



AUSTRALIAN SHEPHERD CLUB OF AMERICA®

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Subject: OPPOSITION to Docket No. APHIS-2011-0003 Animal Welfare; Retail Pet Stores and Licensing Exemptions

To Whom It May Concern:

The Australian Shepherd Club of America (ASCA) is an international single-breed registry headquartered in Bryan, Texas. ASCA was established as the parent club for the breed in 1957 and incorporated as a non-profit corporation. We are proud to be the largest single breed dog registry in North America. ASCA programs provide certification and titles in Agility, Conformation, Obedience, Rally, Stockdog, and Tracking.

ASCA has more than 100 affiliate clubs throughout the United States, Canada, and Europe and 10,200 current individual members. As the largest single breed registry with a membership comprising breeders, owners and rescuers, we consider ASCA to be a major stakeholder in this USDA rulemaking process.

ASCA, in keeping with its aim of breeding for the working ability as well as other outstanding qualities of the Australian Shepherd, has adopted a Code of Ethics to promote and foster the highest standards among breeders, owners, and fanciers. All members in good standing with ASCA subscribe to and uphold this code.

The Australian Shepherd, contrary to what you might suppose from the name, is a wholly American dog breed developed in the American West as a working stockdog and is an integral part of the history of that region. The Australian Shepherd has been an essential part of American agricultural business for over one hundred years. These dogs are a versatile working breed still used today on farms and ranches to handle livestock in addition to living in homes across the country as valued family members. They are not bred by commercial breeders but by individual home/hobby/farmer breeders like our members. The proposed rules would severely limit our members in their ability to continue to provide this assistance to farmer/ranchers and to provide healthy, well-socialized animals as family pets and working partners.

For the following reasons, it is ASCA's position that the proposed rule should be withdrawn:

1. The basis for the proposed regulatory change is anecdotal and not substantiated by objective criteria.
2. The cost analysis for the proposed regulatory change is superficial and omits the costs for many factors not considered by USDA.
3. Many terms used to explain the proposed change are undefined, leading to confusion and a lack of understanding as to how the change will impact individual citizens.
4. The detrimental effect of this regulatory change on the genetic health of the regulated animal species has neither been assessed nor have amelioration strategies been suggested.

5. This regulatory change oversteps the will of Congress and the interpretation of American courts and denies both buyers and sellers free choice in their transactions and in the placement of their animals.
6. There is no plan in place to assure licensees equal protection under the law and there is no plan in place to protect licensees from malicious complaints from animal rights fringe elements.

The proposed rule is an overly broad expansion of the Animal Welfare Act (AWA) leading ultimately to a plethora of bad outcomes while having little effect on its stated purpose – the regulation of large-scale, currently unregulated breeders.

ASCA respectfully requests that this proposed rule be withdrawn until these factors have been studied and corrected.

Basis for Proposed Regulatory Change

In the May, 2010 review of APHIS inspections of known problematic dog dealers, the main focus of the Office of the Inspector General's report was correction of APHIS' methods of enforcing existing law. Of the fourteen recommendations offered, only one suggested the expansion of APHIS enforcement responsibility by regulating "Internet sellers". "To ensure that large Internet sellers are inspected, APHIS should propose that the Secretary seek legislative change to cover these sellers under AWA. Specifically, the agency should propose that the Secretary recommend to Congress that it exclude Internet sellers from the definition of "retail pet store," thereby ensuring that large breeders that sell through the Internet are regulated under AWA"¹

In an informal internet survey with 1,677 responses conducted by one of our members², 53.7% of the respondents who indicated they had purchased from a breeder reported that they did not physically enter the breeder's premises during the purchase. A resounding 96.6% of the respondents purchasing from a breeder indicated that they had no problems with their purchase and the percentage reporting problems was the same whether or not they had entered the breeder's premises during the purchase. Of those reporting problems, it was more likely that the buyer had issues such as money or paperwork problems with the seller or that the dog was not as represented and less likely that the problems involved the health or age of the dog.

The above quoted survey, while not scientific, is indicative of a problem with USDA's reported basis for proposing this rule change. USDA has not quantified the extent of the issue and appears to be relying instead on anecdotal reports rather than performing an in-depth analysis.

A key phrase in the OIG report cited above that seems to have been ignored or overlooked in this suggested rule is "**large** breeders". The OIG report recommended that **large** breeders selling directly to the public via the Internet be included in regulation under the AWA – not that all breeders who utilize the Internet be regulated.

