

Secretary Daniel Glickman
United States Department of Agriculture
c/o Regulatory Analysis and Development
PPD, APHIS, Suite 3C03
4700 River Road
Unit 118
Riverdale, MD 27037-1238

Attn: Docket No. 97-018-1

COMMENTS CONCERNING DOCKET NUMBER 97-018-1

Pursuant to the Animal and Plant Health Inspection Service ("APHIS"), USDA, "Notice of Petition and Request for Comments," Docket No.97-018-1, published at 62 *Federal Register* 14044 (March 25, 1997), the Doris Day Animal League submits these comments on behalf of the following organizations (collectively referred to herein as "petitioners"):¹

American Humane Association
236 Massachusetts Avenue, N.E.
Washington, DC 20002

American Society for the Prevention of Cruelty to Animals
1755 Massachusetts Avenue, N.W.
Suite 418
Washington, DC 20036

Animal Legal Defense Fund
401 East Jefferson Street
Suite 206
Rockville, MD 20850

Council for Compassionate Governance
236 Massachusetts Avenue, N.E.
Suite 506
Washington, DC 20002

¹ See Appendix I for list and description of each organization endorsing these comments.

Doris Day Animal League
227 Massachusetts Avenue, N.E.
Washington, DC 20002

The Fund for Animals
850 Sligo Avenue
Suite 350
Silver Spring, MD 20910

Humane Society of the United States
2100 L Street, N.W.
Washington, DC 20037

Progressive Animal Welfare Society
15305 44th Avenue West
Lynnwood, WA 98037

INTRODUCTION.

Recently, the public has become all too familiar with cases of abuse in dog breeding facilities. In January 1997, a "puppy mill" in Newport, WA was found to house over two hundred sick and maltreated purebred dogs.² The facility failed in all aspects to meet humane care and handling standards for housing, feeding, and sanitation. The facts of this case underscore the urgent need for federal, state and local oversight and regulation of all animal dealers.

Prior to the Newport, WA facility's public exposure, the owner of the abusive breeding operation, Jeanette Bergman, had run into legal problems in Idaho. She relocated to the state of Washington in order to sell dogs and take advantage of lax state and local laws.³ Even Washington state officials acknowledge that abusive dog breeders like Jeanette Bergman are subject to little or no regulation. Moreover, despite a legislative mandate under the Animal Welfare Act ("AWA") requiring federal enforcement of licensing and humane care, handling, and transport standards for animal breeding facilities, the USDA publicly admits that it has a policy of not addressing situations like the Bergman puppy mill because such facilities are exempted "retail pet stores."

The Bergman facility is but one of many examples of cruel and abusive unregulated dog breeding facilities which recently have been exposed by animal welfare organizations and/or the media. Another typical example is that of a dog breeder named John Tanis of Lackawanna County,

² "Dogs Confiscated From Breeding Farm," Seattle Post-Intelligence, January 6, 1997.

³ Nancy Roberts Trott, "Kennel Owner Previously Convicted of Cruelty," Seattle Post-Intelligence, January 14, 1997.

PA. In 1996, he was convicted under state anti-cruelty laws for his operation of a puppy mill.⁴ Mr. Tanis had several previous convictions in other states such as New Jersey, yet continued to operate a puppy mill in which animals were routinely mistreated. Tanis was so notorious that several magazines refused to publish his advertisements offering direct sales to the public.⁵ The Tanis case is yet another grim illustration of how the lack of federal oversight of breeders who sell directly to the public allows known animal abusers to continue their trade.

As DDAL has noted in the past, the USDA's arbitrary and capricious expansion of the definition of "retail pet store" has allowed hundreds of dog breeders like Jeanette Bergman and John Tanis to profit with impunity from animals raised in inhumane conditions and denied adequate veterinary care. When combined with USDA's "policy" of ignoring the AWA by not regulating hunting, security, and breeding dog dealers, the agency has knowingly allowed numerous breeding facilities to maintain standards well below the federally established regulations for humane handling, care, and treatment. The comments submitted below are designed to halt widespread "puppy mill" animal abuse and to place USDA in compliance with the agency's mandate under the AWA.

PROCEDURAL BACKGROUND.

The publication of the Doris Day Animal League ("DDAL") petition for rulemaking in the *Federal Register* is a positive first step in the USDA's attempt to reform its regulation of dog breeding facilities. The agency's commencement of this regulatory reform was preceded by a long history of inaction in addressing complaints made by DDAL and other petitioners.

In 1966, Congress enacted the Federal Laboratory Animal Welfare Act to address the abuses that developed as a result of the nation's vast program of medical research, particularly research involving experimentation with animals.⁶ Four years later, in 1970, Congress passed the Animal Welfare Act of 1970 ("AWA" or "the Act") which expanded the coverage of the statute to include dealers of animals sold for use as pets.⁷ The 1970 amendments "established by law the humane ethic that animals should be accorded basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, and sufficient ventilation."⁸ As a result of the amendments made in 1970, and subsequent amendments made in 1976 and 1985, the Act requires the licensing of animal dealers and exhibitors and directs the USDA to establish licensing procedures

⁴ "Breeder Convicted in N.J. Now Convicted in Pennsylvania," *Humane News*, March/April 1996.

