

# THE ANIMAL COUNCIL

**P.O. Box 168, Millbrae CA 94030**

**Officers:**

Sharon A Coleman  
*President*  
Gayle A Hand  
*Secretary*  
Margaret Kranzfeyder  
*Treasurer*

**Directors:**

Judith A. Brecka  
Dr. Ronald E. Cole  
James Daugherty  
Karen Johnson  
Alice E. Partanen

*Emeritus:*

Leslie L. Altick, 1991-1996

May 22, 1997

Docket No. 97-018-1  
Regulatory Analysis and Development  
PPD, APHIS, Suite 3C03  
4700 River Road Unit 118  
Riverdale, MD 20737-1238

RE: Request for Rejection of Petition for Rulemaking by  
Doris Day Animal League

Gentlemen:

The Animal Council is a non-profit, tax-exempt under IRC Section 501(c)(4) organization founded in 1991 to seek positive, humane solutions to the challenges of ideological animal activists through study, analysis and application of animal husbandry, statistics and law, and to preserve human benefit from all species, breeds and registries. We particularly monitor, evaluate and counsel on legislative and regulatory issues affecting cat and dog breeders.

Our analysis of the Petition for Rulemaking by Doris Day Animal League included a careful analysis of the Animal Welfare Act and accompanying regulations, and related case law, statutes and regulations. We conclude that the requested regulatory changes themselves would be inconsistent with and contrary to the plain meaning of the Act and would exceed the USDA's authority to enact.

The Act provisions relating to cats and dogs present a coherent, complete and *consistent scheme*, based on federal power to regulate commerce, in particular through use of the police power inherent in the commerce clause of the Constitution. Distinguished from the police power to regulate illegal interstate activities such as prostitution and racketeering, this is the police power of social regulation requiring standards compliance for covered but lawful activities. These standards, implemented through licensing and inspections for specific requirements and prosecution for non-compliance, are intended

to prevent undesirable aspects of otherwise legal activities. Statutes and regulations based on this limited use of police power are further distinguished from the economic measures used by the federal government for the national, welfare such as .to stabilize commodity markets.

Cats and dogs are not commodities but animals to be provided humane care and treatment as set forth in 7 U.S.C. 2131-1(b)1. 7 U.S.C. 2132-(f) defines dealer, qualified by the scope of the commerce definition in the statute, and as relevant for this purpose as any person, defined in subsection (a) to include the entire spectrum of entities, who "buys or sells or negotiates the purchase or sale" of specified animals.

The specified animals covered by the Act are (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. The types of special purpose dogs enumerated in subsection (2) are merely in addition to those dogs specified in subsection (1) and are not to be excluded from the Act based on not meeting the descriptions contained in subsection (1). All dogs set forth in these subsections are equally covered by the Act. This concept is reiterated in the last sentence of (g) defining animals.

The dealer definition includes two exclusions. The first exclusion (i) "is a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer." This means that retail pet stores that do sell to research facilities, exhibitors or dealers are included in the dealer definition. It is important to note that the above exclusion is **restricted by sales to dealers, who after** all exemptions are themselves wholesalers. **Wholesaler** buyers disqualify the retail seller, because their own use of the animal is wholesale, by definition for resale to retailers rather than consumers. Thus, the retail pet store that sells wholesale is not entitled to exclusion from the definition.

The second exclusion (ii) has narrow application covering "any person who does not sell, or negotiate the purchase of sale of any wild animal, dogs or cat", and who derives no more than \$500 gross income from the sale of other animals during any calendar year. This section excludes from the dealer definition persons who only breed animals such as hamsters and has no application to anyone selling cats and dogs.

In summary for these questions, the Act covers pet cats and dogs, including hunting, security **and breeding dogs**. Dealers are anyone who buys or sells a cat or dog, for the listed purposes, including the retail pet store prior to exclusions and exemptions.

7 U.S.C. 2133 requires licensing for dealers and exhibitors, allowing exemptions for two categories of dealers not otherwise excluded. The first category is the retail pet store. The second is "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 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 Act."

