



COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Robert A. Mulle, Chief Deputy Attorney General, Legal Review Section
Office of Attorney General

THROUGH: Andrew C. Clark, Deputy General Counsel
Office of General Counsel

FROM: Brook Duer, Chief Counsel
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Pennsylvania Department of Agriculture

DATE: September 29, 2010

RE: Department of Agriculture Regulation #2-170

This memorandum is submitted in response to the questions raised in your memorandum dated September 22, 2010 in reference to Department of Agriculture Regulation #2-170, Commercial Kennel Canine Health Regulations. The questions raised are set forth below in *italics* and the responses immediately thereafter.

QUESTION NO. 1.

1. We are concerned that section 28a.8(e), which details the flooring requirements for nursing mothers, exceeds the Department's authority and is not supported by the statutory requirements of Act 119. We are aware that Act 119 sets forth two different flooring standards: section 207(h)(2)(x), which applies to all dogs, and section 207(i)(3), which applies to dogs over twelve weeks of age. Section 207(h)(2)(x) requires that the floor of a primary enclosure protect the dogs' feet and legs from injury, and not permit the feet of a dog housed in the primary enclosure to pass through any opening. In contrast, section 207(i)(3)(i), while containing similar language to 207(h)(2)(x), specifically forbids the use of metal strand flooring, whether or not it is coated. We realize that these differing requirements do not address the appropriate flooring for a nursing mother housed with her puppies. However, by requiring that the primary enclosures for nursing mothers contain at least 50% of flooring that meets the standard set forth in 207(i)(3), we believe that the Department has violated the clear proscription against the use of metal strand flooring for dogs over twelve weeks of age. Please provide a detailed legal justification for this regulatory scheme.

RESPONSE NO. 1.

Section 28a.8(e) deals with flooring in "puppy enclosures."¹ It has been the subject of many comments in the regulation promulgation process, stating in one form or another, that this provision exceeds the statutory authority for these regulations. The 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.³ This potential temporary exposure is alleged to violate 3 P.S. § 459-207(i)(3)⁴ of the Dog Law.

- It is undisputed that this potential exposure to metal strand flooring could only ever entail 50% of the flooring in any 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. There is no requirement that a dog over 12 weeks of age ever be forced to stand on flooring not fully compliant with the provisions of subsection 207(i)(3).

As noted in footnotes 1 and 3, 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). However, by operation of the immediately following subsection, subsection 207(i), these in fact become the requirements for enclosures built for dogs under 12 weeks of age, i.e. "puppies." Subsection 207(h) also requires that puppies never be housed

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 It is important to understand that mother dogs are housed year-round in enclosures built for adult dogs only and compliant with the provisions of subsection 207(i). When ready to give birth, a mother dog is moved from an adult dog enclosure to a puppy enclosure in order to give birth and nurse the puppies for approximately 4-6 weeks until weaned. Those enclosures are built for puppies only and need only be built to be compliant with subsection 207(h). After nursing is completed, the mother dog must be moved back to its adult enclosure. The puppies remain in a puppy enclosure after weaning until it is legal to transfer ownership of the puppy at 8 weeks of age.

⁴ 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).

with adult dogs -- except the nursing mother who is mandatorily required to be housed with them while giving birth and nursing.

- 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).

The prohibition of metal strand flooring in subsection 207(i)(3) is one differing requirement between the two types of primary enclosures. This prohibition of metal strand flooring is the exception to the broader general rules on flooring in primary enclosures for "all dogs" in commercial kennels. It is also the exception to the general rule for flooring for primary enclosures in all other types of kennels in Pennsylvania under 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),⁵ 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.

⁵ 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)

- 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 enclosures in all kennels licensed in Pennsylvania. The Pennsylvania Legislature consciously chose not to change that fact in the 2008 amendments to the Dog Law and chose to simply prohibit that type of flooring material as an option in one limited subset of primary enclosures.

