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June 8, 2009

VIA COURIER

The Honorable Tom Vilsack
Secretary of Agriculture
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Washington, DC 20250

**PETITION FOR RULEMAKING TO AMEND 9 C.F.R. § 2.12
OF THE DEPARTMENT OF AGRICULTURE'S
ANIMAL WELFARE REGULATIONS**

Dear Mr. Secretary:

On behalf of the Companion Animal Protection Society (“CAPS”) and pursuant to 5 U.S.C. § 553(e) and 7 C.F.R. § 1.28, we hereby petition you to initiate a rulemaking to amend 9 C.F.R. § 2.12 of the U.S. Department of Agriculture (“USDA” or the “Department”) Animal Welfare Regulations. The welfare of hundreds of thousands of companion animals in breeding facilities throughout the country depends on your quick attention to this petition.

Introduction

Section 2.12 of the Animal Welfare Regulations provides discretionary authority to the Animal Care Program of the Animal and Plant Health and Inspection Service (“APHIS”) to terminate USDA licenses issued to animal breeders, brokers, and dealers during the license renewal process, or at any other time following a public hearing for any reason that an initial license application may be denied pursuant to § 2.11. When APHIS fails to exercise that discretionary authority, as it frequently does, animals suffer in voiceless misery.

This petition urges you to restrict APHIS’ discretion in limited circumstances and requests mandatory termination of USDA-issued licenses for certain violations of federal, state or local animal cruelty laws or for making any false or fraudulent statements or records. This rule change will better effectuate the purposes of the Animal Welfare Act (“AWA”), 7 U.S.C. §§ 2131-2159, harmonize its implementation and enforcement with the animal cruelty laws and

regulations of states and local jurisdictions, and efficiently and effectively husband the scarce resources of the Department's Animal Care Program and state and local animal care agencies.

Background on the Companion Animal Protection Society

Founded in 1992, CAPS is the only national non-profit organization dedicated exclusively to protecting companion animals. CAPS is committed to promoting the humane and ethical treatment of companion animals by commercial breeders and brokers, and dedicates substantial resources addressing the abuse and suffering of pet shop and puppy mill dogs. CAPS actively targets the pet shop/puppy mill issue through investigations, dog rescues, education, media relations, legislative involvement, and consumer assistance. CAPS has investigated over 1,000 commercial breeding facilities in sixteen states throughout the Midwest and surrounding areas. CAPS also invites pet shop and Internet customers to submit their complaints using an on-line form so that it can better track problem facilities and breeders in the various states.

Basis for and Explanation of CAPS' Petition

During the course of its investigations of USDA-licensed facilities, CAPS has consistently found companion animals living in filth and squalor, without adequate veterinary care or proper nourishment, in clear violation of the humane handling, care, treatment, and transportation standards specified in 9 C.F.R. Part 3. Tragically, however, your Department's Animal Care Program often turns a blind eye to these barbaric conditions despite numerous attempts by CAPS over the years to persuade APHIS to more effectively implement the Animal Care Program. In fact, the Department even ignores those situations where licensees have been successfully prosecuted by state and local authorities for violations of applicable animal cruelty laws or regulations.

Take, for example, the Kathy Bauck case, discussed in detail in the following section. Ms. Bauck was a frequent and flagrant violator of the AWA, and yet APHIS failed to take action against Ms. Bauck despite ample opportunity to do so. It was not until the State of Minnesota brought animal cruelty charges against her that she eventually relinquished ownership of her USDA-licensed facility. Unfortunately, she transferred ownership to her husband and still works at the facility. Thus, Ms. Bauck has every opportunity to carry out her unethical treatment of animals with continuing USDA approval. The State of Minnesota has done all it can to prevent Ms. Bauck's mistreatment of animals, but only USDA has the authority to revoke her federal license, which is still in her name.

This petition seeks to address the Kathy Bauck case and others like it by amending 9 C.F.R. § 2.12, entitled "Termination of a license." That provision currently provides that a "license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to Sec. 2.11 after a hearing in

accordance with the applicable rules of practice.” 9 C.F.R. § 2.12 (emphasis added).¹ This petition urges you to revise § 2.12 by dividing it into two subsections, as follows:

- (a) Except as provided in subsection (b), a license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.
- (b) A license shall be terminated during the license renewal process or at any other time the Administrator learns that a current licensee:
 - (1) Has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty or neglect; or
 - (2) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies.

Our recommended change, in combination with the current provisions of 9 C.F.R. §§ 2.9 and 2.10 (dealing with officers, agents, and employees of licensees whose licenses have been

¹ Section 2.11 says, in relevant part:

- (a) A license will not be issued to any applicant who:
 - (1) Has not complied with the requirements of Sec. Sec. [sic] 2.1, 2.2, 2.3, and 2.4 and has not paid the fees indicated in Sec. 2.6;
 - (2) Is not in compliance with any of the regulations or standards in this subchapter;
 - (3) Has had a license revoked or whose license is suspended, as set forth in Sec. 2.10;
 - (4) Has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty within 1 year of application, or after 1 year if the Administrator determines that the circumstances render the applicant unfit to be licensed;
 - (5) Is or would be operating in violation or circumvention of any Federal, State, or local laws; or
 - (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

suspended or revoked, and licensees whose licenses have been suspended or revoked), will help protect companion animals from inhumane treatment by revoking federal permits from those who would do them harm. It will also harmonize federal, state, and local efforts to prevent cruelty to animals by making enforcement and permitting decisions more effective and efficient. And it will also ensure that employees and agents of licensees who have been convicted of animal cruelty in either a state or federal court are forbidden from obtaining a license for the same time period as the suspended licensee. This will ensure that facilities can no longer change ownership or operational control and still continue to be run by people closely associated with those who have been convicted of animal cruelty. The case of Kathy Bauck demonstrates why each of these goals is critically important.