¹ Animal and Plant Health Inspection Service Animal Care Program Inspections of Problematic Dealers. Finding 5: Some Large Breeders Circumvented AWA by Selling Animals Over the Internet, pg. 37

² Survey - Proposed APHIS Rule Change - for dog buyers

https://www.surveymonkey.com/sr.aspx?sm=ERcDe87yXGfA9gBfVdYzg13wuDGyIHvzxVzwzj8BS2E_3d

Rather than pursuing the suggested legislative change, USDA has chosen to propose a regulatory redefinition of “retail pet store”, the effect of which will be to bring under USDA scrutiny tens of thousands of small hobby breeders of all regulated species. In choosing this tactic, USDA appears to have relied on anecdotal statements without any attempt at verification or quantification of the existence or extent of the supposed problem. In addition, USDA does not appear to have made any attempt to identify the population at the root of the supposed problem. USDA has made the assumption that all breeders of all regulated species, regardless of size, must be made newly subject to inspection and regulation.

It is ASCA’s position that this proposed rule should be withdrawn until a proper study has been conducted to assess the extent of the problem and to assess the effectiveness of the proposed rule in rectifying the problem.

Cost Analysis of Proposed Regulatory Change

ASCA believes that the logic and extrapolations USDA used to arrive at its figures for the regulatory impact analysis are fundamentally flawed.³

- “APHIS expects that this rule would primarily affect dog breeders that maintain more than four breeding females at their facilities.” This statement does not take into account the lack of USDA definition of “breeding female” nor does it consider the differences in use of and expectations for animals between hobby breeders and large-volume commercial breeders.
- APHIS extrapolates “that there are about 1,500 U.S. retail breeders who would be newly subject to regulation ($2,125 \times 0.69 = 1,466$). This figure is likely overly inclusive, as it assumes that all retail breeders, except for traditional retail pet stores and hobby breeders, would be regulated.” The fundamental flaw in this calculation lies in the stated assumption that hobby breeders would not be regulated. There is nothing in the language of the proposed rule that exempts hobby breeders, and many common practices of hobby breeders that will bring tens of thousands of them squarely under the purview of these regulations, leading us to believe that this extrapolation underestimates the effect of this rule by as much as two orders of magnitude.
- “Assuming patterns of non-compliance by retail breeders newly regulated by this rule would be similar to those observed in pre-licensing inspection of wholesale breeders, we estimate that the total cost attributable to the proposed rule may range from \$2.2 million to \$5.5 million.” Taking only one of the cost factors analyzed by USDA in the Regulatory Impact Analysis, that of inadequate facility maintenance and construction found in pre-licensing inspection of wholesale breeders currently subject to regulation, USDA estimated costs to construct, repair, and maintain facilities to be between \$980 and \$3,900. This estimate is based on the unfounded assumption that the tens of thousands of hobby breeders suddenly finding themselves subject to regulation already have a kennel facility in place. For those people not having a kennel, the actual cost just to bring facilities into compliance is underestimated by at least an order of magnitude.

³ Regulatory Impact Analysis & Initial Regulatory Flexibility Analysis, Proposed Rule, APHIS-2011-0003, RIN 0579-AD57, Revision of the Definition of Retail Pet Store. United States Department of Agriculture, Animal and Plant Health Inspection Service, April 2012

- USDA has provided no estimate of the financial impact to the agency of the vastly expanded inspection and enforcement costs APHIS will experience as a result of the expansion of its duties, nor has it provided any indication of how it will fund these increased costs and labor requirements in this era of shrinking budgets.

The compounding of these flawed assumptions and extrapolations leads to a regulatory impact analysis that is underestimated by three or more orders of magnitude leading us to expect that, rather than the total cost estimate of \$2.2-\$5.5 million attributable to the proposed rule, the cost is more likely to be on the order of \$2.2-\$5.5 billion. Cost estimates more in line with this value have already been submitted to USDA in several of the comments available for inspection online.^{4,5}

It is ASCA's position that this proposed rule should be withdrawn until a proper cost/benefit study has been conducted to assess the true cost to both private individuals and the government and to determine the economic value of the supposed benefits.