⁵ *Id.*

⁶ Pub. L. No. 89-544, 80 Stat. 359 (1966).

⁷ Pub. L. No. 91-579, 84 Stat. 1560 (1970).

⁸ H.R. Rep. No. 1651, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 5104.

tied directly to compliance with humane handling, care, treatment, and transportation regulations.

Recent internal reports, including a 1995 audit by the USDA Inspector General, found that there are 4,556 licensed animal dealers operating in the United States.⁹ While the Inspector General's report found that USDA inspectors had knowingly undermined enforcement of regulations covering licensed animal dealers, the USDA/APHIS has also engaged in practices and policies that exempt many other animal dealers from the entire licensing process and humane handling, care, treatment and transportation regulations.

Under the AWA, "retail pet stores" are exempted from the animal dealer licensing provisions.¹⁰ As a result, "retail pet stores" do not have to meet the established humane handling, care, treatment and transportation regulations. The Act also specifically states that all animal dealers selling dogs for hunting, security, or breeding purposes cannot be exempted from the Act's licensing and thus must meet the humane handling, care, treatment, and transportation regulations.¹¹ The regulations implemented by the USDA have defined "retail pet store" as any "outlet" where dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold blooded species are sold or offered for sale, at retail, for use as pets.¹²

However, the USDA's regulatory interpretation of "retail pet store" is beyond the term's commonly accepted meaning. This overbroad interpretation and the resulting policy have allowed numerous animal dealers to avoid meeting humane handling, care, treatment, and transportation regulations. As a result, there are now hundreds of non-regulated "puppy mills" selling inhumanely handled, cared for, and treated animals for sale throughout the United States.

On January 25, 1989, DDAL wrote a letter to the USDA/APHIS regarding the hunting dog breeding activities of an animal dealer in Oklahoma. The letter, *inter alia*, inquired as to the agency's rationale for failing to regulate the facility in question, and countless other "puppy mills" throughout the United States. The USDA responded in February of 1989 that the facility specifically complained of was not regulated because it was exempt from licensing based upon the USDA's interpretation of "retail pet store." Additionally, the agency's letter stated that "Congress gave no clear indication as to their intent in regulating [hunting, security and breeding dog dealers]." The letter continued that it was the agency's policy not to regulate such facilities and that the agency was reviewing that policy. Subsequently, DDAL held numerous meetings with USDA officials who

⁹ "Enforcement of the Animal Welfare Act," United States Department of Agriculture, Inspector General, USDA/OIG-A/33600-1-CH (1995).

¹⁰ 7 U.S.C. § 2133 (1994).

¹¹ *Id.* § 2132.

¹² 9 C.F.R. § 1.1 (1996) (emphasis added).

asserted, and continue to assert, that it is the agency's policy not to regulate hunting, security, and breeding dog dealers.

On June 22, 1995, pursuant to the USDA regulations,¹³ after waiting nearly four years for the USDA to finish the purported review of its hunting, security and breeding dog policy and after submitting information about dog breeding abuses to the agency, DDAL filed a petition for rulemaking ("Petition") with the USDA notifying the agency that its regulatory definition of "retail pet store" as any "outlet" was overbroad and contrary to the intent of Congress and the AWA. Additionally, the Petition notified the USDA that its stated policy of exempting hunting, security, and breeding dog dealers from the agency's humane handling, care, treatment, and transportation regulations was contrary to the language and congressional intent of the AWA. The Petition asked the agency to take immediate action to remedy these violations of the AWA.

DDAL Executive Director Holly Hazard served the Petition on Ms. Patricia Jensen, then acting-Administrator of the Animal and Plant Health Inspection Service (APHIS), on June 22, 1995. Several months subsequent to filing their petition with Ms. Jensen, DDAL failed to receive acknowledgment of the Petition's filing. DDAL then contacted APHIS seeking a status report concerning the agency's consideration of the Petition. Individuals within the contacted office of APHIS told DDAL that they could find no record of the Petition having been filed with the agency.

Upon receiving the APHIS response, DDAL contacted the USDA's Office of General Counsel, which directed the organization to send a copy of the previously filed Petition. Following the agency's instructions, DDAL again filed the Petition. On February 20, 1996, DDAL sent a letter to APHIS employee Stephen Smith indicating, *inter alia*, that the agency had still failed to acknowledge or respond to the Petition.

On April 22, 1996, DDAL sent another letter to USDA Secretary Daniel Glickman indicating that the agency's failure to acknowledge or respond to the Petition constituted an unreasonable delay, constructive denial of the requested action, and was ripe for judicial review. On December 19, 1996, after receiving no response from the Secretary's office, DDAL, along with several individual plaintiffs, filed a complaint for injunctive relief against the USDA and USDA/APHIS.¹⁴ As a result of this legal action, USDA and the DDAL eventually agreed to a dismissal (without prejudice) of the lawsuit pending USDA undertaking several actions, including publishing of the original DDAL petition found at 62 *Federal Register* 14044, and soliciting comments on the agency's regulatory oversight of puppy breeders.

