

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 03-0024
Karen Schmidt d/b/a)	
SCR Kennels)	
)	
Respondent)	
)	

Decision

In this decision, I find that Respondent Karen Schmidt d/b/a SCR Kennels committed seven violations of the Animal Welfare Act. I also find that Complainant Animal and Plant Health Inspection Service failed to meet its burden of proof with regard to nineteen additional violations alleged in the complaint. After weighing the gravity of the violations, I am assessing a civil penalty of \$2,500 against Respondent, and I am not suspending or revoking her license under the Act.

Procedural History

On April 16, 2003, the Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture issued a complaint under the Animal Welfare Act alleging that Respondent Karen Schmidt d/b/a SCR Kennels willfully violated the Animal Welfare Act and the regulations thereunder on numerous occasions. Specifically, the complaint alleged that violations were discovered at SCR during the course of five different inspections in 2000, 2001 and 2003. Three violations were alleged as a result of the January 24, 2000 inspection; four violations

were alleged as a result of the July 18, 2000 inspection; six from the May 8, 2001 inspection; nine from the October 24, 2001 inspection; and eleven from the January 9, 2003 inspection. The complaint was served on Respondent on May 6, 2003 and Respondent's answer, denying or questioning each of the allegations, was filed with the Hearing Clerk on May 12, 2003. Respondent requested a hearing on the allegations in the complaint.

A hearing was originally slated to commence on September 8, 2004, but was rescheduled and I conducted a hearing on November 3-4, 2004 in Springfield, Missouri. Complainant was represented by Robert Ertman, Esq. Respondent proceeded pro se, but was assisted by Dr. Jerome Schmidt. Complainant called five witnesses and Respondent called seven, including Dr. Schmidt.

Both parties filed briefs with proposed findings of fact and conclusions of law. In its reply brief, Complainant withdrew its proposed findings of and conclusions relating to the two inspections conducted in 2000. Thus, only the 26 alleged violations resulting from the two inspections conducted in 2001 and the single inspection in 2003 remain for my determination.

The Facts

Respondent Karen Schmidt is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri. CX 6. p.1.¹ She is a retired teacher, and has raised and shown champion quarter horses. Tr. II—79-80. She holds USDA Class A Dealer License #43A2135. CX 6. SCR Kennels is a breeding dog kennel, and at the time of the most recent inspection that is the subject of this proceeding, SCR had 150 breeding

¹ Complainant USDA's exhibits are cited as "CX." Respondent Karen Schmidt d/b/a SCR Kennels's exhibits are cited as "RX." The transcript for the first day of the hearing is cited as "TR. I" and the transcript of the second day of the hearing is cited as "TR. II."

females, over 20 breeding males, and a number of puppies. The primary function of SCR Kennels is to sell puppies in commerce, and it sold 442 puppies in 2001. Id.

Allegations of inappropriate government conduct

Throughout the course of the hearing, Respondent contended that it had been unfairly singled out by Complainant for a variety of reasons. While I intend to rule only on the existence or non-existence of the violations alleged in the complaint, it is worth noting that a number of witnesses testified, under oath, that USDA inspectors “were on a mission” against Respondent. Respondent attributes this to Dr. Schmidt’s testifying in favor of kennel owners and against USDA at hearings in 1997 and 2001. In the latter case, *In re Marilyn Sheppard*, 61 Agric. Dec. 478 (2002), Administrative Law Judge Dorothea Baker found “The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations.” Id., at 487.

Since Dr. Schmidt testified in the 1997 hearing, SCR Kennels, owned and operated by his wife, has been inspected at least ten times. CX 44. This is in addition to annual inspections by State of Missouri officials, who apparently have generally found no violations. Dr. Schmidt testified that other kennels have taken to surreptitiously asking him for advice, because they feared that the USDA would crack down on them if they knew they were directly dealing with him. Tr. II—73-75. He stated that another individual, who he declined to name, was told by a USDA inspector that she should use another auction service than Dr. Schmidt’s. Tr. 78. Len Clayton, an inspector with the Missouri Department of Agriculture, testified that he had heard that other kennels were aware of the threat of doing business with Dr. Schmidt, and that it was “common knowledge that USDA was going to take the Schmidts down.” Tr. II-7. Mr. Clayton also

testified that kennel owners felt that there was a relationship between Dr. Schmidt's name appearing as the veterinarian of record and their getting written up for violations. Tr. I-12. Marilyn Shepherd, who owned the kennel for whom Dr. Schmidt testified in the above-captioned case, indicated that "some of the breeders who had been using Dr. Schmidt . . . had decided that because of pressure from the USDA, that they had decided to no longer use Dr. Schmidt as their attending veterinarian." Tr. I—136-137. Mark Landers, a commercial breeder, testified that after Dr. Schmidt indicated that he believed that James Depue, a USDA inspector, transmitted a disease to Mr. Landers' dogs by not using appropriate protective clothing, Depue advised Landers to no longer list Dr. Schmidt as his veterinarian. Tr. II—46-47. There was no testimony in refutation of these various allegations.