This second exemption category applies to dog and cat breeders who meet all of the following three requirements:

- Derive less than a substantial portion of his income (as determined by the Secretary) from breeding and raising dogs or cats...

This is an economic qualification. Due to changing monetary valuation and variations in living standards over time, exact determination is left to agency discretion. A common sense interpretation would be that "substantial portion of income" would be sufficient after tax income to support the person and his dependents if the person had no other income. Rather than analyze persons' tax returns, the Secretary developed exemption categories in the regulations to classify criteria forming reasonable parameters of this requirement forming different sets of criteria. These generally coincide with the Internal Revenue Service's distinction between dog and cat hobbyists and those in business, as determined by the nine part test in Internal Revenue Services Regulations at Section 1.1832 and entitled to use business losses as a deduction from other income. These nine factors are:

1. Manner in which the taxpayer carries out the Activity.
2. The expertise of the taxpayer or his advisors
3. The time and effort expended by the taxpayer in carrying on the Activity.
4. Expectation that assets used in activity may appreciate in value.
5. The success of the taxpayer in carrying on other similar or dissimilar activities
6. The taxpayer's history of income or losses with respect to the Activity.
7. The amount of occasional profits, if any, which are earned.
8. The financial status of the taxpayer.
9. Elements of personal pleasure or recreation.

IRS policy exemplifies federal recognition that activities such as dog and cat breeding, which have some characteristics of business are in fact, a hobby. Similarly, both the Act and the USDA through its Regulations have recognized that dog and cat breeding as a personal activity is almost always a hobby lacking sufficient commercial character to warrant federal regulation as interstate commerce with its burdensome costs, and inherent inefficiencies of inspection and prosecution of persons throughout the United States.

The language does not exclude the person who actually operates a small, non-hobby business as long as it is not a substantial portion of his income, nor does it require a hobby motive.

- The breeding and raising is limited to the person's own premises. This is a broad section indicating its requirement that the exempt person's breeding and raising occur on premises in which he has some possessory interest. The person could be an owner, a lessee or otherwise in lawful possession of the premises. The premises are not specifically limited to residential but could include a person's own business or recreational premises.

- The person may only sell such dog or cat to a dealer or research facility. This means that an exempt person may only sell to another dealer, as broadly defined without reference to exemption status, or to a research facility. This language specifically excludes exhibitors or other persons excluded from the dealer definition. This is a logical use of the above-described police power in that exhibitors generally are zoos and circuses which would obtain dogs and cats for uses incidental to their exhibition activities but inconsistent with dealer uses, such as performing acts, or even uses as food for carnivorous exhibition animals. In the United States, dogs and cats are not animals intended for use as food or fiber (including fur). Additionally the exemption is not available in the case of sales for other unspecified suspect or illegal uses such sacrificial religious ritual, illegal pornography or fighting. Again, this is the extension of police power under the Commerce Clause.

These qualifications serve as the basis for agency interpretation in under its Rulemaking authority to create specific exemptions including the Secretary's authority to determine what level of activities **would produce** less than substantial portion of his income".

The Regulations exempt from licensing requirements eight categories of persons. Each category is **based on authority** contained in the Act to exempt, and all but the retail pet store only grant exemption if the person is not otherwise required to be licensed based on other factual circumstances.

The first (i) exemption is for retail pet stores as specifically excluded from the dealer definition. The regulation specifies that the non-excluded retail pet store is one which wholesales or sells wild, exotic or nonpet animals at retail in accordance with exclusion (i) from the dealer definition.

Further, retail pet store is defined in 9 CFR, Part 1 more specifically as "any 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." The only requirements contained herein are:

- the sale must be retail. As defined by Black's Law Dictionary: ...not in bulk, direct to consumer, and

- for use as pets. This is the only use permitted as distinguished by the other uses covered under the Act.

"Pet animals in these regulations "means any animal that has commonly been kept as a pet in family households in the United States, such as dogs, cats, guinea pigs, rabbits, and hamsters. This term excludes exotic animals and wild animals."