Problematic Terms and Definitions

- "Breeding female" – the definition, or lack thereof, of this term illustrates the fundamental difference between the population USDA has historically regulated and the population that will be brought under scrutiny and enforcement if this rule change is adopted. When asked for the USDA's definition of this term, Dr. Gerald Rushin stated, "We are defining breeding females as we currently define them in wholesaling. The dogs that have the ability to breed."⁶

This definition may work for the large volume breeders with whom USDA has experience but it is certainly not the definition used by the vast majority of hobby breeders, nor is it a definition with which their puppy buyers would be comfortable. In fact, while obviously important from the standpoint of whether or not any puppies will result, this is probably the last criterion a hobby breeder considers in determining whether or not an animal is suitable for breeding.

ARTICLE II BREEDING⁷

1. *A breeder should plan each breeding with the paramount intention of improving the breed.*
2. *A breeder should select sire and dam with an eye to conformation, temperament, and working ability with a careful study of the ASCA Breed Standard, pedigrees, and basic principles of genetics.*
3. *Before entering into any breeding agreement, a breeder should scrutinize pedigree, conformation and working potentials of both sire and dam keeping in mind the ideal Australian Shepherd as described in the ASCA Breed Standard. He should refuse the breeding if, in his opinion, it is not in the best interest of the breed. Should he refuse the breeding, a full explanation of his reasoning should be given to the owner of the bitch.*

⁴ <http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0003-1383>

⁵ <http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0003-3440>

⁶ USDA Proposes to Close Loophole on Retail Pet Sales – APHIS Stakeholders Teleconference Call May 10, 2012.

⁷ Australian Shepherd Club of America, Inc. Code of Ethics. <http://www.asca.org/codeofethics>

4. *A breeder should use for breeding purposes only those individuals free from defects such as monorchidism, cryptorchidism, deafness, albinism and other such disqualifying defects.*
 1. *He should use only those individuals whose hips have been x-rayed for Dysplasia and rated normal to excellent by a qualified radiologist.*
 2. *He should take care to use only dogs whose eyes have been examined and found free from signs of ocular deformities.*
 3. *He should further refrain from using an individual who, although free from the above defects, consistently produced afflicted puppies.*

Australian Shepherd breeders have wholeheartedly accepted the principles promoted in ASCA's Code of Ethics. The Orthopedic Foundation for Animals⁸ reports that 30,510 Australian Shepherds have been evaluated for hip dysplasia since their program began and Aussie breeders have achieved a 27.9% decrease in the incidence of hip dysplasia over the 15 year span between 1990 and 2005. An OFA evaluation cannot be done until the dog is at least 2 years old, thus ASCA members following our Code of Ethics cannot even begin to consider whether or not a bitch is breedable until she is two years of age.

ASCA members typically perform health and genetic testing beyond that suggested in the Code of Ethics. A simple internet search for Australian Shepherd breeders will show you that our members take great pride in listing the genetic and health testing that has been done on their dogs and in making public the results of that testing. In addition, many members do not consider an animal breedable until it has demonstrated the temperament and working ability for which our breed is noted. The training and assessment necessary to make this determination can typically take many years. To include an animal in the count of "breeding female" simply because it possesses the requisite body parts and to regulate and enforce based on a count skewed in this manner is antithetical to the reported purpose of this proposed rule – the availability of healthy pets for the American public.

Hobby breeders typically consider their animals as pets, not as livestock held for breeding. And as pets, these owners often keep them long past their reproductive prime. It is not uncommon for a small hobby breeder to keep unspayed, retired animals for their entire lives. These animals should not be included in the count of "breeding females" simply because they still have their reproductive organs, and owners capable of controlling the reproductive behavior of intact dogs should not be penalized for their management decisions.

"In addition, the proposed rule would increase from three to four the number of breeding female dogs, cats, and/or small exotic or wild mammals"⁹ but the proposed rule is not clear on whether that means four of each species or four "breeding females" in total. In fact, the current regulation states "this exemption does not extend to any person ... maintaining breeding female dogs, cats, *and/or (italics mine)* small exotic or wild mammals on premises on which more than three (3) breeding female dogs, cats, and/or small exotic or wild mammals are maintained"¹⁰

⁸ Orthopedic Foundation for Animals. Statistics by Breed. Evaluations through December 2011.