¹³ 7 C.F.R. § 1.28 (1996); *see also* Administrative Procedure Act, 5 U.S.C. § 553 (1994).

¹⁴ *Doris Day Animal League, et al. v. Daniel Glickman, et al.*, Docket No. 96:CV02806, (D.D.C. December 19, 1997).

ISSUES AND ANSWERS RAISED BY OTHER COMMENTS.

Throughout much of the public discussion of Docket No. 97-018-1, a number of organizations and individuals have mischaracterized the position and actions of DDAL, as well as those of other animal protection organizations. In an effort to clarify DDAL's position and to ease the agency's administrative burden in reviewing the docket, petitioners have made a preliminary review of the docket and will specifically address a number of the concerns raised by those opposing DDAL's request.

1. *Legislative Intent of the AWA.* Many comments suggest that by enacting the "retail pet store" exemption, Congress intended the Animal Welfare Act to exclude from licensing all people who sell dogs at retail. Such assertions are contrary to the legislative history of the AWA. In 1970, Congress amended the Laboratory Animal Welfare Act to expand and strengthen the humane care and regulation of animals.¹⁵ The amendment extended the authority of the USDA to regulate the transportation, purchase, sale, housing, care, handling, and treatment of any warm-blooded animal by persons or organizations engaged in holding animals for sale as pets.¹⁶ The amendments also exempted "retail pet stores" from future regulation.

The intent of Congress in the 1970 amendments was to strengthen the regulation of all animal sales. Given the legislative goal of stricter enforcement and regulation of animal welfare standards, the exemption carved out for "retail pet stores" must be read in a manner consistent with this intent and, thus viewed as narrowly constructed as possible. Indeed, where a statute involves the public interest,¹⁷ such as the AWA, exceptions to its operations must be read narrowly.¹⁸ Further, where there is an express exception, such as the "retail pet store" exemption, it comprises the only limitation on the operation of the statute and no broadening of the exception is implied.¹⁹

¹⁵ Animal Welfare Act of 1970, H.R. Rep. No. 91-1651, *reprinted in* 1970 U.S.C.C.A.N. 5103.

¹⁶ *Id.* at 5105 (statement of J. Phil Campbell, Under Secretary of USDA).

¹⁷ See 54 Fed. Reg. 10822, 10831 (March 15, 1989) (APHIS recognizing the public interest nature of the AWA stating, "Direct benefits accrue to society by knowing that animals may be better cared for and treated humanely. The value of these social benefits are subject to personal preference and concerns.")

¹⁸ See, e.g., *Colorado Dep't of Social Servs. v. Department of Health & Human Servs.*, F.Supp. 337, 351 (D. Colo. 1993) (statutes granting exceptions from clearly anticipated public policy obligations should be construed narrowly); *Conservation Comm'n of Simsbury v. Price*, 193 Conn. 414, 424, 479 A.2d 187, 193 (1984) (exception to environmental protection statute was strictly construed to prevent the defendants' activity).

¹⁹ See, e.g., *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (because procurement statute's fifteen exceptions did not include Native American-owned road construction, the statute applied to a procurement of such services.)

In specifically discussing the exemption, Congress stated, "[T]he term [dealer] excludes any retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer."²⁰ This Congressional description of the exemption reiterates that the exemption covers only certain "stores" by specifically discussing what "stores" do not fall within the "retail pet store" exemption. Courts have found that "retail pet stores" are commonly considered large, public commercial establishments and not individuals who sell animals directly to the public.²¹ The AWA's language and legislative history in no way indicate that Congress intended to exempt from regulation all persons who sell dogs at retail outside of these large establishments. Indeed, legislators have consistently reiterated Congressional intent to regulate the entire pet industry by providing only limited exceptions.²² Thus, the AWA's history suggests that there is a small, narrowly defined class of stores exempted from the Act's legal requirements and USDA's regulatory mandate.

Contrary to this history and legislative mandate, the USDA expanded the term "store" to include any "outlet."²³ As a result, the agency has exempted thousands of breeders from meeting the licensing and humane care, treatment, and handling regulations that Congress intended to cover pet sales. Comments suggesting that this interpretation was the intent of Congress are erroneous. The AWA was passed and amended with the intention of increasing the regulation of animal sales, particularly animals sold as pets. The legislative history of the AWA indicates that the "retail pet store" exemption was designed to exempt large chain and boutique pet stores and not to exempt the non-store breeder who sells directly to the public.

2. APHIS Enforcement Capabilities. Some comments suggest that DDAL's requested alteration of the "retail pet store" definition would overwhelm APHIS' ability to regulate large commercial breeders.²⁴ This assertion is an overstatement of the issue and fails to take into consideration all of the petitioners' proposal. In various fora, the petitioners have addressed APHIS' inspection program

²⁰ *Id.* at 5108 (emphasis added).

