Massachusetts Animal Coalition

Working together to decrease the number of homeless, neglected, displaced and abused animals in Massachusetts.

September 24, 2013

Deval Patrick
Governor

Richard K. Sullivan, Jr.
Secretary

Gregory C. Watson
Commissioner

Michael Cahill
Director of Animal Health

The Commonwealth of Massachusetts
Executive Office of Energy and Environmental Affairs
Department of Agricultural Resources
251 Causeway Street, Suite 500, Boston, MA 02114

Dear Governor Patrick, Secretary Sullivan, Commissioner Watson and Mr. Cahill:

On behalf of the Massachusetts Animal Coalition (MAC), we would like to offer the following comments to **330 CMR 30:00 Animal Rescue and Shelter Regulations.**

MAC, Inc. is a statewide, not-for-profit organization formed in February of 2000 to promote collaboration among those who work in animal welfare, both professionals and volunteers. By joining together, MAC members have created strong alliances and developed new programs and initiatives. The mission of MAC is to maintain a leadership role within the Massachusetts animal welfare community using sustainable, effective and widely used forums for dialogue and strategic collaboration to reduce the number of homeless, neglected, displaced and abused companion animals. MAC Members include animal control officers, veterinarians, representatives from all types of shelters, canine breed rescue, feline rescue, pet supply retailers, cruelty investigators, attorneys, representatives of state agencies, and more.

Through Massachusetts legislation, MAC was awarded the privilege of administering a special license plate program for the benefit of animals in our state. We annually grant approximately $180,000 to non-profit humane organizations and municipal animal control agencies in the Commonwealth, to be used for the spaying and neutering of cats and dogs for free or at minimal cost. The proceeds benefit both community non-profits and town animal control budgets.

Through our "Shelter and Rescue 101" task force, we have consulted with the Massachusetts Department of Agricultural Resources (MDAR) on the development of a training module to help shelters and rescues better understand about disease and its transmission and prevention. We feel that reaching these organizations before an outbreak is the best prevention. This training can also be a tool to help MDAR in certain instances.

MAC has historically worked to make sure our member organizations are educated about best practices for animal health. In fact, Mr. Cahill and Dr. O'Connor have spoken at several of our training meetings and we have partnered with MDAR to create training for shelter workers, rescue groups and animal control officers. More information about us can be found at www.massanimalcoalition.org.

We strongly urge the Department to revisit these regulations and not advance them as written. Please engage with members of the sheltering community to obtain more input and understanding of the impact these will have on shelters and rescues and to narrow the scope of the regulations to those issues that fall within the Department's authority.

We know from our first-hand experience working with the Department that they have seen an increase in problems from shelters and rescues. We understand that regulations can be an important tool for reducing these circumstances that we know can harm both people and animals. However, as written, these regulations are simply not the mechanism to do this. We know of no comparable regulations in other states that have such draconian provisions. Even the state's pet shop regulations are much less severe in many ways.

We would like to note that opposition to these regulations as written comes from a variety of our member organizations – from the smaller ones to the largest, most well-known and respected across the state.

The initial comment we would like to make is that these regulations clearly are beyond the scope of the Department. On behalf of MAC, Virginia Coleman, a retired partner of the law firm of Ropes & Gray, reviewed these regulations and the statutory authority of the Department. She found that in a number of respects the regulations go beyond the scope of the subject matter that the Department is authorized to regulate and therefore, if issued in their present form, would be invalid as ultra vires. The full results of her research, which make a compelling case, are attached hereto. Specific comments on the regulations below do not waive the overall argument we are making - that a given section is beyond the scope of the Department's authority.

In addition to the ultra vires argument, the main concerns are that these regulations:

- are counter-productive to the stated goals of reduced disease transmission and counter to the Association of Animal Shelter Veterinarians (ASV) Guidelines;
- are regulated in areas that no other state has with provisions that are, again, beyond the scope of the agency;
- contain vague and unclear language, especially when revocation of a registration can result from a violation;
- significantly limit the actions of non-profit organizations with a mission to protect and care for suffering, neglected and abused animals;

- include unnecessary provisions that would be incredibly burdensome, requiring staff time, paperwork and money to implement; and
- are confusing, contradictory and contain technical errors in many parts.