⁹ DEPARTMENT OF AGRICULTURE, Animal and Plant Health Inspection Service, 9 CFR Parts 1 and 2 [Docket No. APHIS–2011–0003] RIN 0579–AD57, Animal Welfare; Retail Pet Stores and Licensing Exemptions, Federal Register 28799, Vol. 77, No. 95, Wednesday, May 16, 2012

¹⁰ Code of Federal Regulations, Title 9, Volume 1, Revised as of January 1, 2008, From the U.S. Government Printing Office via GPO Access, Part 2, Subpart A, Sec. 2.1 (3)(iii)

and exhibits a similar lack of clarity. Certainly the implication is that the limit will be four animals in total.

- “Maintain on his or her premises” – a definition of “maintain” must be provided. In addition, a definition of “acting in concert” must be provided. It is very common for hobby breeders to co-own animals. Would USDA consider this to be “acting in concert”? How will this affect each co-owner’s responsibilities under this rule? Will a bitch visiting for a short period of time to be bred be considered to be “maintained” if she is on the premises when an inspector comes? Will a dog visiting with other family members at the hobby breeder’s home be considered to be “maintained” if she is on the premises when an inspector comes? Will a dog being kept for a short time while her owners are on vacation be considered to be “maintained” if she is on the premises when an inspector comes? These are not situations that commonly arise with a large-volume breeder with a separate kennel facility, but they are situations that frequently occur with the home-based hobby breeder. Situations such as these have led to penalties and animal seizures at state and local levels because of confusing, poorly written legislation and regulations. The potential legal effect of all of these situations and more must be clearly defined so that the hobby breeder will know what is required.
- “Born and raised on his or her premises” – A clear statement of what is encompassed by this phrase must be provided. The first situation that comes to mind is, of course, puppies that are born at a veterinarian’s office whether naturally or by caesarian section. But in addition to this, hobby breeders commonly have puppies available that were not whelped or reared by them for the first 8 weeks or so of life. Hobby breeders often take a puppy in lieu of a stud fee. Hobby breeders often take a puppy back from a litter produced by a dog they may have sold several years before. Hobby breeders often take a puppy from a co-owned bitch who does not live with them. Hobby breeders will often whelp a litter for a friend who is not in a position to do so at the time. These are not situations that occur with any regularity with large volume commercial breeders, but they are part of the culture of hobby dog breeding.

This phrase as written will have the immediate effect of shutting down almost every pure-bred rescue organization in the country. Rescues do not breed, thus the animals can obviously not have been born and raised on the premises. Rescues rely on networks of foster homes, thus this would require that each individual foster home be either exempt or USDA compliant. Rescues work to match the dog with the best home, no matter if the home is one town or many states away from the dog’s current location, and arrange transport for the dog, thus again requiring each individual foster home to be USDA compliant.

- “Retail pet store means a place of business or residence that *each (italics mine)* buyer physically enters” – This requirement is overly restrictive and leads, in conjunction with current interpretations of the previously discussed terms, to ridiculous scenarios that will be all too likely to occur with excessively punitive consequences to American citizens who are **not** the target of the regulatory change.

Example 1 – Ronnie Rancher purchased a puppy a year or so ago. He has been training it, but he doesn’t think it has the temperament for what he wants to do. Ronnie’s friend really likes the puppy so the two of them come to a mutual agreement and one afternoon Ronnie and his friend meet at the town diner and exchange pup for a rifle Ronnie has admired in the past.

Ronnie has just sold (exchanged for compensation) a dog that was not born and raised on his property to someone who has not been to the place where the dog has been maintained.

Because of the redefinition of the retail sales exemption, Ronnie is now subject to a fine which reportedly could be as much as \$10,000 per day until he comes into compliance.

Example 2 – Sally Shower has three intact female dogs. She does not breed, but she enjoys conformation showing in addition to the agility competitions that are her true passion. Sally's ten year old son Simon is following in her footsteps. He has guinea pigs, 2 males and 2 females, that he enjoys showing. He does breed his guinea pigs and sells the babies to his friends. At the 4H fair in his county, he sells a guinea pig to one of his friends who has never been to his house. This sale puts him \$2 over the \$500 exemption limit for this calendar year. *Simon has just sold an animal off-site, over the \$500 exemption limit, and there are more than 4 "breeding females" in the household.* Because of the redefinition of the retail sales exemption, ten year old Simon and/or his mother are now subject to a fine.