It is significant to acknowledge that in enacting this exception/prohibition of one particular otherwise-authorized flooring material,⁶ 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 departmental regulation.
- Interpreting the law in such a way as to conclude that the Department can completely prohibit metal strand flooring in puppy enclosures, because a nursing mother is temporarily present while giving birth and nursing, is to give the Department the power to reverse by regulation that which the Pennsylvania Legislature has already decided by statute.
- To urge that metal strand flooring cannot be permitted in puppy enclosures because of the mandatory temporary presence of the nursing mother is to permit the exception to swallow the rule.
- Extending the exception/prohibition in subsection 207(i)(3) on metal strand flooring in primary enclosures for dogs over 12 weeks of age to puppy enclosures would swallow the general rule for all dogs in commercial kennels in subsection 207(h).
- The effective result of such a position would be to completely prohibit metal strand flooring in all puppy enclosures -- because a nursing mother is always temporarily required to be present in all puppy enclosures at some point in time, i.e. when the puppies are born and still nursing.

⁶ 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.

The Department cannot 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. This is a course of action that is not within the Department's regulatory authority.

A legislative choice was made to apply the prohibition of metal strand flooring to primary enclosures for dogs over 12 weeks of age only. This cannot be overridden by these regulations and remain consistent with the statute.

It can be clearly 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 Pennsylvania 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, some have claimed 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 dog. That result is not only far from clear, the evidence is to the contrary.

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 the deliberate choice made by Pennsylvania Legislature to allow puppy enclosures to continue to use metal strand flooring – it complies with subsection 207(i)'s directive that the prohibition only applies to enclosures for dogs over 12 weeks of age.
- 50% of a puppy enclosure can still be metal strand, but 50% must comply with the standards for dogs over 12 weeks of age – this 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 does not have enough non-metal strand flooring to allow the mother dog to exclusively use that floor area.
- Since the legislative intent cannot be determined regarding what impact, if any, the presence of the nursing mother in a puppy enclosure would have on flooring requirements in that puppy enclosure, 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 because there is no evidence that the Legislature even contemplated an impact on flooring in a puppy enclosure by the temporary presence of the mother.

QUESTION NO. 2.

2. *Additionally, if hygiene is a concern because of the presence of puppies in the primary enclosure, has the Department considered requiring the slatted flooring permitted by section 207(3)(ii)?*

RESPONSE NO. 2.

The Department cannot contradict the flooring choices for puppy enclosures made by the Pennsylvania Legislature in 3 P.S. § 459-207(h) by limiting the type of flooring that may be used and requiring one specific type of flooring to the exclusion of all other types, i.e. the slatted flooring referenced in 3 P.S. § 459-207(i)(3)(ii). Certainly, that type of flooring may be used in puppy enclosures if it meets the standards of 3 P.S. § 459-207(h). However, it cannot be legally mandated as the only option and the required type of flooring.

QUESTION NO. 3.

3. *Several commentators have expressed concern that the installation of the monitoring devices required by section 28a.4(b) violates the 4th Amendment to the U.S. Constitution, freedom from warrantless searches, and that the use of the data from these devices as part of a civil or criminal proceeding violates the 5th Amendment, freedom from self-incrimination. Please describe, in detail, how the use of these monitoring devices, and the data they collect, is constitutionally permissible. We are particularly concerned that data gathered from these devices may be used to institute criminal penalties against a Class C kennel owner.*

RESPONSE NO. 3.

I. Fourth Amendment

No person has a legal right to operate a dog kennel in the Commonwealth of Pennsylvania without being licensed on an annual basis by the Department of Agriculture, Bureau of Dog Law Enforcement. All kennels must be inspected prior to commencing operation (3 P.S. §§ 459-206(a) and 459-207(a.1)(1)(2)). Kennels are subject to unannounced random warrantless inspections and are required to comply with the provisions of the Dog Law and the regulations at all times when dogs are present, not just during regular business hours when a physical inspection by a State Dog Warden can occur. The standards established by the Dog Law and the regulations are standards which are necessary to maintain the health, safety and welfare of the dogs housed in the kennel at all times of day or night, weekends and holidays.

The Dog Law provides the Department with the authority to conduct warrantless inspections, or "searches," of licensed kennels (C-Class, K-class and Non-profit) (3 P.S. § 459-218(a)). The Dog Law goes further and makes it a violation of law for a kennel owner to refuse entry to an agent of the Commonwealth acting to enforce the

act (3 P.S. § 459-220(a)). The Dog Law allows the Department to obtain an administrative search warrant if entry to the kennel for inspection is refused (3 P.S. §§ 459-218(c)(1)).