I have made my determinations as to whether violations were present on the dates of the three inspections currently at issue in this matter, based on the evidence presented before me. However, the allegations of Respondent concerning government misconduct, while not being material to my decision, are quite serious. I have referred a copy of the transcript of this hearing to the USDA Inspector General's office for any further action they may wish to take.

The May 8, 2001 Inspection

APHIS Animal Care inspector Sandra Meek inspected Respondent's facility on May 8, 2001. Inspector Meek was accompanied by both Respondent and Dr. Schmidt and recorded her observations in an inspection report. CX 16. Other than the very brief narrative description of the alleged violations contained in CX 16, there was no photographic documentation of the violations alleged at this inspection, nor was there any

testimony at the hearing about these violations on behalf of USDA, other than Ms. Meek verifying that she wrote CX 16.²

With respect to the six willful violations alleged as a result of the May 8, 2001 inspection:

1. There is no reliable evidence to support the allegation that section 3.1(b) was violated as a result of there being an accumulation of weeds. There was no testimony on this allegation, and the inspection report simply states that there was “an accumulation of weed and grass growth around/in the outdoor enclosures which interferes with inspections, cleaning and pest management.” CX 16, p. 2. There is no evidence of the height and thickness of the grass or weeds, or any description of how it would interfere with the above-described activities. As Respondent points out, in CX 44, Daniel Hutchings states that Ms. Meek stated that weeds were 6 to 12 inches or more, but there is no statement in this record that supports his statement. Meek makes no reference to the height of the weeds in her report. Further, as Respondent points out in her brief, it is highly unlikely that weeds of that height would be present that early in the season. Complainant has not carried its burden of proof with respect to this allegation.

2. The evidence does not support a finding of the presence of excessive rust that prevents required cleaning and sanitation of surfaces. The inspection report stated that seven primary enclosure door frames were excessively rusted to the extent that they could not be cleaned and sanitized. Once again, there was no testimony by Complainant on this issue, but just a confirmation by Ms. Meek that she wrote the inspection report which

² Complainant occasionally refers to CX 12 in its brief. The document marked as CX 12, an affidavit executed by Ms. Meek dated March 18, 2001, was never offered into evidence. Furthermore, it basically just states that the May 8, 2001 inspection results are “As noted on the inspection.” Had it been offered into evidence, there presumably would have been questions raised, given that it was dated two months before the May 8, 2001 inspection occurred.

stated the existence of the violation, without any relevant details and without any photographic confirmation. On the other hand, both Dr. Schmidt and Ronnie Lee Williams testified that SCR used Rustoleum paint, which they testified was brown colored and looks like rust in photographs. Tr. II 66-67, 143-144. Nothing was offered to refute their testimony. Without any photographs or samples, and with the only testimony at the hearing being that brown Rustoleum was used on these surfaces, the preponderance of the evidence supports a finding that no violation was committed here.

3. The evidence does not support a finding that outside facilities were not provided with a wind break and a rain break. Once again, there was no oral testimony on this finding on behalf of Complainant. The only evidence presented by Complainant for this inspection date was a statement in Ms. Meek's inspection report that "The wind break for two adult Border Collies has been partially detached from the shelter and needs to be repaired or replaced." CX 16, p. 2. This statement is not even consistent with the charge in the complaint, which states that a wind break and a rain break were not even provided. In the absence of any specifics about the extent of the alleged detachment of the wind break, including whether and to what extent the two border collies alleged to have been impacted were in fact impacted by these conditions, Complainant has not met its burden of proof. Since the regulations only state that a wind break and a rain break are required, and are in effect a performance standard, part of the Complainant's burden is to show how the conditions expose the dogs to wind or rain. In the absence of any statement regarding the extent of the alleged detachment of the wind break, and the degree of exposure to wind that would have resulted, and in the absence of any other documentation of this violation, including photographs, this count must be dismissed.