Specifically, these requirements in 30.09(b) and 30.09 (d) relating to health certificates and the health status of animals at adoption would actually increase the disease incidence in shelters and are contrary to the Association of Shelter Veterinarians Guidelines (www.sheltervet.org). Studies have shown that the primary risk factors for disease in shelters are animal density and the amount of time spent in the shelter (Hurley, 2012, Dinnage et al 2009, Holt et al, 2010; see full list below). Requiring veterinary examinations and health certificates prior to the advertisement or transfer of animals would significantly increase the length of stay before adoption, resulting in delays that would increase crowding, and would result in disease, and euthanasia. While health certificates for all animals may sound ideal, even the state's veterinary association recognizes that it will be impossible for most shelters and rescues to accomplish. If there is indeed a problem with contagious disease in specific communities that can be traced back to specific organizations, perhaps a better way to prevent such disease would be to target these organizations and review their practices.

Obviously, not only is it still possible for a sick animal to be adopted out with a current 30 day health certificate, but many reputable and responsible organizations will be hurt by the financial inability to hire veterinarians for the job, meaning the unnecessary deaths of thousands of animals for lack of proper paper work. A mid- to large- size organization using conservative estimates would expect to spend more than $100,000 per year for veterinary costs, as well as for animal care costs associated with increased lengths of stay. It is also important to mention that the vast majority of shelters are already providing veterinary care for the animals in their care.

Several sections suffer from the use of vague language. This is particularly worrisome in the sections regarding animal behavior. Terms such as "serious behavior issue or concern" are highly subjective and revocation of an organization's license could be the result of a disagreement over behavior issues that are often situational and complicated. Another example can be found in 30.04 (9) that requires the Department to be notified of a "substantial change" of information in an application. Such a term is vague.

There are also significant concerns about the provisions in 30.04 and 30.07 (5) and how they would deter people from serving as foster homes, as their names would be given to MDAR and they would be subject to home inspections *without limitations*. This is an example where it is clear that MDAR does not understand how essential these homes are to saving animal lives and make the difference between life and death for many animals. Foster homes are an invaluable resource for pregnant and nursing mothers and their litters, kittens and puppies with immature immune systems, animals that are overwhelmed by the stress of the shelter environment, and convalescing and hospice animals. Removing or making access to foster care difficult would have unintended negative consequences that are counter to the intentions of the proposed regulations. The importance of foster homes to the very existence of shelters cannot be stressed enough. We will not provide more detail on this since we know that other organizations will comment about specific ways to improve these sections.

You will hear from many organizations that will more fully comment on specific concerns but we note the following:

- Requiring a veterinarian's estimate for a non-contagious medical condition is useless; veterinarians' estimates will vary widely as to make this requirement meaningless (30.09 (6)).

- In the spay/neuter section 30.09 (8), this should mimic the state law; using different language regarding the use of the certificate process for animals who are adopted unaltered is confusing and unnecessary.

- The use of the term "any animal" is used in places it shouldn't be 30.06 (2)(i) and 30.06 (2)(j); these provisions are about care and housing. It doesn't make sense that these should apply to all species.

- There are also sections in the regulations that contradict themselves. For example, 30.09 (1)(d) and 30.09 (5) and 30.09 (6) are in direct contradiction. 30.09 (1)(d) says an animal can't be transferred unless healthy, but then 30.09(5) allows an animal to be stabilized (implying it is not "healthy" just stabilized) and 30.09(6) last says that a disclosure must be given (implying that a non-healthy animal can be transferred).

We also encourage more discussion so that that language is changed so that revocation only happens with a substantial violation and that there be an initial phase-in time for compliance with regulations.