The Case of Kathy Bauck

Ms. Bauck has run a USDA-licensed dog breeding facility in Minnesota since 1983. Over the years, the Department cited Ms. Bauck for numerous violations of the AWA, some of which are highlighted below. In fact, the Department had the discretion to revoke or deny renewal of her license years ago, but failed to take action. Over time, the conditions at Ms. Bauck's facility degraded, eventually leading to her conviction on state animal cruelty charges in May 2008. Unfortunately, that conviction didn't stop Ms. Bauck. She was convicted again on animal cruelty charges in March 2009. Had our proposed amendment been in place, Ms. Bauck's license would have been automatically revoked in May 2008. While this may not have corrected the past failures of the Department to act, it certainly would have prevented future violations from occurring because the facility would have been closed or at least sold outside the Bauck family. Instead, the breeding facility continues to operate today, run by Ms. Bauck's husband and daughter, and Ms. Bauck continues to work there as an employee.

A History of Noncompliance

Kathy Bauck has a long record of noncompliance with her USDA-issued license. For example:

- On March 7, 2001, she received a citation for transporting an "obviously ill" dog, even though the dog had a health certificate from her facility issued the day before, as well as transporting puppies in containers that were too small for them to make "normal postural adjustments." The inspection occurred at the Bradley International Airport in Windsor Locks, Connecticut, while the animals were in transit. *See Attachment A.*
- On January 16, 2002, she received a citation for inadequate record keeping for the animals in her facility, and for using two outdoor pens without wind or rain breaks, both of which are required under the AWA regulations. *See Attachment B.*
- On January 8, 2003, she was cited for having "permanent tethering" of dogs next to a building rather than in pens as required in the AWA, as well as for possessing expired

drugs, and storing bags of food on the floor and next to walls allowing potential vermin contamination. *See Attachment C.*

- On January 21, 2004, she was cited for possessing expired drugs, inadequate records on her animals, and inadequate storage of bedding supplies. *See Attachment D.*

In 2006, Ms. Bauck's facility was inspected by the Department several times throughout the year, with citations issued in January, April, and November. *See Attachments E, F, G.* The January citations were for a lack of adequate veterinary care, including having no "program of veterinary care," and possessing, yet again, expired medications. Additionally, under the lack of veterinary care, the Department noticed a Great Dane that was lame and a Boxer that had bloody diarrhea, neither of which were noticed in a required daily inspection. In that same January inspection, there were several dogs that were not listed on the inventory, a requirement of the AWA. The inspector observed "a large amount of fecal accumulation on the outside elevated run portion" of one of the pens as well as two pens that had physical hazards that "may cause [the dogs] injury." The Department's inspector also noticed a large crack in the concrete floor of an outdoor run and gave Ms. Bauck five months to repair it. Finally, in that same January inspection, the slatted floor of one of the whelping pens (holding an adult dog and five puppies) had large enough spaces in between the slats to allow the puppies' feet to go through. *See Attachment E.*

In the April inspection, the large crack in the concrete floor of an outdoor run still had not been corrected from its initial notice in the January inspection. The Department's inspector noted that Ms. Bauck still had a month to fix the crack, but that it had yet to be dealt with, "allow[ing] a buildup of waste and debris which will not allow the surface to be cleaned and sanitized effectively." *See Attachment F.*

That November, the same inspector made another visit and cited Ms. Bauck for not having adequate veterinary care when she observed a dog with a swollen right front paw as well as missing skin from a separate area of his body. The inspector also found "2 dogs fighting between two enclosures that housed 2 dogs each." She cited Ms. Bauck for not having compatible groupings because aggressive dogs were not housed separately. *See Attachment G.*

State Action

The State of Minnesota also conducted an investigation of Ms. Bauck's operations in 2006 and issued a cease and desist order to her on October 12, 2006 for practicing veterinary medicine without a license. *See Attachment H.* Since Ms. Bauck's facility is licensed by the Department, the most Minnesota could do, without bringing criminal charges, was to issue a cease and desist order. Unfortunately, this allowed her facility to keep running and enabled her to continue practicing veterinary medicine without a license. In its investigation, the State turned up evidence of Ms. Bauck spaying and neutering dogs, often ineffectively, sometimes causing infections and death of the dogs. She also performed ear crops, tail docks, Caesarian sections, hernia repairs, dew claw removals, and vaccinations. In her spay and neuter surgeries, the State

determined the “anesthesia” she used was merely a sedative and did not “provide a surgical plane of anesthesia.” Importantly, these egregious practices were discovered by the State to have occurred between 2002-2006. And yet, none of these violations were ever noted by the Department in one of its many inspections of her facility during that same time period.