4. Inspector Meek reported that “sixteen pens in the west side of the red barn . . . have broken wires . . . which need to be repaired.” CX 16, p. 3. While the regulation cited prohibits an enclosure from having “sharp point or edges that could injure the dogs,” 7 C.F.R. 3.6(a)(2)(I), Inspector Meek’s report documents no actual or potential exposure to sharp points or edges that could harm the dogs. There is no photographic evidence, and no observations that would corroborate Complainant’s conclusion that this regulation was violated. There must be some nexus shown between allegedly broken wires at the bottom of the pens and the sharp points or edges that could injure the animals. The regulation does not bar broken wires, unless the wires presented potential injury to the dogs. There is no factual allegation that would lead me to conclude that sharp points or edges were present at SCR on May 8, 2001. Complainant does not even make a prima facie showing regarding this violation.

5. The fifth allegation arising out of the May 8, 2001 inspection was that feeding receptacles were excessively chewed and worn and could not be sanitized. In support of this allegation, Complainant proffered zero testimony, zero photographs, and a conclusory statement in the inspection report that “twenty-four food receptacles that are excessively chewed, worn and no longer able to be cleaned and sanitized.”

On the other hand, SCR witness Ronnie Lee Williams, holder of a Missouri Class C license in Sanitary Water Supplies, Tr. I-143, testified to his sanitizing of plastic pails with chewed areas. He stated that it took approximately four minutes to sanitize a plastic pail and that even though there were chew marks and some discoloration, the pail was sanitized. Tr. I-149, RX 36. His testimony showed that the edges of a feeding pail could be chewed without preventing it from being easily sanitized. RX 42 (bottom photo).

Complainant had no challenges to this testimony either in cross-examination or in rebuttal. Complainant has failed to show by a preponderance of the evidence that these twenty-four food receptacles were made of a non-durable material, and were no longer able to be cleaned and sanitized.

6. The final allegation of violation based on the May 8, 2001 inspection was that water receptacles were not kept clean and sanitized. As with the previous charge, the only evidence proffered by Complainant was the statement in the inspection report that “There are five water receptacles that are chewed, worn and no longer able to be cleaned and sanitized.” CX 16, p. 2. There was no evidence allowing me to determine whether and to what extent these five water receptacles were chewed or worn. Apparently the type of pails used for feeding and watering were the same or similar, and Mr. Williams’ unrefuted testimony that these receptacles were easily cleanable is persuasive. Dr. Schmidt testified that when a pail is found that is torn up, they simply throw them away, and that the use of plastic pails, particularly in the cold weather, is more beneficial to the dogs because it takes longer for the water to freeze. Tr. II-92-99. There is no basis for me to find that there was a violation of 7 C.F.R. §3.10 on the date of the inspection.

The October 24, 2001 Inspection

APHIS Animal Care Inspector Sandra Meek again inspected SCR on October 24, 2001. She was accompanied during this inspection by Jan Feldman. The two inspectors were accompanied by both Respondent and Dr. Schmidt. Their findings were memorialized in an inspection report. CX 17. In addition to the narrative in the report, Ms. Feldman took a number of photographs to document their observations. CX 18-27.

With respect to the nine willful violations alleged as a result of the October 24, 2001 inspection:

1. The complaint charges a violation of section 3.1(b) of the regulations for an accumulation of weeds at the kennel. Inspector Meek testified that CX 18, a photograph taken that day by Inspector Feldman, showed “excess weeding and grass growth, which can harbor insects, pests, disease . . .,” Tr. I-33, and stated in her inspection report, CX 17, that the grass and weeds needed to be cut to prevent rodents and pests from breeding and “to protect the health and welfare of the animals.” Inspector Feldman testified that she did not know how tall the grass was or how thick it was, and she did not know the type of diseases which could be spread. Tr. I—94-95.

Dr. Schmidt testified that the grass and weeds evident in CX 18 were generally about four inches high—“that it’s getting time to be cut, but it’s not where it’s detrimental to the dogs.” Tr. II-113. Dr. Schmidt testified that the fence depicted in the picture was 28 inches high, so that it appears that with the exception of one or two shrubs, the grass/weed height was not much more than four inches. Tr. II-111-113. The area depicted in CX 18 is very small, and the grass/weed level, while being above the height of a perfectly manicured lawn, does not appear to be a violation of the regulations. In the absence of any regulatory definition or convincing testimony as to what a violative accumulation of weeds is, Complainant has not met its burden here.

