ 118,905.

Accepted by: _____ Date: / /

Optional Bid:

Our installed price for additional circulating fans is: \$ 13,653.

Accepted by: _____ Date: / /

Customer to Supply:

Correct fused current with disconnect to equip
Method for condensate removal
Any permits or engineered drawings
Temperature alarms & monitoring
Level concrete base for outdoor units
Level floor free of obstructions
Building must support weight of air handlers
Removal of walls
Sealing of all roof penetrations
Bumper posts for equipment
LP or Natural gas supply to building
Water treatment
Soft water supply to humidifiers
Drains for humidifiers

Warranties:

Factory warranty
12-month Brubaker workmanship
1-year compressor warranty

Terms of Payment:

30% down upon acceptance
Work progressive
15 days following start up

Thank you,
Jim Nolt
Project Manager

Rufus Brubaker Refrigeration, LLC
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Manheim, PA 17545-8516

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September 9, 2009

NATHAN MYER
170 W BRUBAKER VALLEY RD
LITITZ PA 17543-9401

Kennel Equipment List

Equipment	Qty	Model#	Dimensions	Lbs	Volts	MCA	MOPD	UNIT AMPS
ERV	1	HE6X	109 x 86 x 78	2,410	230/1	70.0	90.0	56.0
Cambridge	1	M115	77 x 44 x 33	1,014	230/1	0	0	35.5
AC condenser	6	GSE1306	38 x 43 x 32	350	230/1	35.0	50.0	32.7
Air Handler	2	ARUF4860	22 x 29.5 x 52	180	230/1	9.5	15.0	7.6
Humidifier	15	HM512DG115			120/1	15.0	20.0	12.0
Circulator fans	8	SQB08A			120/1	7.3	15.0	5.8

HVAC installation cost = \$ 118,905.

Additional fan cost = \$ 13,653.

Estimated Heating operating cost per year based on liquid propane at \$ 1.50 per gallon, 100 heating days, and 60% average operating capacity = \$ 14,022. per year

Estimated Electrical operating cost per year based on \$ 0.12 per Kilowatt Hour is =
\$ 34,954. per year

Total first year installation and operational costs= \$ 181,534.

Jim Nolt
Project Manager