Example 3 – Brenda Breeder has been scaling down her dog activities now that she is in her mid-seventies and actually has not had a litter for over three years even though she has 6 intact bitches in her home. One of her friends has been having significant health issues and Brenda has taken over the care of Bianca's dogs and has been helping her to find homes for them. A mutual friend and breeder several states away has always admired Bianca's lines and would like to purchase 2 of Bianca's dogs now that they are available. The friends make arrangements for the dogs to travel to a distant show with another exhibitor and the new owner will pick them up there. *Brenda has just sold 2 animals, not born and raised on her property, off-site, and she has more than 4 "breedable females".* Because of the redefinition of the retail sales exemption, Brenda is now subject to a fine.

It is ASCA's concern that the strict interpretation of the USDA's working definitions of these terms is overly restrictive and negates the availability of any of the supposed "exemptions" Congress allowed in the Animal Welfare Act that relate to small, home-based hobby breeders. The intent of this rule is to regulate **large** commercial breeders selling directly to the public who are currently not covered by the Animal Welfare Act. Writing a rule that impacts tens of thousands of ordinary citizens going about their normal lives, like the ones in the examples above and many more, is counterproductive to this intent and will be ruinously expensive to the USDA and APHIS.

It is ASCA's position that this proposed rule should be withdrawn until a regulation can be formulated that will bring the target population under USDA control without inflicting collateral damage on small hobby breeders, private rescues, and ordinary citizens.

Effects on Genetic Health and Genetic Diversity

Hobby breeders in general and Australian Shepherd breeders in particular are deeply concerned with the genetic health of the puppies they produce. An excellent source for genetic information is the Australian Shepherd Health and Genetics Institute¹¹, an organization dedicated to the increase and diffusion of knowledge of genetics in the Australian Shepherd, and the inherited diseases from which it sometimes suffers. Australian Shepherd breeders also developed the 10 Steps Program¹² for breeders, owners, supporters and lovers of the Australian Shepherd who want to join the effort to improve the genetic health of the Australian Shepherd, and who support the use of open health registries.

A key requirement for the maintaining of genetic diversity in a breed is the ability to freely and easily mix and recombine genetic lines in a breed. This proposed redefinition of the mandate of USDA with respect to dog breeders will make that difficult, if not impossible to achieve. The commonly accepted

¹¹ Australian Shepherd Health and Genetics Institute, <http://www.ashgi.org/research.htm>

¹² Ten Steps to a Healthier Australian Shepherd Breed, <http://www.ashgi.org/tensteps/tensteps.htm>

practices of hobby breeders – co-ownership of animals, leasing a bitch for a litter, taking a puppy in lieu of a stud fee, taking a puppy back from a previously sold animal, and buying new animals that come from unrelated lines – all serve to expand the genetic pool available to the small home-based breeder. All of these practices will become difficult and overly expensive under the proposed regulations.

Apologists for USDA will argue that there is nothing in the proposed rule that will outlaw these practices, and that is theoretically true. But the practicality is that animals will no longer be co-owned – the confusion over which animal will count for which owner and whether puppies sold by the custodial owner will count as off-site sales against the non-custodial owner makes the co-owning of animals too fraught with the possibility of ruinous fines. Bitches will no longer be leased for a litter for the same reasons. When taking a puppy in lieu of a stud fee, the stud dog owner will often co-lease the bitch so that the stud dog owner is also considered a breeder of the litter, thus all the same reasons apply again in this case, plus more. If the puppy does not grow up as desired, the stud dog owner will not be able to sell it without building a USDA compliant kennel and becoming licensed or being subject to fines for being unlicensed – a five or six figure expense to be able to legally sell the occasional three or four figure puppy is not a reasonable expectation for a government to lay upon its citizens. These same reasons apply to the very common practice of taking a puppy back from a previously sold bitch.

The final means of maintaining genetic diversity, the purchase of unrelated animals, would seem to not pose a problem under the proposed rule but that is also not true. One-time and occasional breeders do not often have more than 4 intact bitches, but the serious hobby breeder seldom has less than 4. It is unlikely that this breeder considers them all “breedable” but it is likely that USDA will. And it is the serious hobby breeders, with decades of experience in the breed and decades of careful breeding behind them, that produce the animals other breeders want to add to their own breeding programs. If the prospective purchaser of an animal lives in New York, for example, and the prospective seller lives in Colorado, the cost to travel from New York to Colorado to pick up a puppy because the breeder has chosen to operate under the new, highly restrictive retail sales exemption will be prohibitively high.