2. The second charge arising out of the October 24, 2001 inspection was that “surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces.” The inspection report, CX 17, referred to seven primary enclosures where the metal doors were “excessively rusted,”

and CX 20 consisted of four photographs which showed that a number of the enclosures had doors which were indeed rust colored. Inspector Meek testified that the doors were rusted and that one of the pictures showed that the wires were rusted to the point that they were broken. Tr. I—33-34. Dr. Schmidt testified that the doors were painted with Rustoleum, which was rust colored, and which inhibits the formation of rust. Tr. II—66-67. No scraping or samples were taken from these enclosures that would aid me in determining whether the doors were in fact rusted or just painted with Rustoleum as Dr. Schmidt testified without contradiction. Since the burden of proof is on Complainant, I must find that this count has not been proven.

3. The complaint alleges that chemicals and cleaning substances were stored in an unsafe manner, in violation of 9 C.F.R. 3.1(e). The inspection report, CX 17, indicates that chemicals such as paints and paint thinners were stored in SCR's red barn in proximity to bulk food supplies, rather than being stored in a cabinet or a separate area. There was no photographic documentation of this allegation, nor was there any substantive testimony that would support a violation finding here.

4. The complaint alleges that outdoor housing was not large enough to allow each animal to sit, stand and lie in a normal manner and to turn about freely. The gist of this count was that the kennel housing in a particular pen was not considered adequate to accommodate the number of dogs that were in that pen. Inspector Meek stated that CX 21, a photograph depicting a number of dogs in the corner of a pen, demonstrated that only two shelters, plus a lean-to which did not qualify as a shelter from the elements, was insufficient shelter for the eleven dogs in the enclosure. There was no demonstration of the size of the shelters that were in this pen, and why they were inadequate for the

number of dogs housed. Looking at CX 21, which only depicts what appears to be a small corner of the pen, it is impossible to discern the nature and number of shelters present. Without any documentation as to the size of the shelters in the pen, a determination as to their adequacy cannot be made.

Respondent contended that the lean-to covered three doghouses, but offered no reliable documentation of this statement. Dr. Schmidt stated that with his training as a practicing veterinarian for many years, his judgment was that the shelter was adequate for these dogs. While I note that neither party presented me with convincing evidence as to the number of dogs involved and the number and dimensions of the shelters, the fact that I cannot determine from Complainant's photograph a reliable depiction of the conditions present on the day of the inspection, coupled with the requirement that it is Complainant's burden to show that the regulations were violated, leads me to find that a preponderance of the evidence does not support a violation here.

5. Complainant's allegation that outside facilities were not provided with a wind break and rain break at the entrance is not supported by the evidence. The regulation provides no specific measurements or standards as to the size or shape of the wind or rain breaks, so the key presumably is whether the shelter is protected against wind and rain. The only testimony proffered by Complainant on this count was the statement by Inspector Meek describing CX 22 as a photograph of a shelter "without a proper wind break," and that the opening in front of the shelter was too large so that the wind and rain would go through. Tr. I—35-36. In CX 17, Meek mentioned but did not identify or photographically document two other outdoor wooden shelters as not having a wind break at the entrance, but there was no further testimony on the allegation. Meek also

confirmed that there are no specifications for wind breaks and water breaks, but that the standard is they have to “protect the animals from the wind and the rain.” Tr. I-60.

Dr. Schmidt testified in great detail on the nature and quality of the wind breaks at SCR, demonstrating that SCR’s pens were designed to reduce the effects of wind and rain, and pointing out that for the one shelter that had the gap in front, that there was another board inside the shelter that prevented wind or rain from reaching the dogs inside. Tr. II—88-89. Dr. Schmidt stated that his judgment as to the adequacy of these shelters was superior to that of the USDA inspectors, Tr. II-84, and that SCR’s shelters were as good or better than those that he said were recommended by USDA. Dr. Schmidt’s detailed testimony in this area went unchallenged, and given the dearth of testimony proffered by Complainant, no violation is established here.