It should also be noted that although the Dog Law requires the Department to perform two inspections of each kennel every year, the Department may do an unlimited number of inspections of a kennel annually.⁷

The authority to conduct warrantless searches under the Dog Law was heavily debated during the passage of the legislation and was addressed by the United States District Court for the Middle District of Pennsylvania and found not to violate the Fourth Amendment of the U.S. Constitution.

The U.S. District Court for the Middle District of Pennsylvania, in the case of Professional Dog Breeders Advisory Council v. Wolff, 2009 U.S. Dist. LEXIS 83054 (M.D. Pa. Sept. 11, 2009), found that the kennel industry – particularly the commercial kennel industry – is a heavily regulated industry and as such does not enjoy the same level of protection under the Fourth Amendment of the U.S. Constitution against warrantless search and seizure as might otherwise be the case in other contexts, such as a private home.⁸

⁷ This statutory scheme was found to be constitutional in Professional Dog Breeders Advisory Council v. Wolff, 2009 U.S. Dist. LEXIS 83054 (M.D. Pa. Sept. 11, 2009), citing Burger, 482 U.S. at 711 n. 21, explaining that a statute will not be invalidated merely because no limitation on the number of searches is provided.

⁸ Professional Dog Breeders Advisory Council v. Wolff, 2009 U.S. Dist. LEXIS 83054 (M.D. Pa. Sept. 11, 2009). In footnote 19, the Court found that it is well established that people have a reasonable expectation of privacy in their home or business, that the Fourth Amendment prohibits unreasonable, warrantless searches in a person's home or business, see Katz v. United States, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); U.S. Const. Amend. IV, but that the expectation of privacy in commercial settings is much more limited when it comes to "closely regulated industries." New York v. Burger, 482 U.S. 691, 699, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). "Certain industries have such a history of government oversight that no reasonable expectation of privacy [can] exist for a proprietor over the stock of such an enterprise." *Id.* (quoting Marshall v. Barlow's, Inc., 436 U.S. 307, 313, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978)). Individuals who "choose to engage in such licensed and regulated businesses accept the burdens as well as the benefits of the trade." Frey v. Panza, 621 F.2d 596, 597 (3d Cir. 1980). Dog breeding is a pervasively regulated activity and has been the subject of federal and state regulation since at least 1976 and 1982 respectively. See 7 U.S.C. § 2131, et. seq.; see 9 C.F.R. § 1.1 et. seq. (federal regulations); 3 P.S. § 459-101 et. seq; see 7 Pa. Code § 21.1 et. seq. (state regulations). In Professional Dog Breeders Advisory Council v. Wolff, the Court stated, "In Pennsylvania, dog breeders have been on notice since 1982 that their businesses are subject to random unannounced inspections. Furthermore, by Plaintiffs' own contention, the industry is heavily regulated, hence the reason for this suit. Plaintiffs cannot successfully argue that the kennel industry is not pervasively regulated while at the same time maintaining that the kennel industry is too pervasively regulated. Regulations concerning the kennel industry in the areas of licenses, enforcement, fees, penalties, operations and various other provisions have been around for years. Furthermore, the kennel industry has been subject to random inspections and searches since at least 1982. As such, the kennel industry is a pervasively regulated activity."

Warrantless, random, unannounced inspections work to further the Department's interest in ensuring compliance with the Dog Law.⁹ Furthermore, the Court found that the Pennsylvania Dog Law properly advises kennel owners that the search is being made pursuant to law and adequately defines the scope and the limitation of the inspecting officials.¹⁰

The Commercial Kennel Canine Health Regulations establish and meet these same standards. The regulations establish specific humidity limits and temperature standards, all within the scope of the Dog Law.¹¹ The monitoring devices required by section 28a.4(b) ("monitors") limit the scope of the search to the kennel facility itself and to the collection of only temperature and humidity levels. In so doing, the monitors carry out the purpose of assuring compliance with specific provisions of the Dog Law, and its attendant regulations, that are imperative to dog health and welfare.¹²

⁹ Professional Dog Breeders Advisory Council v. Wolff, 2009 U.S. Dist. LEXIS 83054 (M.D. Pa. Sept. 11, 2009). In footnote 21 the Court noted. "If inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible. Burger, 482 U.S. at 710 (quoting United States v. Biswell, 406 U.S. 311, 316, 92 S. Ct. 1593, 32 L. Ed. 2d 87 (1972))." The Court went on to find that, unannounced, random inspections work to further the government's interest in ensuring that the Dog Law is being complied with and administrative searches of dog kennels to establish that the kennels are in compliance with the statute are authorized as an exception to the general warrant requirement.