²¹ *See, e.g.*, In re Maiké, 77 Bankr. 832, 17 Colliers Bankr. Cas. 2d (MB) 538, 16 Bankr. Ct. Dec. (CCR) 349 (Bankr. D. Kan. 1987) (Finding that debtors are not farmers because a majority of their income is derived from breeding, raising and sale of puppies which are sold to retail pet stores *or* the public)(emphasis added); Labrador, Inc. v. Iams Co., et al., 1995-2 Trade Cas. (CCH) P71, 161 (D. C.D.Cal. 1995) (indicating that large stores such as Petco and Petsmart are commonly considered retail pet stores); Ralls v. Docktor Pet Centers, 177 Bankr. 420, Bankr. L. Rep. (CCH) P76, 414 (D. Mass. 1995) (indicating that large national franchisors with over 200 stores is commonly referred to as a retail pet store); In re Audra-John Corp., 140 Bankr. 752, 26 Collier Bankr. Cas. 2d (MB) 1554, 23 Bankr. Ct. Dec. (CCR) 18 (Bankr., 3rd Div. Minn. 1992), (describing a retail pets store located in a mall).

²² *See, e.g.*, 137 Cong. Rec. E1296 (April 17, 1991) (Statement of Rep. Lee Hamilton)

²³ *See* 9 C.F.R. § 1.1

²⁴ "Canine Legislative News," The American Kennel Club ... on line, <http://www.akc.org/legnews.htm> (May 14, 1997); *see also*, The Cat Fancier's Association "Alert" opposing "The Petition to Expand Animal Welfare Act Regulations," (undated).

shortcomings. Nevertheless, petitioners believe that a comprehensive approach to addressing the overbroad licensing exemptions (and the agency's policy of not regulating hunting, security and breeding dog dealers) can create workable solutions.

Specifically, the petitioners have proposed that the hobby breeder licensing exemption found at 9 C.F.R. § 2.1(a)(3)(iii) should be expanded to allow hobby breeders with five or fewer females to be exempted from licensing. This suggestion ensures the non-regulation of hobby breeders and also prevents the number of new facilities coming under APHIS regulatory oversight from becoming overburdensome. The petitioners have also proposed a high trigger for "on site" inspection of newly regulated facilities as additional protection from unnecessary intrusion for the "hobby" breeder.

Additionally, the petitioners propose that APHIS raise current application and licensing fees to establish a dedicated source of revenue that will support APHIS' expanded inspection staff and regulatory activities in the area of dog breeding. If the agency makes both a financial and institutional commitment to its inspection program, petitioners believe that APHIS could meet its oversight burden under the DDAL proposal.

3. Agency Oversight of Direct Sales. Comments submitted by American Kennel Club ("AKC") members suggest that expanded regulation of non-store animal breeders is unnecessary because customers who buy dogs directly from breeders can see for themselves the conditions under which their prospective pet was raised.²⁵ To understand the erroneous nature of this argument, APHIS need only look to the comments of Daniel Kingston.²⁶ As Mr. Kingston's long-distance purchase of an inhumanely raised hunting dog exemplifies, the breeding market is filled with breeders who will sell dogs by telephone or through advertisements without the customer ever setting foot in or near the breeding facility. These pet consumers are not in a position to judge immediately how a particular animal has been raised, and even those members of the public who do go directly to a puppy breeder to purchase an animal are often unaware of the abusive pet breeders activities. This is due in part to the considerable efforts of some abusive breeders to hide their abuses from prospective customers. Furthermore, the emotional excitement of becoming a pet owner often overshadows a person's ability to critically evaluate the condition of his or her prospective pet. Even when a pet consumer is aware of a breeder's mistreatment and does register a complaint, the receiving industry organization, and local or state officials often refuse to intervene to protect the animals involved. While the public plays an important and critical role in monitoring dog breeding facilities, the average pet consumer is not in a position to substitute for government regulation.

4. Privacy Issues. According to the Cat Fanciers' Association, the actions and regulatory changes requested by DDAL would result in federal agents entering the backyards, barns, and living rooms

²⁵ *Id.*

²⁶ Docket No. 97-018-1, Comment Number 5, received April 10, 1997.

of breeders in an unwarranted invasion of privacy.²⁷ The petitioners believe that such characterizations of the requested USDA regulatory changes are unwarranted and should not enter into consideration of administrative decisions. The petitioners have no reason to believe there would be, and in no manner endorse, inspection behavior by employees of the USDA that would in any way compromise protected Constitutional rights to privacy or run contrary to the regulatory strictures of USDA.

Petitioners believe that these comments are fueled in part by breeders' concerns that amended regulations may expand the financial inspection and/or audit behavior of the Internal Revenue Service concerning revenue raised from direct pet sales. In this regard, petitioners believe that USDA/APHIS should clarify its interagency relationship with the IRS on this matter in order to establish comprehensive approaches to the regulatory oversight of the pet breeding industry.