6. The sixth charge arising from the October 24, 2001 inspection concerns allegations that SCR did not maintain its primary enclosures in such a manner as to protect the animals from injury. Complainant has documented a number of incidences where broken wires or sharp edges in the enclosures presented potential injury hazards to the dogs sheltered therein. Inspector Meek testified that the six photographs contained in CX 23 demonstrated that several wire enclosures had broken wires, which were protruding in a manner which could cause harm to the dogs. Tr. I—37-38. In CX 17, her inspection report, Inspector Meek stated that eighteen primary enclosures posed safety threats to the dogs as a result of broken wires or side/bottom panels, but her testimony and the photographs only appear to document two such instances. Tr. I—66-67.

From Dr. Schmidt’s testimony, it appears that repair of enclosures is a constant activity at SCR, particularly with dachshunds, which have a tendency to chew or claw at

the enclosures. It was evident from CX-23, and from photographs proffered by Respondent, that there were many shiny clips on the enclosures that indicated repairs were made not long before the inspection—i.e., that Respondent appeared to be fairly diligent in monitoring and repairing broken wires. On the other hand, it is uncontroverted that at least two broken wires were in a position to potentially cause injury to the dogs, and thus I hold that Complainant has proven a violation existed at the time of the inspection.

7. The seventh count in this inspection was that feeding receptacles were excessively chewed and worn and could not be adequately cleaned and sanitized. Inspector Meek indicated in CX 17 that five excessively chewed or rusted food receptacles were not able to be cleaned and sanitized. She testified that a rusted surface could not be properly cleaned and sanitized. Tr. I—69. CX 24 appeared to show that several food receptacles had some rust on their outside surfaces, but there is absolutely no evidence of any excessive chewing on these receptacles. Likewise, there is no evidence that there was any rust on the inside of these feeders, nor is there any evidence that any food was contaminated in any way by the rust.

Dr. Schmidt testified that there was no water in the feed or any other contamination and that the feeders were in good working order. Tr. II—142. Mr. Williams testified that the feeders could be easily sanitized with chlorine. Tr. I—146-147. In the absence of any evidence that the light coating of rust on top of and on the outside surfaces of the feeders would have prevented the cleaning or sanitizing of these feeders, Complainant has not met its burden of establishing a violation here.

8. Complainant once again cited SCR for having water receptacles that were not kept clean and sanitized. While CX 25 demonstrates that at least one plastic water container was chewed around the edges, that does not in itself indicate that it cannot be cleaned or sanitized. As I have already discussed with reference to the final count based on the May 8, 2001 inspection, I have no basis to find a violation of the cited regulation.

9. The final count derived from the October 24, 2001 inspection was an alleged failure to keep the kennel clean. Inspector Meek testified to “an accumulation of dirt and debris on the floor” of the whelping room, Tr. I-40-41, CX 26, stating that the dirt and other objects on the floor reflect that there was not a routine cleaning of the room. In addition, Ms. Meek discussed CX 27, a photograph showing an accumulation of spider webs in the ceiling surface area of the red barn, which also indicated to her that “. . . the facility is not being cleaned on a regular basis. Proper practices are not being followed.” Tr. I-42. Dr. Schmidt stated that the inspection occurred before the cited areas had received their daily cleaning.

Looking at the photographs in CX 26, I do not see an accumulation of dirt or debris that is indicative of a violation. I saw nothing in these photographs that would indicate a likelihood that the area could be a breeding or living area for pests, as alleged in the complaint. At worst, it looks like an area that could use a little cleaning, but hardly to the degree that constitutes a housekeeping violation. Nor do spider webs in the rafters of a barn, high above the area where dogs would be present, appear to present a hazard to the dogs. I find no violation of 9 C.F.R. §3.11 on the date of this inspection.

The January 9, 2003 Inspection

On January 9, 2003, Inspector Meek once again inspected SCR Kennel. On this occasion, Ms. Meek was accompanied by APHIS Senior Inspector Daniel Hutchings. Inspector Meek prepared an inspection report, CX 33, and Inspector Meek took photographs, CX 34-43. The inspectors were accompanied by both Karen Schmidt and Dr. Jerome Schmidt.

With respect to the eleven willful violations alleged as a result of the January 9, 2003 inspection:

1. Inspector Meek once again determined that “surfaces of housing facilities were not kept free of excessive rust that prevents the required cleaning and sanitization of the surfaces.” Other than her statement that two metal door frames needed to be repaired or replaced, there was no documentation of this allegation. No photographs were taken, and no explanation was made as to the nature of the inadequacy of these two door frames. No violation of 9 C.F.R. 3.1(c) has been demonstrated by Complainant.