¹⁰ In Professional Dog Breeders Advisory Council v. Wolff, 2009 U.S. Dist. LEXIS 83054 (M.D. Pa. Sept. 11, 2009), the Court found that because the Pennsylvania Dog Law, 3 P.S. § 459-101 et seq., adequately advises those subject to search that such searches are being made pursuant to law and because the searches are limited in time, place and scope, a constitutionally adequate substitute for a search warrant has been established.

¹¹ The Department was required to promulgate regulations that, among other things, establish humidity standards and temperature monitoring that protects the health and welfare of the dogs in commercial kennels (3 P.S. §§ 459-207(h)(7) and 459-221(f) and (g)). Compliance with these standards is what is measured by the monitoring devices.

¹² Dog studies were used to determine the heat index ranges established in the final-form regulation. The Department with the assistance of veterinarians on the Canine Health Board found and utilized a dog survivability study that pinpoints the upper most range of the heat index that would allow for survival of dogs. The upper most Heat Index value is based on the results and recommendations of a survivability study conducted on beagles. The study entitled "A Temperature/Humidity Tolerance Index for Transporting Beagle Dogs in Hot Weather", was sponsored by the Federal Aviation Administration and authored by Gerald D. Hanneman and James L. Sershon. The document is available to the public through the National Technical Information Service, Springfield, Virginia 22161. The Heat Index Value is also based on the Tufts Animal Condition and Care (TACC) criteria, specifically the TACC Weather Safety Scale, authored by in 1998 by Dr. Gary Patronek, then-Director of the Center for Animals and Public Policy at Tufts University School of Veterinary Medicine and first published in "Recognizing and Reporting Animal Abuse: A Veterinarian's Guide." The survivability study and the TACC Weather Safety Scale are generally acknowledged to be the only two scholarly resources that give specific heat-related guidance applicable to canines. Those studies conclusively establish that heat index ranges over 90 cause heat stress in dogs and prolonged exposure to such heat index levels will lead to heat stroke. Heat index ranges over 95 lead to heat stress and heat stroke in six hours or less. The temperature and humidity levels in a kennel are obviously vital to assure the proper health, safety and welfare of dogs housed in the kennel. Therefore, it is

The same information measured by the monitors may be captured and recorded during any inspection of the kennel by a State Dog Warden during regular business hours. Therefore the collection of the data recorded by the monitors is fully within the permissible scope of, and limitations on, inspecting officials established by the Dog Law. The Department could require the kennel owner to manually collect and record the same data recorded by the monitors and require that it be made available to the Department for compliance purposes on whatever schedule or frequency the Department deemed appropriate to protect the health and welfare of the dogs. Such a frequency could be daily, weekly, monthly or otherwise. Instead, that data is simply recorded and made available to the Department through a different, and less burdensome, method.

The monitors are only placed within the kennel facility. They carry out a limited "search," which is focused on compliance with a very specific standard (temperature humidity) which the Department is required by the Dog Law to establish and enforce. The time period over which the monitoring occurs is consistent with the provisions of the Dog Law, which allows inspections without regard to frequency. Notably, the Dog Law does not limit the right to warrantless inspections to Monday through Friday, 8:00 am to 5:00 pm.

The monitors therefore meet all of the criteria and standards delineated by the courts interpreting what constitutes a reasonable search and seizure. The search is reasonable because the information sought and collected is within the authority of the agency, the demand is specific and definite and the data being recorded is reasonably relevant, in fact essential, to the government purpose of assuring compliance.¹³

Monitors collecting information specifically related to the duty and scope of the Dog Law is not a violation of the Fourth Amendment rights of this heavily regulated industry. The collection of this data through monitors is less intrusive, less costly and less burdensome on the regulated community than requiring manual recordkeeping of the same information. The Department could require kennel owners to buy monitoring equipment (hand held or installed), record the same temperature and humidity levels on an hourly basis, and provide State dog wardens access to those records upon inspection. However, the regulated community, in Comments to the proposed regulation, felt that such a regulatory scheme would be too subjective, costly and burdensome.¹⁴

imperative that kennel owners maintain proper heat index levels in the kennels – at all times – in order to assure the dogs' health, safety and welfare are protected.