5. *Undue Burden on Hobby Breeders.* Numerous comments suggest that small hobby breeders will be unduly burdened by limiting the "retail pet store" exemption and changing USDA's interpretation of the AWA's coverage of breeding, security, and hunting dogs. This allegation is based upon incorrect assumptions of DDAL's position. As APHIS is aware, breeders with three or fewer females are currently exempted from licensing under 9 C.F.R. § 2.1(a)(3)(iii). DDAL and other petitioners in no way request a removal of this exemption. In fact, the petitioners suggest that the 9 C.F.R. § 2.1(a)(3)(iii) exemption be expanded to exempt hobby breeders with five or fewer females.²⁸ Also, as mentioned previously, petitioners have suggested a trigger for "on site" inspections that should not affect hobby breeders. Therefore, petitioners suggest that APHIS dismiss as "in error" comments submitted by already exempted hobby breeders opposing the proposed regulatory change because they would be unduly burdened or require the regulation of every small breeder. The petitioners have proposed an expansion of licensing exemptions of hobby breeders to ensure that they are not unduly burdened.

6. *Undue Financial Burden On Small Breeders.* Other comments allege that alterations in the "retail pet store" regulation will place an undue financial burden on those breeders who make only a small amount of money selling puppies directly to the public. Again, these comments are made in error. The petitioners support the AWA's legislative mandate and APHIS' regulatory implementation of licensing exemptions for all persons who have revenue of under \$500 dollars from the sale of dogs. Combined with the petitioners' proposed expanded licensing exemption for hobby breeders, small breeders will in no way be overburdened by the financial requirements of USDA licensing and regulation.

²⁷ Norma Bennett Woolf, "Dog Breeders Face Limits As USDA Probes New Rules and Congress Considers AWA Expansion," NAIA News, (National Animal Interest Alliance, Portland, OR), May-June 1997.

²⁸ See *infra* comments at page 10.

While the petitioners acknowledge AWA's legislative intent in creating a \$500 exemption, they recognize that for any individual owning five breeding females, the \$500 revenue threshold is irrelevant. Due to the extreme variability in the value of different breeds, individuals can easily surpass the threshold with the sale of only one breeding female's offspring. Petitioners believe that government concern for the protection of animals is best served by focusing regulatory thresholds around the number of animals affected. As a result, petitioners find the dollar threshold for triggering inclusion under the APHIS regulations largely irrelevant.

7. *The Role of Local Authorities.* Some comments suggest that state and local laws are better equipped to handle animal breeding abuses. However, the AWA has already set national standards for humane care, handling and transport of animals. While some states are rigorous in their enforcement of local humane treatment laws, many states have provided little legal recourse or financial support for efforts to curtail abusive animal breeding. In the Bergman case, state officials claimed that dog breeding operations, like the one raided, are subject to little or no state and local regulation.²⁹ Indeed, Jeanette Bergman set up shop in Washington to avoid rigorous local enforcement in Idaho. In response to DDAL's inquiry into the Oklahoma hunting dog purchased by Daniel Kingston³⁰, a local prosecutor stated, "We have children with worms in this county" as a justification for not aggressively prosecuting that animal cruelty case.³¹ Similarly, several plaintiffs in *DDAL, et al. v. Glickman* found that West Virginia officials could not, or would not, do anything to curb a local abusive puppy mill.³²

By ignoring the AWA's regulatory mandate, USDA has created a situation where a federal vacuum of oversight has given rise to certain states and localities being favored by abusive animal breeding facility owners. The new regulatory regime suggested by the petitioners would remove this "forum shopping" by animal abusers and provide a complaint and investigation system which will ensure coordination between local, state, and federal entities. Petitioners suggestions would allow local and state officials to act on abuse cases knowing that there is federal support behind them. It is important to note in this regard that the Uniform Dog and Cat Welfare Act developed by local and state animal health professionals recognizes that model state laws should be designed to complement the AWA so as not to create conflicts of law.³³ These complementary state and local efforts can only begin with a strong federal oversight regime.

²⁹ Nancy Roberts Trott, "Kennel Owner Previously Convicted of Cruelty," Seattle Post-Intelligence, January 14, 1997, B1.

³⁰ See, Docket No. 97-018-1, Comment Number 5, received April 10, 1997.

³¹ Telephone conversation with Holly Hazard, Executive Director DDAL and local prosecutor's office.

³² Doris Day Animal League, et al. v. Glickman, et al., Docket No. 96-2806 (EGS), December 19, 1997.

³³ See United States Animal Health Association, The Uniform Dog and Cat Welfare Act, USAHA, One Hundredth Annual Meeting (Little Rock, AK) October 1996.

COMMENTS AND PROPOSED REGULATORY CHANGES.

1. Definition of "Retail Pet Store."

As originally proposed by the DDAL, the petitioners believe the definition for "retail pet store" found at 9 C.F.R. § 1.1 should be amended to reflect Congressional intent that only actual "retail pet stores" be exempt from licensing and humane care, treatment, and handling regulations. Petitioners suggest a minimal change from the original DDAL proposal. This new proposed amendment to the existing regulation reads as follows:

Retail pet store means any non-residential business establishment used primarily for the sale of pets and pet supplies to the ultimate consumer outlet where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats, rabbits, guinea pigs, hamsters, gerbils, rats, mice, gophers, chinchilla, domestic ferrets, domestic farm animals, birds, and cold-blooded species. Such definition includes stores clearly in the pet industry but which have a higher gross sale of pet supplies than of pets.