2. The complaint alleges that chemicals, cleaning substances and food supplies were stored in an unsafe manner. In particular, Inspector Meek testified that she observed an open bag of chemical insecticide near where the bulk food is stored. Tr. I—42-43. Exhibit 34 consists of two photos which document this observation.

Respondent did not deny that the open bag of insecticide was located as described by Inspector Meek, but rather downplayed its significance. Dr. Schmidt identified the insecticide as Rotenone and emphasized that it was a safe insecticide for dogs and humans, and was commonly used in gardening. Tr. II—125-126. He stated that there were no open bags or food containers near the Rotenone and that it presented no danger. Tr. II—124-125.

Complainant has sustained its burden in regard to this allegation. While an insecticide may be safe to use under certain conditions, it would be hard to argue that it is permissible to store it in the same area that food is being stored, particularly where the regulation is clear that it must be stored either in a separate area or in a cabinet.

3. The third count in the complaint arising from the 2003 inspection was that “Housing facilities were not equipped with a drainage system that minimized contamination and disease risks.” CX 33 discusses two aspects to this charge. First, the report mentioned that waste from two waste removal drainage pipes was running along a fence line rather than into the lagoon. Second, the report indicated that in the “small room” of the red barn, waste materials from the upper enclosures was being washed down between the back of the lower enclosures and the wall. There were no photographs and essentially no testimony on behalf of Complainant to support the lagoon allegation. With respect to the enclosures in the red barn, Complainant proffered CX 35 which appears to show that some hair had been trapped in the upper part of the lower enclosure.

Ron Williams, who has expertise in the area of waste management, testified that the lagoon system was in good shape and was working properly. The lagoon system, as described by Respondent in RX 39, appeared to be clearly separated from the dog enclosures by a fence. Mr. Williams testified it was an aerobic lagoon and was “highly serviceable.” Tr. I—155-156. He was never cross-examined on his conclusion, nor was any evidence presented that would contradict his conclusion. Thus, I conclude that there was no violation with respect to the lagoon.

I also conclude that the testimony on CX 35 is not persuasive in demonstrating a violation of the regulations. From my observation of the photograph, it appears that there

is just some accumulation of dog hair at the top of the lower enclosure. Other than that, I see nothing that appears to be waste. There is no readily identifiable solid waste material, contrary to the findings in the inspection report. While the inspection report indicates that only fiber board separates the two layers of enclosures in the small room of the red barn, Respondent points out in her brief (pp. 28-29) that fiber board would dissolve once it became wet, and that CX 20, photograph 4, demonstrated that the two layers of enclosures were actually separated by polymer plastic sheets. In the absence of any evidence that the “waste” was anything more than one day’s accumulation of hair, I find no violation of the drainage and waste disposal regulation.

4. I find no basis for the allegation that the indoor housing facilities did not have adequate lighting to allow routine inspection and cleaning. It appears to me that this regulation does not mean that the facilities had to have sufficient lighting to allow an enforcement inspection of every nook and cranny in the facility, but rather applies to the routine daily inspections associated with running a kennel. That the inspectors needed to use a flashlight to observe the back of the enclosure does not in itself constitute a violation. Dr. Schmidt testified that in his opinion as an experienced veterinarian that the lighting provided was beneficial for animal husbandry, particularly for enhancing the kennel’s conception rate. Tr. II-145. Dr. Schmidt also pointed out that the kennel’s lighting arrangement had been inspected by compliance inspectors for years, and had never been criticized as being out of compliance with regulations. Id., 144-145. I find no violation here.

5. Complainant alleges that the wind and rain breaks in two of the outdoor shelters were inadequate to protect the dogs from the wind and the rain. In particular, the

inspection report, CX-33, p. 2, indicated that the small protrusions extending three inches from the top of these two shelters were inadequate. As Respondent pointed out in her brief at p. 31, Meek apparently based this violation finding solely on her judgment, citing no standards or specifications in support of her exercise of judgment. Tr. I-60. Dr. Schmidt, an experienced veterinarian, testified in great detail how the structures at SCR protected, in his judgment, against wind and rain. Tr. II—80-88. SCR suggests in its brief that in a dispute between a veterinarian and a non-veterinarian as to the adequacy of wind and rain breaks, particularly where there are no specific, measurable standards, I should defer to the experienced veterinarian. I am inclined to agree, particularly where, as here, there was no veterinarian testifying on behalf of Complainant whose judgment differed from Dr. Schmidt's and where no evidence was generated, either through cross-examination or rebuttal, to contradict Dr. Schmidt's educated judgment. Complainant has not met its burden with regard to this allegation.