Sincerely,

Emily McCobb, DVM MS DACVAA
MAC president

References

1. UC Davis Veterinary Medicine Koret Shelter Medicine Program fact sheet on shelter length of stay Available at http://www.sheltermedicine.com/shelter-health-portal/information-sheets/length-of-stayAccessed September 15, 2013

2. Dinnage J. D., Scarlett, and JR Richards. Descriptive epidemiology of feline upper respiratory tract disease in an animal shelter. J of Feline Med Surg 2009 11 (10): pp816-25.

3. Edinboro, CH. MP. Ward and LT. Glickman. A placebo controlled trial of two intranasal vaccines to prevent tracheobronchitis (kennel cough) in dogs entering a humane shelter. Preventative Veterinary Medicine, 2004 62(2): pp 89-99.

4. Edinboro CH et al. A clinical trial of intranasal and subcutaneous vaccines to prevent upper respiratory infections in cats at an animal shelter. Feline Practice, 1999 27 (6): p 7-13.

5. Holt, DE, MR Mover and DC Brown. Serologic prevalence of antibodies against canine influenza virus (H3N8) in dogs in a metropolitan animal shelter. J Am Vet Medical Association 2010, 237(1): pp71-3.

MEMORANDUM

In a number of respects, the regulations go beyond the scope of the subject matter that the Department is authorized to regulate and therefore would be invalid as ultra vires. What follows is the results of this research.

The Department's regulatory authority is quite narrow, notably unlike the sweeping regulatory authority granted to other administrative bodies as to which "[o]ur [judicial] deference is especially appropriate." Goldberg v. Brd. Of Health of Granby, 444 Mass. 627 (2005). G.L. c. 129, sec. 2, the primary statutory authority for the regulations, lists specific topics about which regulations may issue, and to the extent those topics deal with domestic animals at all (as opposed to cattle, swine and the like) they focus *exclusively* on contagious diseases of such animals: the prevention and treatment of contagious diseases, burial of carcasses of diseased animals, and disinfection of places where contagion exists. This is entirely consistent with G.L. c. 129 as a whole, which is entitled "Livestock Disease Control" and which deals overwhelmingly with inspecting for and detecting contagious disease, isolating affected animals, putting down affected animals, regulating the entry into the state and transportation of animals, reporting affected animals, precautions to prevent contagious disease in animals, and licensing requirements for various businesses dealing with animals.[1]

The proposed regulations also cite c. 129, sec. 37 and c. 140, sec. 139A as additional statutory authority. Section 37 deals with enforcement of violations of c. 129, via fines, revocation of a license or permit, or injunctions, and authorizes the Commissioner of Agriculture to "promulgate regulations to implement this section." The only portion of the proposed regulations which deals with enforcement matters is Section 30.13; Section 37 cannot possibly provide the requisite statutory authority for the remaining regulations.

G.L. c. 140, sec. 139A requires that dogs or cats adopted from a shelter be spayed or neutered and authorizes the Commissioner of Agriculture to "establish regulations to ensure compliance with this section." Proposed section 30.09(8) deals with this subject and is clearly within the regulatory authority granted by sec. 139A. Again, however, the rest of the proposed regulations do not touch on spaying and neutering and thus likewise cannot be sustained on the basis of the authority granted by sec. 139A. We are left with c. 129, sec. 2 as the sole statutory authority for the proposed regulations other than 30.09(8) and 30.13.

Those proposed regulations cast their net far beyond matters related to preventing or treating contagious diseases in shelter animals or disposing of the bodies of shelter animals who die from contagious disease. For instance, in addition to providing rules for isolation rooms and quarantine rooms, the regulations contain minimum standards for animal shelters and minimum standards of animal care, including requirements that animals be protected from "excessive, constant, or stressful illumination," (30.05(1)(e)) and exercised regularly in order to "reduce the stress of confinement" (30.06(2)(i)). Section 30.09(5) and (6) deals with animals affected by a non-contagious medical