2. Licensing Exemptions Found at 9 C.F.R. § 2.1(a)(3).

Pursuant to 9 C.F.R. § 2.1(a), all dealers, exhibitors, or operators of an auction (as defined by 9 C.F.R. § 1.1) must have valid licenses issued by APHIS. However, the agency exempts several classes of persons from this requirement. In order to fully implement the proposed amendment to regulations under the AWA, the agency must revisit the scope of these exemptions. Petitioners submit the following proposed changes:

- (A). 9 C.F.R. § 2.1(a)(3)(I). Retail pet store exemption. Retain.
- (B). 9 C.F.R. § 2.1(a)(3)(ii) Specific Person who sells other than wild or exotic animals, dogs or cats and derives less than \$500. Retain.
- (C). 9 C.F.R. § 2.1(a)(3)(iii) Person who maintains a total of three (3) or fewer breeding females. Change to:

Any person who maintains a total of ~~three (3)~~ five (5) or fewer breeding female dogs and/or cats within a calendar year and who sells only the offspring of these dogs or cats, which were born and raised on his or her premises, for pets or exhibition, and is not otherwise required to obtain a license.

This change is necessary to ensure that the agency is not faced with the overwhelming burden of regulating small hobby breeders across the country.

- (D). 9 C.F.R. § 2.1(a)(3)(iv). Person who sell 25 or less dog/cats for research sales. Retain.
- (E). 9 C.F.R. § 2.1(a)(3)(v). Transporters for breeding and exhibiting purebreds. Retain.
- (F). 9 C.F.R. § 2.1(a)(3)(vi). Person who buys, sells, transports for food and fiber. Retain.
- (G). 9 C.F.R. § 2.1(a)(3)(vii). Person who breeds and raises domestic pet animals for direct retail sale. Change to:

Any person who breeds and raises domestic pet animals for direct retail pet sales to another person for buyer's own use and who sells or transfers in any manner no more than 75 animals per year for this purpose and who buys no animals for resale and who sells no animals to a research facility, an exhibitor, a dealer, or a pet store (e.g. a purebred dog or cat fancier) and is not otherwise required to obtain a license.

As previously written, the 9 C.F.R. § 2.1(a)(3)(vii) exemption would have allowed an unlimited number of unregulated sales from "outlets." In creating consistency with the narrow exemption recommended for "retail pets store" above, this subsection must be redrafted. It is proposed to limit the licensing exemption to those direct retail sellers who sell no more than seventy-five dogs per year. This proposal serves a dual purpose: (1) to assure small hobby breeders that they are in no way going to be overburdened with the cost of licensing, and (2) to allow the agency to focus limited inspection resources and activities on the large-scale retail operations.

- (H). 9 C.F.R. § 2.1(a)(3)(viii). Person who buys animals for own use. Retain.

3. Licensing Fees Found at 9 C.F.R. § 2.6.

The narrowing of the "retail pet store" exemption will place additional inspection and operating expenses before the agency. While petitioners encourage the agency to seek additional funds to cover this requirement during annual appropriations, they also propose that the current licensing fee regulation be amended to increase the fees. Petitioners suggest that the proposed increases be established as a "user fee" system where the additional revenue derived from the increases would go to fund the inspectors and infrastructure needed to meet the new agency inspection burden under these amended regulations. In addition, the small hobby breeders will not be burdened financially as the proposed 9 C.F.R. §§ 2.1(a)(3)(iii) and (vii) allow their continued exemption from application and licensing fees.

Petitioners propose the following changes to 9 C.F.R. § 2.6:

(A). 9 C.F.R. §2.6(a). The application fee required to be paid upon application from license, license renewal, or change of license class should be raised from \$10 to \$25.

(B). 9 C.F.R. §2.6 (c). The annual license fee table should be amended to read as follows:

Table 1: Dealers, Brokers and Operators of an Auction Sale Class “A” and “B” License

Over	But Not Over	Fee
\$ 0	\$ 500	\$ 60
500	2,000	120
2,000	10,000	240
10,000	25,000	450
25,000	50,000	700
50,000	100,000	950
100,000		1,500

This proposal represents a doubling of the current licensing fee requirements. Despite the increase, the fees are still low given the amount of revenue received by an individual licensee. For example, a Class “A” licensee who sells \$75,000 worth of animals would pay a \$25 application fee and a \$950 licensing fee for an annual total of \$975. This doubled fee would still represent a little over one percent (1.3%) of the applicant’s revenue derived from animal sales.

4. Inspection of Regulated Breeding Facilities Found at 9 C.F.R. § 2.3.

Again, to facilitate a smooth transition in the change of the “retail pet store” exemption, petitioners suggest that the agency consider an alteration in the pre-licensing inspection requirements found at 9 C.F.R § 2.3 for those entities to be added as a result of the proposed changes. In order to create a reasonably attainable inspection requirement for the agency, regulations should be adopted that would establish a threshold for determining whether an on-site inspection is necessary prior to licensing for Class “A” dealers selling directly to the public.