The only general limitation is to the enumerated species, but there follow five (5) specific exclusions, as follows:

(1) "Establishments or persons who deal in dogs used for hunting, security or breeding purposes."

This exclusion is a subset of the uses permitted under the Act. It merely excludes dealing in these uses per se as qualification as a retail pet store. Dogs used for hunting, security and breeding purposes may be kept in the buyer's household as pets in addition to their functional use in activities that are performed by persons using the dogs. The exclusion merely states that a dealer in **these dogs** alone is not a retail pet store, but does not disqualify an otherwise qualifying retail pet store that might also sell such dogs in addition to pets.

(2) "Establishments of persons exhibiting, selling, or offering to exhibit or sell any wild or exotic or other nonpet species of warm-blooded animals (except birds), such as skunks, raccoons, nonhuman primates, squirrels, ocelots, foxes, coyotes, etc.;"

This exclusion also relates to the use for pets requirement.

(3) "Any establishment or person selling warm-blooded animals (except birds, and laboratory rats and mice) for research or exhibition purposes; and

This exclusion also relates to the use for pets requirement.

(4) "Any establishment wholesaling any animals (except birds, rats and mice).

This exclusion relates to the retail requirement above.

(5) "Any establishment exhibiting pet animals in a room that is separate from or adjacent to the retail pet store, or in an outside area, or anywhere off the retail pet store premises."

Exhibiting and-exhibition are-not specifically defined within these regulations but describe activities of an "Exhibitor", as defined, which means any person (public or private) exhibiting any animals which were purchased in coercion or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and education exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations

sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary." Non-excluded, associated exhibiting precludes qualification as a retail pet store, because it is an activity covered under the Act that would superimpose additional commercial character the retail pet store, thereby exceeding the bounds of excluded activity.

The second (ii) exemption derives its authority from the second exclusion from the dealer definition, and has no application to persons selling dogs or cats.

The following six categories were created subsequent to the preceding (i) and (ii) and were described by the agency at 52 Fed. Reg. 10293 (Mar. 31, 1987) as exempting persons who "...derive less than a substantial portion of their income from dealer activities..." A careful analysis of each of these indicates that every one has been tailored to specific statutory elements, reflecting the following considerations, and in no way precludes the availability of or application of exemption (i) or the definition of retail pet store.

- Congressional intent of the Act to only regulate animal activities with a substantial degree of commercial character.
- The primary factor in determining the degree of commercial character is whether a transaction is wholesale or retail.
- A wholesale transaction is by definition to someone who will engage in yet again another commercial transaction, whereas a retail sale is direct to an end user, curtailing commercial activity.
- The purpose of licensing is to require compliance with exacting standards for physical facilities, care of animals, staffing and other requirements of conducting a business. These assume, in fact, that the licensee is regularly conducting business such as to continuously meet the requirements and can expect to generate sufficient income to cover the cost of licensing and compliance in addition to operating expenses, notwithstanding whether there is profit potential to economically justify the ongoing operation and the inherent risk of loss from raising any animals as a business.
- In this context, activities are not only distinguished by wholesale and retail but by the degree to which they are otherwise commercial in nature.
- The additional factors used in determining commercial degree include small numbers of animals, the person's use of his own premises not limited as to any specific type of premises, breeding and raising only on the premises, and selling directly to end users as further considered by their use categories.

The third exemption (iii) derives its authority from the second license exemption category covering "any person..." who maintains 3 or fewer "breeding" female dogs or cats, sells only offspring of these females that were born and raised on his premises, and sells these

only for pets or "exhibition" which is undefined except as activities carried on by exhibitors, as covered by the Act and defined in the regulations. This exception is carefully crafted to allow small scale wholesaling of pet cats and dogs, as well as sales for exhibition which may not otherwise require licensing.

The fourth exemption (iv) also derives its authority entirely from the second license exemption category covering "any person...". This exemption is limited to a small scale breeder of cats and dogs born and raised on his premises and selling to research in a quantity fewer than 25 per year.