This prohibitively high cost will serve to stifle the easy mixing and recombination of lines within breeds and will create artificial areas of geographic isolation. When the number of available dogs for breeding becomes very small, the unavoidable result will be an increase in inbreeding leading to genetic drift and thus the loss of diversity within the restricted geographic area and within the breed as a whole. Hand in hand with loss of diversity (which can be explained as increasing levels of homozygosity of gene pairs) comes increase in genetic disease. For more complicated biochemical reasons, a general increase in homozygosity also leads to a decrease in general vigor and a greater sensitivity to stress--all in all, less healthy animals. Rather than ensuring healthy puppies for the American public, this rule change will promote an increase in unhealthy puppies.

Many of ASCA’s most successful breeders also currently ship puppies internationally. American born dogs can be found in almost every country in the world, contributing to the genetic health of the breed world-wide. Similarly, foreign born dogs are brought to this country to enhance breeding programs. All of this will become prohibitively expensive due to increased travel costs under this proposed rule change. It will be a significant problem in a populous breed such as the Australian Shepherd; it will be a disaster leading potentially to extinction in other, rarer breeds.

It is ASCA’s position that this proposed rule should be withdrawn until a regulation can be formulated that will foster rather than imperil the genetic health of the regulated animals.

Retail Sales and Freedom of Choice for Buyers and Sellers

The rationale for the proposed regulatory change, that some breeders selling pets are taking advantage of a loophole that improperly exempts them from meeting the basic requirements of the Animal Welfare Act, is disingenuous at best. The Animal Welfare Act was not written to address or regulate retail activities and nothing in its legislative or its judicial history gives any indication that Congress or the courts intend that to change. A federal appeals court found in *Doris Day Animal League v. Veneman*:

“[I]t is true that in the years since passage of the Act and the Secretary's adoption of the regulation, Congress has not altered the regulatory definition of “retail pet store” although it has amended the act three times. One line of Supreme Court cases holds that “when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the ‘congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.’”¹³

The Secretary of Agriculture at the time of this court case, Ann M. Veneman, asserted that “retail outlets are not unregulated. There are already many State and local laws and ordinances in place to monitor and respond to allegations of inhumane treatment of and inadequate housing for animals owned by private retail dealers. If we were to regulate these dealers along with State and local officials, it would clearly not be the most efficient use of our resources”¹⁴ and this has not changed in the intervening years. If anything, the intervening years have seen an increase in State and local laws and ordinances on this very subject.

“Sight unseen” sales of pets have been common since before the Animal Welfare Act passed more than 40 years ago. Congress has amended the AWA several times since its original passage and twice since the decision in *DDAL v. Veneman*, most recently in 2008, yet it has never changed the decades old regulatory interpretation of a “retail pet store”. Remote retail sales involving the nationwide shipment of pets were very common in 1966 when the Animal Welfare Act was enacted, and have continued to be common practice each time the AWA was amended.

Prior to the Internet, retail breeders advertised dogs for sale in national magazines, brochures, and catalogs. Since the advent of the Internet, it too has been used as a sales and advertising medium and it is a much more powerful informational medium than newspapers, magazines, brochures or catalogs. The Internet gives a buyer who chooses to make the effort significant advantages over simply coming to a person's place of residence to see and take home a puppy. It gives the buyer an opportunity to study pedigrees and to find and contact other breeders having animals with similar pedigrees. It gives the buyer an opportunity to research dogs bred by the breeder they are considering and to contact other buyers who have dealt with the same breeder. It gives the buyer an opportunity to establish a relationship with their chosen breeder before the litter is even born and, depending on the breeder's Internet expertise, to see pictures, videos, and possibly even a live puppy-cam broadcast of the puppies as they grow. None of this was available to long-distance buyers to this extent prior to the Internet.

In contrast to the huge increase in information and transparency now available to the puppy buyer with the advent of the Internet, its impact on the practices of hobby breeders has been very small. True,

¹³ *Doris Day Animal League v. Veneman*. United States, 315 F.3d 297 (D.C. Cir. 2003)

¹⁴ *Doris Day Animal League v. Veneman*. United States, 315 F.3d 297 (D.C. Cir. 2003)

many hobby breeders have websites where they showcase their dogs and often announce upcoming litters and available puppies. But hobby breeders still list themselves with the breeder referral services of their parent breed clubs, just as they always have. Hobby breeders still take out advertisements in their breed magazines, just as they always have. Hobby breeders still use wins in conformation or obedience or agility or some other venue of their choice to validate their breeding decisions and the prowess of their dogs, just as they always have.