¹³ For a search by an administrative agency to be reasonable, it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant to a requirement of the statute. State Real Estate Commission v. Roberts, 441 Pa. 159, 271 A.2d 246 (Pa. 1970).

¹⁴ Potential questions were raised as to where in the kennel to take the readings; who calibrates the equipment; how is that calibration verified; different monitoring devices may have different degrees of accuracy; what would be the frequency of the measurements and what is the operational burden on the kennel of taking such measurements; what would be the expense to purchase monitoring equipment; would there be subjective differences in State Dog Warden measurements and kennel owner measurements.

The monitoring devices under the Department's regulations will be uniform and calibrated according to manufacturer specifications. They will be installed at places within the kennel established by an engineer hired by the kennel owner who certifies that the ventilation and humidity systems for the kennel are capable of complying with the law. Thus, the readings are taken at agreed points within the kennel established by a professional engineer.

In addition, the Department may not utilize the readings on those monitors as the sole basis for an enforcement action of any kind. Independent readings must be taken by State dog wardens during an actual inspection in order to provide the basis of any enforcement action.

Finally, it is not unprecedeted for an agency, through regulation, to require continuous monitoring of conditions of a regulated industry. Some regulations even allow the agency to utilize the data collected by such monitors as the basis for enforcement actions.¹⁵

II. Fifth Amendment

To the extent any commercial kennel is incorporated, they do not enjoy a Fifth Amendment right against self-incrimination.¹⁶

However, not all commercial kennels are incorporated. With regard to those commercial kennels who are not incorporated, the applicable case law supports the conclusion that monitoring or "self-reporting" requirements imposed by Commonwealth regulations are not a violation of any Fifth Amendment right, even if resulting in self-reporting of violations of an act or regulation which may be used in an enforcement action.

The information recorded by the monitor is not testimonial in nature, but is instead a record of air temperature and humidity standards present in the kennel. It is a

¹⁵ DEP regulations for air quality standards for coal plant, fossil fuel and natural gas plant emissions, and ozone and nitrogen compound emissions, require the industry to install monitoring devices (meeting certain standards), impose reporting requirements, and in some instances specifically allow the agency to utilize the data collected by those devices for purposes of enforcement. (25 Pa.Code §§ 123.25(c)(e)(g), 123.46(b)(d), 123.51, 123.108-123.109, 123.111, 123.210-123.211 and 123.215). DEP regulations for dam safety and water quality for bottled water and public water suppliers also include the requirement to monitor and install monitors. 25 Pa.Code §§ 105.54 and 105.131, 109.1103, 109.301(1)(i)(c) and (1)(iv) and 109.1305.

¹⁶ Al Hamilton Contracting Co. v. DEP, 1993 EHB 1651. In Hamilton, the appellant contended that the Department's use in those proceedings of information appellant provided to the DEP in its permit applications violated appellant's right against self-incrimination found in the Fifth Amendment of the U.S. Constitution and Article I, § 9, of the Pennsylvania Constitution. These arguments were found without merit. As was held in Kerry Coal Co. v. DER, 1990 EHB 1359, 1364, the Fifth Amendment protection against self-incrimination does not apply to corporations. See also, Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974). Because the self-incrimination privileges of the United States and Pennsylvania Constitutions are identical, the protection against self-incrimination contained in Article I, § 9, also does not apply to corporations. See Commonwealth v. Webster, 323 Pa. Super. 164, 470 A.2d 532, 536 (Pa. Super. 1983).

measure of an existing physical condition of air in the kennel which the legislature required the Department to establish for the purpose of promoting the public policy of assuring the health and welfare of the dogs housed in the kennel.¹⁷

The disclosure of records required by law to be kept in order to collect information which is the appropriate subject of government regulation are not protected by the privilege against self-incrimination.¹⁸

The purpose here is completely regulatory. The monitor will collect a record of humidity and temperature, which combined result in a measure of "heat index." As set forth previously, the Dog Law requires the Department to set and then enforce humidity standards in kennels (3 P.S. § 459-207(h)(7)). The purpose of the heat index standard is to assure the dogs' health and welfare. Improper heat index values can lead to heat stress and death in dogs and therefore must be maintained at all times. The regulations establish those levels and the records of such, if used for enforcement purposes, are documents in which there is a public interest. The kennel industry is also subject to extensive regulation and the persons entering the field