6. The sixth allegation in the complaint arising out of the January 9, 2003 inspection was that outside facilities were not provided with clean, dry bedding material at temperatures less than 50 degrees, in violation of 9 C.F.R. 3.4(b)(4).³ The inspection report stated that fifteen shelters did not “have appropriate bedding material that allows the animals to burrow down into.” CX 33, p. 2. While the regulation does require clean and dry bedding material, the requirement that this material should be such that the animals can burrow down into it is nowhere to be found in the regulation. Dr. Schmidt testified at some length why Respondent's use of rubber mats was superior to other forms of bedding, including the fact that it was resistant to being torn up and thus was better able to insulate the dogs from colder temperatures. Tr. II—101-110. Once again, there is

³ The complaint cited 3.4(b)(5), which presumably is a typographical error.

no evidence to contradict Dr. Schmidt's testimony, and I hold that there was no violation proven here.

With respect to the cleanliness of the bedding and the enclosures, see the discussion of the counts 9 and 10, infra.

7. The complaint cited SCR for not maintaining building surfaces in good repair, in violation of 9 C.F.R. §3.4(c). In particular, the inspectors cited SCR for having a broken hinge on a single door in one of the outdoor enclosures, causing the door to hang at an angle. CX 33, p. 3. A photograph, CX 38, confirms that the door to a shelter is indeed hanging by its top hinge. Respondent admits that the hinge was broken, but points out that the different color of the door where the hinge is missing indicates that the hinge could not have been broken for a very long time. Resp. Br. at 33-34, Tr. I-74. In addition, Inspector Meek testified that the missing hinge did not prevent animals from entering or leaving the shelter. Nevertheless, the hinge is missing, and a violation, although an exceedingly minor one, is established.

8. Complainant once again cites SCR for allowing primary enclosures to present sharp points or edges which could injure the dogs. Complainant indicated that there were a number of enclosures with broken and/or protruding wires, that one enclosure had a sheet of tin with sharp edges, and that another enclosure had two large protruding nails. Complainant also indicated that the failure of a light bulb to have a protective covering also constituted a violation due to the possibility of it breaking and exposing the dogs to broken glass.

Testimony on the broken wires was a bit hazy, as were the photographs that purported to show the wires. I saw and heard no evidence in support of the contention

that protruding nails were present. The sheet of tin did appear to have sharp edges; even though Respondent has contended that there were no dogs in the area at the time of the inspection, there was no indication that this was not an area that could be utilized for the dogs. The fact that it was not used by dogs on the day of the inspection is not necessarily dispositive as there was no indication that the enclosure had not been used recently or would not be used again shortly. This constitutes a violation, although in the absence of any showing of exposure of any dogs to this hazard, the violation is not one of great significance.

There is no basis for a finding that the failure to cover a light bulb constituted a violation. The far-fetched interpretation of the regulations, which indicate nothing that would lead any fact-finder to conclude that the covering of a light bulb would be required in these circumstances, combined with the fact that the light bulb had been in the same position through years of previous inspections by both state and federal inspectors without ever being cited, (Resp. Br., p. 35) seem to add credence to Respondent's oft-repeated contention that the inspectors were "out to get" SCR, and were looking for any possible interpretation of the regulations to beef up their complaint.

9. Respondent was charged with failure "to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair and fecal and food wastes." Complaint. There was an outdoor enclosure (identified as enclosure 13) that had a substantial accumulation of waste material. No dogs were seen in the pen at the time of the inspection and SCR has indicated that that pen had not been used for nearly a year before the inspection. Nevertheless, it is clear that an animal had been using the pen, since the amount of waste in it was clearly excessive. CX 41, p. 9. Len Clayton, a

Missouri Department of Agriculture official called by Respondent, admitted on cross-examination that the pen in question appeared not to be in compliance with Missouri regulations. Tr. II—15. Tom Jacques, also with the same state agency, testified similarly. Tr. II—31-32. If the pen was not in use at the kennel, it is reasonable to surmise that the excessive waste observed by at least three inspectors and documented photographically would not have accumulated. While this is not a major violation, it clearly is not a demonstration of compliance.