[1] Sections 39, 39A, 39B, and 45, covering licenses for dealers in cattle or hogs, pet shop operators, guard dog businesses, and horse dealers or auctioneers, respectively, each contain separate authorization to issue regulations governing the issuance and revocation of such licenses and the conduct of the businesses so licensed. In the case of guard dog businesses, the regulations may also deal with maintenance of the premises and the health of the dogs. These are likewise very narrowly defined grants of regulatory authority, which have not been (and could not be) cited to support the proposed regulations.

condition – by definition not a contagious disease. Finally, Section 30.09(2), (3), (4) prohibits the adoption of animals with "any significant behavioral concern" unless the animal is first treated for the problem or the problem is disclosed in writing to the adopter. Beyond that, the record of every dog kept by a shelter must include "a behavioral assessment of the animal completed by the [shelter] or provided professionally documenting behavioral concerns or temperament issues that may pose a safety concern for humans or other domestic animals" (30.11(2)), and this information must be supplied to the prospective adopter prior to transfer (30.09(4)). Behavioral issues have nothing to do with contagious disease.

This is not to suggest that any of the foregoing provisions are necessarily wrong in the abstract and some or all may perhaps be very much desirable. That is beside the point, however. If a regulation is ultra vires, the merits of the regulation are irrelevant. See Commonwealth v. Maker, 459 Mass. 46, 50 (2011).

Case law in Massachusetts supports the conclusion that in this instance the Department has overstepped its authority. The general criteria by which a regulation challenged as ultra vires will be judged have been stated by the Supreme Judicial Court as follows:

> "An administrative agency's duly enacted regulations are entitled to a presumption of validity. Regulations are invalid, however, when the agency utilizes powers 'neither expressly nor impliedly granted by statute.' Although we look to the statute as a whole to determine the scope of the agency's power, an agency can exercise only 'the powers and duties expressly conferred upon it by statute and such as are reasonably necessary to carry out its mission.'" Commonwealth v. Maker, 459 Mass. 46, 49-50 (2011) (Citations omitted.)

Despite the presumption of validity, which is virtually always emphasized at the outset, the Massachusetts courts have ruled a challenged regulation ultra vires in John Doe v. Sex Offender Registry Board, 82 Mass. App. Ct. 152 (2012), rev. den. 463 Mass. 1111 (2012) (Regulation of Sex Offender Registry Board); Commonwealth v. Maker, supra (Regulation of Sex Offender Registry Board); Morey v. Martha's Vineyard Commission, 409 Mass. 813 (1991) (Regulation of the Martha's Vineyard Commission), and Tebo v. Board of Appeals of Shrewsbury, 22 Mass. App. Ct. 618 (1986) (Regulation of Board of Fire Prevention).[2] Each case of necessity hinges on the particular enabling statute and the particular regulation, so by definition there can be no such thing as authority on point. However, one of the cases, Tebo, bears some similarity to the instant situation in that the regulation was held invalid as outside the substantive purview of the issuing agency.[3] Furthermore,

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[2] In other instances a regulation has been held invalid as inconsistent with the enabling statute. See, e.g., Spaniol's Case, 466 Mass. 102 (2013) (Regulation of Department of Industrial Accidents); Smith v. Comm'r of Transitional Assistance, 431 Mass. 638 (2000) (Regulation of Department of Transitional Assistance); Nuclear Metals, Inc. v. Low-Level Radioactive Waste Management Board, 421 Mass. 196 (1995) (Regulation of Low-Level Radioactive Wste Mgmt Board). Not surprisingly, since a regulation that is inconsistent with the enabling statute is by definition ultra vires, the two grounds are sometimes cited interchangeably, as in Mass. Hospital Association v. Dept of Medical Security, 412 Mass. 340 (1992) (Regulation of Department of Medical Security). The converse is not true, however, and in this situation only the ultra vires rationale seems to fit.