Given the egregious nature of these practices, Minnesota eventually brought six criminal charges against Ms. Bauck in April 2008: five for practicing veterinary medicine without a license and one for animal cruelty. *See* Attachment I. In May 2008, the parties entered into a plea agreement, which required Ms. Bauck to plead guilty to one count of practicing veterinary medicine without a license. She received a 10-day jail sentence, a \$900 fine, and two years probation. Had our proposed amendment been in place, Ms. Bauck’s license would have been automatically revoked at that time. Yet, despite her guilty plea, Ms. Bauck’s USDA license remained in effect.

Only a few short months later, the State of Minnesota filed another criminal complaint against Mr. Bauck. This time, the criminal complaint, filed July 9, 2008, listed nine charges: five counts of animal cruelty; two counts of torture; and two counts of practicing veterinary medicine without a license, all from just the two-month period following the earlier plea agreement. *See* Attachment J. Incredibly, a USDA inspector visited Ms. Bauck’s facility in late July 2008 and found no violations. In January 2009, five of the criminal counts were dropped, but Ms. Bauck was found guilty of the four remaining charges in March 2009,² including three misdemeanor counts of cruelty to animals and one gross misdemeanor count of torture. On May 1, 2009, Ms. Bauck was sentenced to 20 days in jail and ordered to pay a \$500 fine. She was also placed on probation and must allow the Humane Society to perform unannounced inspections of her facility. *See* Attachment L. Despite two criminal convictions under state law and numerous documented violations of the AWA over the past several years, the Bauck facility remains licensed to this day by APHIS.

The Current Regulations Need Strengthening

Under the Department’s existing regulations, Ms. Bauck’s license may be revoked by APHIS pursuant to § 2.12, but it is not mandatory. And given the Department’s track record, it is not likely. The ironic twist is that a similar guilty plea or conviction would prohibit Ms. Bauck from receiving an initial license under § 2.11, but a repeat offender and flagrant violator can continue operating for years under a pre-existing license. Such a result is clearly contrary to the purposes and intent of the AWA, and even is at odds with other provisions of the Department’s Animal Welfare Regulations. For example, § 2.100(a) require all dealers to “comply in all respects” with the Animal Welfare Regulations, and § 2.1(e) states that the failure of any person

² That same month, APHIS inspected the facility and discovered two injured dogs needing veterinarian care and more than a dozen other dogs “excessively soiled” – that is, covered in their own feces. *See* Attachment K.

to comply with those regulations “shall constitute grounds for denial of a license . . . or for its suspension or revocation by the Secretary, as provided in the Act.” The current discretionary language of § 2.12 is wholly contrary to these requirements, particularly where the Department fails to exercise its discretionary revocation authority despite mounting evidence of significant noncompliance that clearly constitute grounds for revocation of the license.

The description of even a fraction of the pain and suffering occurring in Ms. Bauck’s facility should make the revocation of her license a foregone conclusion. Yet, not only is the facility being run by Ms. Bauck’s husband and daughter, she herself still works there. The facility continues to ship puppies to pet stores all across the country, as well as operate unlicensed on the Internet.

Mr. Secretary, you have an obligation, conferred by Congress through the AWA, to ensure that licensees act humanely towards their animals. Although your rules only require a “minimum” standard of care be provided to the animals you are charged to protect, the case of Ms. Bauck demonstrates an inability by the Department to meet even that low standard. Under our proposed amendment to § 2.12, Ms. Bauck’s license would have been revoked from the time of her first conviction, and the cruelties and torture that occurred afterwards in her facility would never have occurred. This proposal will certainly not be a remedy to all of the abuses that happen to companion animals under your Department’s administration of the AWA, many of which CAPS has discussed with APHIS over the years. It will, however, mandate that your Department automatically revoke the license of people who have committed and been convicted of heinous acts of animal cruelty.

Conclusion

What the case of Kathy Bauck demonstrates is the need for you to amend the Department’s rules to include an automatic revocation of a license for certain violations of the AWA. In this case, Minnesota issued a cease and desist order and brought two separate criminal complaints against Ms. Bauck, resulting in one guilty plea for practicing veterinary medicine without a license and convictions for four other misdemeanor counts of animal cruelty and torture. This result, reached by the State of Minnesota, was still not enough for the Department to take action to remove Ms. Bauck’s license to run a breeding facility. The case of Kathy Bauck places the failure of the Department to enforce the AWA in stark relief. Section 2.12 needs to be amended so license revocation is a mandatory result for licensees convicted of animal cruelty.

Sincerely,



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Pro Bono Counsel for CAPS

The Honorable Tom Vilsack

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Attachments

cc: The Honorable Kathleen A. Merrigan, Deputy Secretary of Agriculture
Cindy Smith, Administrator, Animal and Plant Health Inspection Service
Dr. Chester A. Gipson, Director of Animal Care
Deborah Howard, President, Companion Animal Protection Society

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ATTACHMENT

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