Hobby breeders typically sell their dogs with a contract and these contracts typically contain provisions such as the following:

- Health guarantees – many hobby breeders offer guarantees on the puppies they sell, often for the lifetime of the dog, against hereditary health defects and not merely a ten day guarantee against communicable disease
- Reproductive restrictions – many hobby breeders sell dogs on spay/neuter contracts or require breed appropriate health testing done before a dog can be bred
- Responsible owner incentives – many hobby breeders offer monetary rebates to buyers upon proof of spay/neuter or upon proof of completion of obedience classes
- Lifelong interest in and concern for the puppy – many hobby breeders include in their contracts provisions for return of the dog at any age if the buyer is no longer able to care for it

Hobby breeders take great care in selecting the right homes for their puppies. Hobby breeders typically have only one litter at a time and they spend time with their puppies. From the time they are born until they leave for their new homes, the breeder is caring for them, playing with them, challenging them and observing them. The breeder knows which one is daring, which one is more timid, which one is a social butterfly and which one needs a job. The breeder is the person best suited to match the puppy with the appropriate family, because the hobby breeder knows the puppies and the hobby breeder makes an effort to know the families. For the federal government to effectively restrict breeders to selling only to buyers in their immediate geographic area is an egregious and baseless interference in the lives of both breeders and their buyers.

People who purchase dogs from hobby breeders do so because they value the breeding practices, the care and concern, and the philosophies of hobby breeders. Hobby breeders typically build relationships with the people buying their puppies – at least with those buyers who want an ongoing relationship. It is very common for a buyer to come back puppy after puppy throughout the years, or for a buyer to wait years for a breeder to have their next litter. USDA's proposed regulatory change will have a deeply detrimental effect on these choices and relationships. The Internet has not changed how hobby breeders market and find homes for their puppies, nor has it changed the ways in which dog owners acquire their purpose-bred dogs, whether that purpose be working, sporting or pet. Rather, it has exponentially expanded the information available to both buyers and sellers who choose to take advantage of it in finding the perfect placement for their animals.

The problem with long-distance, sight-unseen sales lies not with the character of the sales, but with the characters of the individual parties to the transactions. There are a multitude of State and local laws already in existence that address animal welfare and honest business practices. If problematic sales are reported to appropriate State and local agencies and addressed by those agencies, there is no need for duplicative, heavy-handed, and ruinously expensive expansion of federal oversight. To refuse to allow the majority of the animal-buying American public the opportunity to purchase the pet of their choice

because of the bad experiences of a few consumers is a classic example of throwing the baby out with the bath water.

It is ASCA's position that this proposed rule should be withdrawn until a regulation can be formulated that does not overstep the will of Congress and the interpretation of the courts and that allows both willing buyers and willing sellers free choice in their transactions without the intrusion of unwarranted governmental interference.

USDA Enforcement and Inspections

With the tens of thousands of breeders newly subject to regulation, inspections will have to be complaint-driven. With the available resources of the agency, there is no conceivable way that APHIS will be able to maintain a schedule of regular inspection of licensed entities while still conducting initial inspections of new licensees. With this in mind, ASCA has a number of inspection-related questions that need to be addressed.

- **How will assessing the validity of complaints be handled?**

The promulgation of this rule at this time is almost certainly animal rights driven and there is ample prior history throughout the country to suggest that animal rights activists will use this rule to harass and intimidate lawful operations of breeders of all covered species. In fact, the Humane Society of the United States, a known animal rights organization, is currently advertising a \$5,000 bounty on dog breeders.¹⁵

Protections for breeders need to be included in the finalized rule. Nothing in the current AWA regulations, the proposed rule, or the Animal Care Inspection Guide detailing how to handle a complaint inspection appears to deal with the possibility of malicious complaints intended only as breeder harassment. False reporting is a crime and the rules should make mention of this fact and should make provision for the reporting of this crime. The rules should also address the question of liability for the expenses of inspection and investigation if the complaint is determined to be unfounded, particularly if it can be established to have been of malicious intent.