¹⁷ In Commonwealth v. Long, 2003 Pa. Super. 319, 831 A.2d 737 (Pa. Super. 2003), the issue was the constitutionality of the self-reporting requirements in the Pennsylvania Vehicle Code. The vehicle code, specifically sections 3742 and 3744, requires drivers who have been in an accident involving injury to person or property to report certain information, such as their name, address, drivers license number, insurance information and location of the accident, to the police immediately. The information required to be reported was ruled not testimonial in nature but used instead for identification and financial responsibility purposes. While there is the possibility that a driver may incriminate himself by remaining at the scene and providing this information, public policy dictates that the driver remain to provide immediate physical aid and to accept potential financial responsibility. The regulations therefore did not violate any fundamental right guaranteed by the Fifth Amendment to the United States Constitution and Article I § 9 of the Pennsylvania Constitution. Thus, Defendant Long's argument that sections 3742 and 3744 of the act were unconstitutional failed.

¹⁸ Estate of Baehr, 408 Pa. Super. 172, 596 A.2d 803 (Pa. Super. 1991). Records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subject of government regulation are not protected by the privilege against self-incrimination. The exception does not apply if the purported government regulation specifically targets individuals suspected of criminal activities. However, if the government's purposes are essentially regulatory, the requested records are normally kept by the regulated party, and the records have assumed public aspects, the exception applies. The term "assumed public aspects" is used in the case to mean records necessary to assure public confidence in the agency's administration or carrying out of the duties imposed by statute and regulations. With regard to the Dog Law and its regulations, the monitoring of heat index values is essential to assuring the kennel owners are complying with standards that are essential to dog health and welfare. Failure to comply with the standards could result in adverse health consequences and even death of a dog.

See also State Real Estate Commission v. Roberts, 441 Pa. 159, 271 A.2d 246 (Pa. 1970), where the court found the inspection of a real estate broker's escrow account was not a violation of his Fifth Amendment right against self-incrimination under the Real Estate Brokers License Act, because the act required no alleged wrongdoing before an investigation; the privilege against self-incrimination did not apply under the required record doctrine, wherein certain records were required to be kept by law, and the doctrine applied to appellant because he voluntarily entered a field that required state licensing; and the administrative search was within appellee's authority, not too indefinite, and the information was relevant as the act required that the accounts be carefully kept.

must be licensed. By entering this field of extensive governmental regulation the person waives the privilege against incrimination as to the required records.¹⁹

In addition, the purpose of the monitoring is not solely or even primarily to impose criminal or civil penalties. In Commonwealth v. Long, 2003 PA Super 319, 831 A.2d 737 (2003), the Court noted that the filing of tax returns and records and the self-reporting of traffic accidents are two examples of self-reporting that could potentially lead to citations or other civil or criminal prosecution. The court pointed out that the filing of tax returns has been found not to violate the Fifth Amendment right against self-incrimination. The Court then went on to find that the self-reporting requirements related to traffic accidents did not violate a person's Fifth Amendment right against self-incrimination.²⁰

Many of the tenants the Court applied in Long apply in this case. The operation of a licensed commercial dog kennel is not illegal nor an inherently criminal activity. This is analogous to the analysis set forth in Long. Operating a commercial kennel is a heavily regulated industry, just as Long concluded was the case in regulating the

¹⁹ Estate of Baehr, 408 Pa. Super. 172, 596 A.2d 803 (Pa. Super. 1991). Administration of an estate is the subject of extensive government regulation. The court may direct the executor to file an accounting at any time. Accountings have public aspects, they become part of the court record, and can be demanded by persons having a claim against the estate. An accounting also assures public confidence in the handling of an estate, a separate public aspect. A person who voluntarily enters a field where it is established that records must be kept, waives the privilege against incrimination as to the required records. The required records exception to the privilege against self-incrimination applies to the person in his individual capacity, not merely in his custodial capacity, thereby broadening the extent of the waiver involved.