The fifth exemption (v) excludes transport of animals solely for the purposes of breeding, exhibiting in purebred shows, boarding (not associated with commercial transport), grooming or medical treatment. This is a limitation on the scope of commerce, as defined in 7 U.S.C. 2132-(c) as interpreted to define and narrow the scope of 7 U.S.C. 2134, requiring licensing of dealers and exhibitors who transport covered animals of other dealers and exhibitors.

The sixth exemption (vi) covers animals used only for the purposes of food or fiber (including fur) and derives its authority from the definition of animal at 7 U.S.C. 2132-(g), because food and fiber uses are excluded from the Act.

The seventh exemption (vii) derives its authority from both license exemption categories, because it includes persons who breed and raise "domestic pet animals", rather than only dogs and cats, and makes no references to "premises" either as to possessory rights or whether business, residential or other types of premises. It is further qualified by three limitations:

- the exempt person is limited to direct retail sales to another person-for the buyer's own use
- the exempt person must buy no animals for resale
- the exempt person sells no animals to a research facility, an exhibitor, a dealer, or a pet store. The parenthetical example is a purebred dog or cat fancier. In this context, "dealer" should be construed as those dealers not included here specifically and not otherwise excluded or exempt.

This category is slightly broader than the statutory "other person" as to species and premises and otherwise consistent with the retail pet store exemption except that the exempt person must breed and raise his own animals rather than purchase animals for resale.

The eighth (viii) is limitation on the coverage of the dealer definition based on a reasonable limit to the scope of commerce as defined at 7 U.S.C. 2132-(c). This exempts an animal buyer who is the ultimate non-commercial consumer in a retail transaction and is qualified by two limitations:

- buys animals solely for his or her own use or enjoyment
- does not sell or exhibit animals

The buyer's purpose is not specifically restricted to use as a pet but could include any other personal use not otherwise regulated.

Based on the above analysis of the statute and regulations, our comments in reference to the two questions presented by the above petition are:

Question 1. The definition of "retail pet store" in 9 CFR Part 1 should not be revised to read "a non-residential business establishment used primarily for the sale of pets to the ultimate customer". The rationale of Petitioner's request is based on a perception that nonexempt animal activities are escaping regulation by concealment in private residences. Petitioner, without regard to the Agency's precise crafting of regulations tailored to target the intended commercial activity under the Act, asks that the concept of "retail outlet" be redefined to exclude retail, or direct sales from a residence thereby precluding from licensing exemption thousands of individuals. While this presumes further rewriting of regulations, the examples cited in Petitioner's appendices show clear demand to extend federal regulations to cover both sellers and buyers in direct, retail transactions.

Petitioner argues that Congress actually intended to limit the retail pet store exemption, initially created by the 1970 amendment to the Act, to in some way qualify it as to other uses of retail premises. However, the legislative history of the 1976 amendment to the Act-confirmed the exemption and definition of retail pet store, and the accompanying conference report referred to prior definition of "retail pet store" as any retail outlet where animals are sold only as pets at retail". 36 Fed. Reg. 24919 (Dec. 24, 1971). The Agency incorporated this into its regulations to carry out the legislative intent to exempt any "outlet" where a retail transaction occurs regardless of what other land uses might occur at the location of the retail transaction. Nowhere in the Act or regulations is there any reference in any respect to "residence".

Based on estimates by The American Kennel Club from its registration data, at least 90 percent of the dogs it registers come from non-commercial sources, or overwhelmingly individuals occasionally breeding their personal dogs at home and selling some of those dogs directly to individuals. Based on the AKC's special transfer procedure for pet shops, they can determine the percentage of their registrations sold by pet shops that do not breed their own puppies, and in 1995 this was only 5.7 percent. Had the agency for over 25 years mistakenly excluded approximately 90 percent of those Congress intended to regulate why have not Congress or the courts taken corrective action? The AKC estimates that 10 to 20 percent of breeders are involved in breeding dogs as an adjunct to participating in dog

shows and related events. These breeders breed when they have a dogs suitable for breeding, have the time and money to spare for for the project and contingencies (such as cesarean sections, orphaned puppies or veterinary catastrophes) and believe they will be able to place puppies they don't keep. For very few, is this breeding done on a regular basis nor with the expectation of profit. The litter is accommodated in the home, and there is no need for permanently installed facilities, employees or elaborate procedures. The remaining 70 percent of residential breeders comprise those homes with one female dog who breed one litter one time and may keep one puppy and sell or give the others to friends, relatives and local buyers. The AKC itself conducts inspections of its larger scale registrants and serves as an additional check on breeders practices.

