

UPDATES FROM THE ANIMAL COUNCIL: PAWS

August 13, 2005

(Last publication date 8/6/05

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Preserving Our Right To Own And Breed Animals Is Your Responsibility

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*** PRIORITIZING PAWS PROBLEM SECTIONS**

*** USDA POLICY REVIEW: THE 1998 ANPR**

FEDERAL S 1139 by Senator Rick Santorum (R-PA,) co-sponsors Richard Durbin (D-IL,) Arlen Specter (R-PA,) Dianne Feinstein (D-CA,) and Elizabeth Dole (R-NC) - shorthand, "PAWS" - the Pet Animal Welfare Statute of 2005 would amend the Animal Welfare Act with subsequent rules to be adopted and wipe out the USDA's historic interpretation of AWA as only requiring licensing and regulation of breeders selling at wholesale. This standard was upheld in the 2003 United States Court of Appeals For The District Of Columbia Circuit case of Doris Day Animal League v. USDA (link on Yahoo group site.) In addition to requiring licensing of unknown numbers of additional breeders and sellers of dogs and cats, the bill has other provisions of different origins, impact and priority.

For opposition purposes, the key bill provisions are Sections 1 and 6. Section 1 amends the "dealer" definition to include retail breeders of dogs and cats along with wholesale breeders and other sellers falling outside the new definition of "Retail Pet Store" - currently only defined in the regulations and not in the AWA. The PAWS new Retail Pet Store definition expressly excludes retail breeders and restricts retail pet stores to "public retail establishments," by implication excluding anyone selling from a private, residential setting.* Section 6 of PAWS would delete from the AWA the key language from Section 2133:

"Provided, however, That any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor under this chapter. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder."

The "other person" provision allowed USDA discretion to determine its own thresholds to exempt those dog and cat breeders not truly in business and - according to the Court in DDAL v USDA - selling outside retail channels, i.e. wholesalers. This is the basis for USDA's exemption (iii) from dealer licensing: "(iii) Any person who maintains a total of three (3) or fewer breeding female dogs, cats, and/or small exotic or wild mammals, such as hedgehogs, degus, spiny mice, prairie dogs, flying squirrels, and jerboas, and who sells only the offspring of these dogs, cats, or small exotic or wild mammals, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license. This exemption does not extend to any person residing in a household that collectively maintains a total of more than three breeding female dogs, cats, and/or small exotic or wild mammals, regardless of ownership, nor to any person maintaining breeding female dogs, cats, and/or small exotic or wild mammals on premises on which more than three breeding female dogs, cats, and/or small exotic or wild mammals are maintained, nor to any person acting in concert with others where they collectively maintain a total of more than three breeding female dogs, cats, and/or small exotic or wild mammals regardless of ownership;"

PAWS Section 6 would eliminate the statutory authority for the above regulatory exemption and subject wholesale breeders to the same quantitative thresholds as retail breeders and private sellers. Additionally, the PAWS "retail pet store" definition expressly excludes "a person selling wild animals" raising questions of how such sellers would be treated under a post-PAWS AWA. Further confusion is added by the 2002 "Helms amendment" to the AWA to the definition of "animal:

".term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research,[effective 2003]" Thus, the AWA does not exclude birds or rats and mice that are bred for purposes other than research. On June 4, 2004, APHIS published an Advance Notice of Proposed Rulemaking regarding several changes being considered regarding birds, rats and mice not specifically excluded under the AWA. The rulemaking process is still in progress.

The final sentence of Section 2133 allows agency discretion about whom to license when the person falls outside the inclusive definitions; in other words, those who voluntarily wish to be licensed, whether initially or as their circumstances change. Thus Section 6 contains some unscrutinized curve balls.

Section 3 provides agency access to source records of re-defined retail pet stores for dogs and cats. Licensed dealers are already required by regulation to keep these records subject to inspection. The purpose for adding pet stores is for enforcement of dealer licensing, and this has long been suggested as a possible amendment although it is dependent on a definition of a retail pet store as a reseller either under the existing regulations or as would be superseded by PAWS.

Section 4, the Extension of Temporary Suspension Period, and Section 5, "Authority to Apply for Injunctions," have been on the USDA wish list for years: "We are also examining the possibility of increasing the length of summary license suspensions and of extending our current authority to seek injunctions against individuals in serious violation of the law. In other words, we are seeking ways to get the bad operators out of business quicker by putting more teeth into the law." Michael Dunn remarks, 1996 Animal Welfare Act: Historical Perspectives and Future Directions Symposium Proceedings

<<http://www.nal.usda.gov/awic/pubs/96symp/awasymp.htm>>

While Senator Santorum's statement in the Congressional Record of July 27 (posted in our Files section on July 29) suggests forthcoming amendments to address these and other drafting problems, as to PAWS Sections 1 and 6, the existing USDA regulatory scheme has furnished a coherent, internally consistent, economically sensible and viable framework to which the agency was judicially accorded deference to its rational discretion. As we noted in our July 10 update:

"Wholesaling is a simple, qualitative measure that is done on a business model that includes compliance costs and can be anticipated year in and year out until a business decision is made to cease operation. Absent change in federal law, were the USDA to change this standard on its own, it would need to comply with the federal Regulatory and Flexibility Act (5 USC 601 et seq.) that requires agencies to consider the economic effects of rule changes on small entities including, businesses, organizations and individuals. This entails estimating the number of operators affected by changes and likely dollar impact of rule changes should small entities be those most affected by the rule changes and an entire procedural scheme enforced by the Small Business Administration. Agencies can impose "significant" regulation on small businesses and non-profit organizations but are required consider less burdensome alternatives and to explain why it has rejected those alternatives.

This law along with some Executive Orders make dubious any USDA instigated effort as broad as the PAWS bill. However, it would force USDA to follow these requirements in additional rulemaking pursuant to any amendments to the AWA. This may, or may not, result in changes to existing regulation of licensed dealers, many of which are also small businesses on a dollar basis."

Note that the above considerations would also apply to any change in the regulations to develop different standards for retail breeders, i.e. operating in residential settings, absent an express statutory directive to do so.

Prior to the DDAL appellate decision, DDAL had sought to change the retail pet store definition to exclude breeders, i.e. to license retail breeders, through a Petition for Rulemaking (a technique permitted under the Federal Administrative Procedure Act to force a federal agency to consider a privately sponsored rule.) USDA received 35,953 comments on the Petition of which 35% raised objections including the strain on federal resources and uncertainty about the number of new dealers. On June 24, USDA published an Advance Notice of Proposed Rulemaking (ANPR) requesting comments about specific parameters of possible changes in light of potential strain on agency resources. A key USDA statement in the ANPR was:

"Through that experience, we have determined that the risk of noncompliance with the regulations significantly increases if facilities care for more than 60 breeding female dogs and/or cats. At this time, however, we would like to gather more data to support the proposal of a specified number."

Based on the comments received, USDA re-affirmed its policy of only licensing wholesale breeders and sellers under the AWA, later challenged and upheld in the DDAL litigation.

To read or (refresh your memory on) the ANPR, see the June 24, 1998 Federal Register page, scroll down and select either the text or PDF version. We have also added a direct link on the Yahoo site to the text version: <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPaddress=&dbname=1998_register&docid=98-16807-filed>

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Online news updates published sporadically since 1997.

Legislative tracking subject to change. CA bill and law information

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