²⁰ In Commonwealth v. Long, 2003 Pa. Super. 319, 831 A.2d 737 (Pa. Super. 2003), the Court addressed the constitutionality of the self-reporting requirements established by 75 Pa.C.S.A. §§ 3742 and 3744. In its analysis the Court noted the police powers of the Commonwealth are particularly broad in matters pertaining to highway safety. Commonwealth v. Tarbert, 517 Pa. 277, 535 A.2d 1035, 1045 (Pa. 1987). The Court also found that the requirements were a reasonable exercise of the police powers of the Commonwealth to protect public safety by encouraging prompt reporting and rescue as well as financial responsibility for accidents. The Court considered that compelled self-reporting entails genuine risks of self-incrimination from the driver's point of view. It found that a conclusion that the Fifth Amendment extends to this regulatory scheme in order to assure drivers are not charged for potential criminal aspects of an accident would impair the capacity of the state to pursue both the regulatory and criminal objectives related to automobile accidents simultaneously. In this instance, compelled self-reporting is a necessary part of an effective scheme of assuring personal financial responsibility for automobile accidents. The Court reasoned that although it could be argued that the purpose of the Fifth Amendment is to compel the state to opt for the less efficient methods of an "accusatorial" system (see Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)), it would not follow that the constitutional values protected by the "accusatorial" system are of such overriding significance that they compel substantial sacrifices in the efficient pursuit of other governmental objectives in all situations where the pursuit of those objectives requires the disclosure of information which will undoubtedly significantly aid in criminal law enforcement.

With regard to tax returns, the Court went on to state that this Court has upheld the statute requiring the filing of income tax returns in the face of a self-incrimination challenge under Article I § 9. City of Philadelphia v. Cline, 158 Pa. Super. 179, 44 A.2d 610 (Pa. Super. 1945) (because the filing of income tax returns is not inherently criminal in nature, filing requirements are not unconstitutional). The Court basically found there was no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of prosecution.

operation of motor vehicles -- stating that the department had broad powers to regulate. Just as the self reporting provisions at issue in Long assure the health and safety of the persons involved in the accident, the purpose of the monitor requirement is to protect the health and welfare of the dogs.

The primary purpose of the data collection is to assure compliance with standards which, if not followed on a daily and even hourly basis, could lead to serious health consequences for the dogs housed in the kennel. Such consequences could include death. The outcome of monitoring the heat index levels in a kennel may theoretically lead to the investigation of a charge for violation of the regulation. However, subsection 28a.4(b)(8) states, "Data taken from these devices shall not be used as the sole basis for a civil penalty or criminal penalty under 3 Pa.C.S.A. § 459-903 (a) or (b) for violation of section 28a.4 of this Chapter." Just as in Long, it follows that a kennel owner's interest in avoiding possible prosecution for a violation of the regulations is not sufficient to compel a substantial sacrifice in the Department' efficient pursuit of it's duty to assure proper heat index levels to protect the health and welfare of the dogs.

Finally, the Department of Environmental Protection, Department of Agriculture, Department of Transportation, and the Gaming Control Board all have statutes or regulations that require self-reporting of violations, through records, monitors or otherwise, of other heavily regulated industries.²¹

²¹ The following regulatory provisions require self-reporting through records obtained from monitoring devices or reporting of possible violations and/or system malfunctions: As set forth in footnote 8, DEP regulations for air quality standards for coal plant, fossil fuel and natural gas plant emissions and ozone and nitrogen compound emissions require not only that the industry install monitoring device, but also impose reporting requirements and in some instances specifically allow the agency to utilize the data collected by those devices for purposes of enforcement (25 Pa.Code §§ 123.25(c)(e)(g), 123.46(b), 123.51, 123.108(4), 123.109, 123.113, 123.210 and 123.215); DEP regulations for Dam safety and water quality also include the requirement to keep records from the monitoring and make them available or submit monitoring results to DEP (25 Pa.Code §§ 105.53, 109.1103(d)(2), 109.1107, 109.701 and 109.810); the Pesticide Act enforced by this Department specifically allows the Department to promulgate regulations requiring an applicator to self-report significant pesticide accidents or incidents, such incidents could result in penalties and the revocation of the license. The provision is enforced through the recordkeeping provisions of the regulations (3 P.S. § 111.40 and 7 Pa.Code §§ 128.35 and 128.65); the Gaming Act requires the self-reporting of any violation 4 Pa.C.S. § 1333, which would include those of one's employer or employees -- "Any licensee, key employee or gaming employee shall have the duty to: ... (3) inform the board of any actions which they believe would constitute a violation of this part....)