When an "anonymous" complaint is made, the rules should direct that USDA have some means of maintaining a file containing identifying information of the complainant so that a record of each complainant can be maintained by USDA. This record should detail all complaints submitted by that complainant so as to demonstrate a pattern of behavior or habit of contact by that complainant. Additionally a record of whether or not each complaint was substantiated by USDA inspectors or investigators should be maintained. The rules should allow USDA to void any complaint based on a record of habitual malicious complaint submission.

- **How will inspections of hobby breeder licensees be handled?**

Hobby breeders are just that – hobbyists. This implies that they have other means of earning a living. This also implies that they do not have "regular business hours". The Inspection Guide states that the inspector must be accompanied by the licensee or other designated responsible person over the age of 18. Since these inspections, both regular (which realistically are unlikely to occur if this proposed rule goes through due simply to the exponential increase in number of licensees) and complaint-driven are supposed to be unannounced, how is a hobbyist licensee to

¹⁵ <http://www.examiner.com/article/hsus-puts-a-bounty-on-breeders>

comply with this? The Inspection Guide says that if no one is present at the facility the inspector is to call the licensee and give him 30 minutes to appear. If the licensee does not appear within 30 minutes then the Inspection Guide says he must be cited. This is completely unrealistic in the case of a hobby breeder who is now required to be licensed because of this proposed change in the definition of "retail pet store". Some method of accommodating the realities of life and their influence on availability for unannounced inspections for the hobby breeder must be included in the final rule.

- **How will complaint-driven inspections of unlicensed hobby breeders be handled?**

Again, hobby breeders are hobbyists and have regular jobs. If an inspector appears unannounced at the home of a breeder who, because he does not believe he is required to be licensed, is not home, what is the procedure for continuing with the inspection/investigation? Will the homeowner be considered to have refused to allow the inspection? If the homeowner is present and refuses to allow an unannounced inspection of his private property, what will be the consequences? It appears from the Search Inspection section of the Inspection Guide that if the "responsible person" refuses to allow an inspection, then he will be considered to be in violation of the Animal Welfare Act. Before this proposed rule is finalized, this needs to be addressed in the rule-making process. It appears that the simple, constitutional refusal to allow a government inspector access to a private home without a warrant will constitute a violation of the Animal Welfare Act. This is problematic in and of itself, but especially so if the original complaint is based on an activist's malicious and unsubstantiated complaint.

- **How does USDA plan to organize itself so that enforcement of the AWA will be even-handed?**

This question speaks to itself. In the current economic conditions, how will APHIS structure itself to maximize its effectiveness without resorting to differential enforcement?

APHIS released a Revised Factsheet in July 2012¹⁶ that implied use of a double standard between existing commercial license holders and potential retail license holders. This Factsheet stated that pet retailers and rescue groups selling to buyers face-to-face at locations other than their own premises were "not the focus" of the Proposed Rule and would not need to obtain a license. The language of the Proposed Rule has not been amended to accommodate this interpretation. Thus, this statement in the Factsheet implies intent on the part of APHIS to engage in differential enforcement of this rule.

The Factsheet further stated in the case of dog breeders who allow their dogs to have free run of the entire house, APHIS inspectors will assess the homes individually for compliance with the federal standards. This implies that federal standards are interpretive and that APHIS will selectively enforce portions of the AWA and the Proposed Rule. Without accompanying written changes to the Proposed Rule and/or the AWA all such statements in this Factsheet are invalid.

It is ASCA's position that this proposed rule should be withdrawn until a proper plan has been put in place that will assure even-handed enforcement of the AWA without making a mockery of the constitutional rights of the newly-regulated population.

In Summary

¹⁶ http://www.aphis.usda.gov/publications/animal_welfare/2012/retail_pets_faq.pdf

The proposed rule is an overly broad expansion of the Animal Welfare Act (AWA), unsupported by either statute or the courts, which will affect the lives of hundreds of thousands of American citizens while having little effect on its stated purpose – the regulation of large-scale, currently unregulated breeders. The only people who breed pets in the United States who will not have to change their normal practices are the USDA licensed commercial breeders. Rather than helping to assure a source of healthy, well-socialized pets for the American populace, this regulation will make it impractical if not impossible for the hobby breeders who currently supply those pets to continue with their proven husbandry practices. Instead this regulation will promote the large-scale commercial breeders who are the only ones equipped to comply with the engineered care standards that are suitable only for large-scale breeding operations.

It is ASCA's position that this proposed rule should be withdrawn in its entirety.