For example, the USDA could establish the following changes to 9 C.F.R. § 2.3:

(a). Each Class “A” dealer applicant not exclusively selling directly to another person for the buyer’s own use and each Class “B” applicant must demonstrate that

his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in business comply with the regulations and standards set forth in part 2 and 3 of this subchapter.

(b). Each Class "A" dealer or dealer applicant selling exclusively and directly to another person for the buyer's own use must either:

(i) Certify annually that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in business comply with the regulations and standards set forth in part 2 and 3 of this subchapter, and make available for review such certification and his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in business; and

(ii) In the case of an application for an initial license or actual or anticipated yearly gross sales of animals of the lesser of \$40,000 or 150 animals demonstrate that his or her premises and any animals, facilities, vehicles, equipment, or other premises used or intended for use in business comply with the regulations and standards set forth in part 2 and 3 of this subchapter.

(b): (c). In the case of an application for initial license under paragraphs (a) or (b)(ii) of this section the applicant . . . The applicant will have ~~two~~ one more chances to demonstrate his or her compliance with the regulations and standards through re-inspection by APHIS. If the applicant fails the ~~third~~ second inspection he or she will forfeit the application fee and cannot re-apply for a period of 6 months following the ~~third~~ second inspection . . .

These proposed changes would allow small licensees to certify their compliance with the AWA regulation through a written affidavit pledging their compliance. The change would relieve the agency of an overwhelming pre-license inspection load and encourage a focus on new license inspections of the larger operations. In addition, they would allow smaller operations to forego the initial cost and burden of licensing inspection in exchange for the applicants' written affidavit of compliance.

Petitioners recognize that, prior to 1979, APHIS had used a certifying system and stopped the program because of misrepresentations and misuse of the method.³⁴ However, the petitioners believe that, when combined with a public complaint-driven inspection system, the affidavit system will provide a way to ease the agency's pre-licensing inspection burden without sacrificing continued oversight of self-certifying facilities.

³⁴ 60 Fed. Reg. 13893, 13894 (March 15, 1995).

5. *Complaint Driven Inspections.*

The petitioners recommend that the agency amend its inspection regulations to include a complaint-driven inspection system:

Proposed 9 C.F.R. § 2.12. Any person, local, state or federal government employee may file a written complaint seeking a full APHIS investigation into a regulated licensee's compliance with the regulations and standards set forth in parts 2 and 3 of this subchapter. Within ninety (90) days of the receipt of a complaint and upon review of the complaint's validity and supporting evidence, APHIS will either investigate the premises alleged to be in non-compliance or issue a confidential written determination to the complainant that no investigative action will be taken. All such APHIS decisions will be published in APHIS' Annual Report in a manner which ensure confidentiality for the parties.

This new provision would allow the public and federal, state and local officials to submit specific complaints to the agency seeking an investigation of a particular regulated facility. This public oversight system would allow the agency to devote a portion of its inspection activities to suspected violating facilities. Additionally, public oversight of a complaint driven system would help to ensure that self-certifying licensees, as outlined above in proposed 9 C.F.R. § 2.3(a)(ii), remain in compliance (despite the absence of an initial pre-license inspection) for fear of an inspection.

6. *Hunting, Security and Breeding Dog Dealers.*

The Animal Welfare Act requires the Secretary of Agriculture to issue licenses to animal dealers and exhibitors upon application and in manner prescribed by the Secretary.³⁵ Licensed dealers and exhibitors must meet, *inter alia*, minimum regulatory requirements for the humane handling, care, treatment and transportation of animals covered by the Act. Additionally, licensed dealers and exhibitors are open to USDA inspection and can be mandated through administrative proceedings to correct behavior failing meet the regulatory minimums.

Under the Animal Welfare Act § 2132(f) a "dealer" is defined as:

[A]ny person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiate the purchase or sale of (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) *any dog for hunting, security, or breeding purposes*, except that the term does not include -

³⁵ 7 U.S.C. § 2133 (1994).

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer;
or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year (emphasis added).

Pursuant to the definition of dealer contained at § 2132(f) all hunting, security and breeding dog providers must *inter alia*, obtain a license and meet minimum regulatory requirements for the humane handling, care, treatment and transportation of animals covered by the Act.³⁶ Despite this statutory mandate, USDA has adopted a stated administrative policy which does not require hunting, security and breeding dog dealers to obtain licenses and meet the minimum humane handling care and transportation standards established under the AWA.

As noted in the published DDAL petition, the USDA's action in this regard are contrary to the intent and spirit of the AWA and its implementing regulations. Petitioners believe that the agency must officially reverse this administrative policy and publish a written policy bringing hunting, security and breeding dog dealers under the licensing regulations as found at 9 C.F.R., Part 2, Subpart A, and as amended in the petitioners' comments. As a result of this policy change, all hunting, security and breeding dog dealers will be required to obtain a Class "A" license unless the dealer meets the licensing exemptions, as proposed by petitioners, under 9 C.F.R. § 2.1(a)(3). Similarly, all hunting, security and breeding dog dealers will be subject to, as proposed by the petitioners, the inspection requirements at 9 C.F.R. § 2.3, the licensing fees at 9 C.F.R. § 2.6, and the complaint driven inspection system at 9 C.F.R. § 2.12.