There has been no correction of the Agency's policies, because Congress never intended that individuals pursuing a ,hobby or very small business, rather than a business from which they could expect a substantial portion of their income, should be regulated and inspected by a federal agency and bear those costs. As a matter of public policy, the national values in protecting privacy within the home outweigh any federal interest in policing citizens who breed, raise and sell dogs from their homes to the public. The very nature of these transactions makes the buyer a far better inspector than any federal employee.

To now modify a key determinant under the Act -- the direct sale to a consumer -- by a concept irrelevant to and never contained in the statutory and regulatory language -"residential" actually does exceed the authority of the agency. To do so would require extensive development of new definitions and regulations and result in hiring additional personnel with associated costs. It would also subject citizens to harassment by others philosophically opposed to dog breeding or grudge-bearing neighbors and associates who would threaten federal action.

The agency is well within its legal authority, because the statute does not address or even intimate the concept of "residence" in any way. These regulations are entirely permissible and consistent with and not contrary to the Act in accordance with statutory and case law governing the Agency.

Question 2. Dealers of dogs intended for hunting, security, and breeding should not be subject to the applicable regulations at 9 CFR part 3, subchapter A, because these categories of dogs are subject to this regulation unless their dealers are otherwise exempt from licensing and thereby exempt from part 3. Under the statute and existing regulations, these dealers are excluded from exemption under the regulatory definition of retail pet store, which means only that a dealer in these dogs who otherwise does not meet the retail pet store requirement cannot qualify for this particular exemption. The additional utility of these dogs increases the likelihood that they may be the subject of wholesale transactions, but they are not precluded from otherwise qualifying for exemption under (viii) if the

specific dealer meets the requirements and sells to "another person for the buyer's own use". Some such dealers may fail to qualify, because they would buy dogs for resale, but this would in no way distinguish them from other dog dealers who would do the same.

It is only when hunting, security and breeding dog dealers buy dogs for resale or sell at wholesale and are also excluded from the retail pet store definition, that they are subject to licensing and compliance with the regulations at 9 CFR part 3, subchapter A. There is no need for additional regulation, and doing so would be duplicative and unnecessary.

We believe that the USDA has ample statutory authority under the Act as well as under statutory and case law applicable to its regulatory function to support and maintain the existing regulations. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). To proceed as requested by Petitioner would be contrary to all such authority and Congressional intent to limit federal regulation of dog and cat breeders to those whose activities actually do meet significant levels of commercial activity as discussed. These do not include direct, retail sales by individuals unless they conduct other commercial activities subject to licensing, in which case those persons are currently not exempt. The current exemptions reflect the reality that very little dog or cat breeding is of such commercial nature that its scope warrants federal regulation. In those cases requiring licensing, the economic character of the business supports the cost of regulatory compliance and standardized facilities and has a greater need for standards in facilities, handling and care procedures due to the large number of animals necessary to sustain the business. If these standards were applied to individuals conducting currently exempt activities in their private homes, the impact would be prohibitive and encourage expansion of truly commercial breeding to meet public demand. This would be contrary to the public interest in supplying the retail market with pets, not as a commodity, but as part of a personal transaction with the breeder, whose knowledge of the pet's background and suitability for the buyer are a noncommercial value added that best ensures humane care and treatment of both the breeders' and buyers' pets.

We respectfully request that USDA reject DDAL's Petition in its entirety and confirm the existing regulations.

Respectfully submitted,

SHARON A. COLEMAN  
President