[3] The other three cases (Doe, Maker, and Morey) involved regulations which were within the broad purview of the regulatory body but were held invalid because they added impermissibly to procedures set forth by the relevant enabling statute: in Doe by permitting the Board to reclassify a registered sex offender on its own initiative; in Maker by requiring a sex offender to register with the local police department, and in Morey by allowing proposed development projects to

this conclusion was reached not on the basis of the statutory scope of regulatory authority considered by itself, but rather on the basis of the entire enabling statute. This situation thus presents an easier case inasmuch as consideration of sec. 2 of c. 140 by itself does lead to the conclusion that the proposed regulations are ultra vires, as does consideration of c. 140 in its entirety.

Tebo involved a challenge to a regulation of the Board of Fire Prevention that prohibited blasting within a stated radius of a microelectronic manufacturing operation under certain circumstances. The regulation was enacted at the urging of a maker of microelectronic components, which objected to the location near its facility of a quarrying company conducting earth removal operations. The enabling legislation (G.L. c. 148 sec. 9) empowered the Board to regulate explosives and, according to the Appeals Court, "by simple extension, blasting." The subject matter of the regulation, therefore, was not in and of itself ultra vires. However, the Appeals Court, upon a review of the history of c. 148 concluded that "its preoccupation is safety" and that the challenged regulation was ultra vires because "[i]t proscribes blasting in certain locations irrespective of safety concerns. . . . Seen realistically, what the fire board's new regulation does is to favor one form of economic activity, manufacture of microelectronic components, over another form of economic activity, quarrying rock and grading land for development. It is quite apparent that economic choice, rather than safety, underlies the regulation." 22 Mass. App. at 629, 630. To be sure, the choice made might be rational, and the Legislature could authorize an administrative board to make these kinds of choices, but it had not authorized the Board to do so. 22 Mass. App. at 630.

In this situation, whatever may have prompted the proposed regulations, they go far beyond the purview of the Department contemplated by c. 129 as a whole, which is to say the prevention and management of contagious disease in animals, as well as the actual grant of regulatory authority in Section 2.

Energy Nuclear Generation Co. v. Dept of Environmental Protection, 459 Mass. 319 (2011), in which a regulation challenged as ultra vires was upheld, makes an instructive contrast with this situation. The challenged regulation dealt with cooling water intake structures ("CWIS"), components which withdraw water from the surface for industrial purposes, and was issued by the DEP under the Clean Water Act pursuant to their statutory authority to adopt "rules and regulations which it deems necessary for the proper administration of the laws relative to water pollution control and to the protection of the quality and value of water resources." G.L. c. 21, sec. 27(12). The Court noted that the underwater suction created by CWISs caused them to "pose a threat to aquatic species and ecosystems" and upheld the regulation even though the state statute did not mention CWISs or water intake and focused instead on water pollution in the form of the discharge of harmful substances into the water. Key to this conclusion was the broad scope of the grant of regulatory authority:

> "The emphasis on traditional threats to water resources cannot be read to deprive the department of authority to address atypical or novel threats that may also harm those resources. The department's authority to create a discharge and pollution reduction program does not limit its authority to deal with water quality issues other than discharges and traditional pollution under its broad statutory powers. Restricting the department's authority to water pollution control, as Entergy suggests, would render superfluous the department's

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come before the Commission in a way other than that called for by the enabling statute. Thus, those cases are not particularly helpful except as standing for the general proposition that a regulation can be ultra vires.

> parallel duty to protect 'the quality and value of water resources.'" 459 Mass. at 330-331 (footnote omitted).[4]

This situation is in no way comparable. The Department's grant of regulatory authority in section 2 of c. 129 is narrow; there is no general language about protection of the public from dangerous domestic animals comparable to the DEP's regulatory authority over the protection of the quality and value of water resources.

Based on the forgoing the proposed regulations, if enacted in their present form, would be vulnerable to challenge.

Virginia Coleman
Ropes & Gray

[4] The omitted footnote noted that when the Clean Water Act was enacted the ecological impact of CWISs was not known and therefore not addressed. However, "[t]he Legislature wisely adopted language in the State Act that permits the department to adapt its regulations to evolving knowledge of the problem."