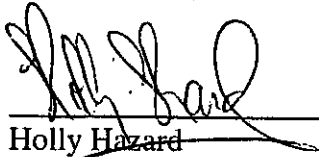
CONCLUSION.

Without question, APHIS' regulatory oversight of dog breeding facilities needs to be reformed. The suggestions contained in these comments attempt to establish a reasonable and enforceable program for the agency to manage and maintain. However, petitioners note that the success of future dog breeding oversight rests with a commitment by the agency to pursue abusive pet dealers and breeders vigorously, to seek and lobby for the adequate appropriation of funds necessary to meet its legal oversight burden established under the AWA, and to work cooperatively with organizations such as the petitioners to address these issues in a timely manner. If the agency commits itself to upholding the AWA and adopts recommendations included herein, petitioners believe the agency will have established a reasonable and workable plan to ensure that humane

³⁶ *Id.*

handling, care, and transport standards become the norm within the pet breeding industry.

Submitted on behalf of all petitioners, on this 27th Day of May, 1997.



Holly Hazard
Executive Director
Doris Day Animal League

APPENDIX I:

DESCRIPTION OF PETITIONING ORGANIZATIONS

The American Humane Association (AHA), 63 Iverness Drive, East, Englewood, CO 80112; 236 Massachusetts Ave., NE, Washington, DC 20002; 15502 Ventura Blvd. Encino, CA 91436. Founded in 1877, the mission of AHA is to prevent cruelty, abuse, neglect and exploitation of children and animals and to assure that their interests and well being are fully, effectively and humanely guaranteed by an aware and caring society. AHA has 6700 organizational and 170,000 individual members and supporters.

The American Society for the Prevention of Cruelty to Animals (ASPCA), 1755 Massachusetts Ave., NW, Suite 418, Washington, DC 20036 (Headquarters: 424 East 92nd Street, New York, NY 10128-6804). Founded in 1866, its mission now includes not only the original goal of providing "effective means for the prevention of cruelty to animals throughout the United States," but also the alleviation of pain, fear, and suffering in all animals. This is accomplished through programs of animal placement, humane education and law enforcement, low-cost spaying and neutering, government affairs, and shelter outreach to name a few. ASPCA membership numbers approximately 400,000.

Animal Legal Defense Fund (ALDF), 401 East Jefferson Street, Suite 206, Rockville, MD 20850 (National Office, 127 Fourth Street, Petaluma, CA 94952) ALDF is a national non-profit corporation dedicated to improving the treatment of animals through all legal means. ALDF has a nationwide membership and constituency of over 75,000 persons including lawyers, law professors, law students and other citizens.

Council for Compassionate Governance (CCG), 236 Massachusetts Ave., NE, Washington, DC 20002.

Doris Day Animal League (DDAL), Suite 100, 227 Massachusetts Avenue, NE, Washington, DC 20002. Founded in 1987, the Doris Day Animal League's mission is to reduce the pain and suffering of non-human animals, to encourage the spaying and neutering of companion animals, and to increase the public's awareness of its responsibility toward non-human animals through legislative initiatives, public and membership education, and programs to require the enforcement of statutes and regulations which have already been enacted protecting animals. DDAL has 341,000 members and supporters.

The Fund for Animals, 850 Sligo Avenue, Suite 350, Silver Spring, MD 20910 (National Office, 140 West 57th Street, New York, NY 10019). Founded in 1967 by best-selling author Cleveland Amory, the fund of Animals uses education, litigation, legislation, and direct action to protect wildlife and domestic animals.

Humane Society of the United States (HSUS), the nation's largest animal protection organization, is located at 2100 L Street, NW, Washington, DC 20037. Founded in 1954, HSUS' primary and motivating mission is the elimination of suffering and the prevention of cruelty to all living creatures. The primary goal of HSUS is to educate the general public regarding the essential place animals have in society and the important part they play in ecological wholeness of the planet. The Society's programs seek to foster respect, understanding, and compassion for all creatures. HSUS has 4.9 million members and constituents.

Progressive Animal Welfare Society (PAWS), 15305 44th Avenue West, Lynnwood, WA 98037 (Mailing Address: Box 1037, Lynnwood, WA 98046). Founded in 1967, PAWS is creating peaceful coexistence between animals and humans through the following: **Wildlife Rehabilitation:** to rescue and rehabilitate sick, injured, and orphaned wildlife with the objective of returning them to the wild; and to provide humane, non-lethal solutions to conflicts between wildlife and humans thereby minimizing negative human impact. **Companion Animal Shelter:** to provide care for stray and homeless companion animals with the objective of returning them to their guardians or adopting them into appropriate homes. **Animal Advocacy:** to combat animal abuse and exploitation through education, public campaigns, legislation, litigation and direct action. PAWS has approximately 40,000 supporters.