The other allegations under this count are not as compelling. While it is true that there appear to be waste and hair in a few of the areas photographically depicted, there is nothing like the waste accumulated in enclosure 13. Respondent contends that the daily waste cleanup had not yet been undertaken, particularly since they were dealing with a crisis from a broken sewage pipe, and the amounts of waste and hair in the other locations were not such as to indicate more than a day's accumulation. Likewise, the presence of rocks in a few of the indoor enclosures did not appear to me to present a cleanliness/sanitation problem, as there was no showing that it was more than the amount of rocks and gravel that dogs tended to bring into the enclosure in a normal day or two. Finally, I reject the contention that the water receptacles could not be cleaned and sanitized for the reasons discussed earlier.

10. The complaint also cited Respondent for failing to maintain housing premises free of accumulations of dirt, fecal matter, hair and debris. While this count seems to overlap with much of the previous count, the photographs and testimony appear to focus on the conditions caused by the broken drainage pipe in the kennel's sewage system. There is no dispute that there was a breakage in one of the pipes of the sewage system

that served the kennel, nor is there any dispute that as a result of this breakage there were accumulations of waste matter that normally would not be present in a kennel complying with the requirements of the regulations regarding sanitation and cleanliness. CX 42. Although the problem was the result of an accident, the fact remains that there were violations caused by the sewage problem. The undisputedly accidental nature of the violation and the prompt cleanup that had already begun by the time the inspectors arrived are factors that I will weigh in my discussion on appropriate sanctions, infra.

11. The final allegation based on the January 9, 2003 inspection was for a lack of effective pest control. The only matter of significance alleged, other than the trivial observation of approximately 20 gnats, was the presence of rodent holes on the premises near the outdoor pens. The presence of several holes was well-documented. CX 43. The allegation was that these were active rodent dens, but no rodents were actually seen entering or exiting these dens during the course of the inspection.

The presence of the holes, which clearly could only be rodent holes, is enough to sustain a violation here. The inspectors were not required to stick their hands in the holes to determine whether there was activity or other indicia of the active presence of rodents. Sound practice would require that if a rodent hole were detected, then appropriate measures should be taken not only to eradicate the rodents, but to fill in the hole.

Conclusions of Law

1. Respondent did not commit any of the violations alleged in the complaint that were based on the May 8, 2001 inspection.

2. On October 24, 2001 Respondent was in violation of 9 C.F.R. § 3.6(a)(2)(i) for not maintaining its primary enclosures in such a manner as to protect all its dogs from

injury. Complainant did not sustain its burden of proof with regard to any of the other eight violations alleged as a result of that inspection.

3. On January 9, 2003, respondent was in violation of 9 C.F.R. § 3.1(e), for storing chemicals and food supplies in an unsafe manner; of 9 C.F.R. § 3.4(c) for a minor failure to keep outdoor housing facilities in good repair; of 9 C.F.R. § 3.6(a)(2) for primary enclosures having sharp points or edges which could injure dogs; of 9 C.F.R. § 3.11(a) for the excessive accumulation of waste and dirt in enclosure 13; of 9 C.F.R. § 3.11(c) for the results of the accidental breakage of a drainage pipe in the kennel's sewage system; and of 9 C.F.R. §3.11(d) for the presence of rodent holes near the outdoor pens. Complainant did not sustain its burden of proof with respect to any of the other allegations in the complaint resulting from that inspection.

Sanctions

Complainant has requested that I impose a civil penalty of \$25,000 and a license suspension of at least a year against Respondent. However, Complainant failed to prove the significant majority of the violations, and many of these violations were minor or non-willful. Many of the citations give great credence to the contention of Respondent that it was being targeted by Complainant, including a number of counts, such as that involving the nature of bedding materials, the sanitization of water receptacles, the need for a protective covering over a light bulb, that involve interpretations of the regulations that are extremely questionable, at best. Even the more serious violations, such as exposing dogs to protruding wires or sharp edges, are obviated by the fact that Respondent has clearly and consistently been repairing these types of conditions as she becomes aware of them.

After closely examining the entire record in this case, I am convinced that no suspension of Respondent's license is warranted. For the violations I sustained, I am imposing a sanction of a \$2,500 civil penalty. In imposing the civil penalty, I considered (1) the gravity of the violations, many of which were not very significant; (2) Respondent's good faith, which was demonstrated by the generally good state of repair of the facility; and (3) the history of previous violations. I also find the penalty to be appropriate for the size of Respondent's business.

Order

Respondent has committed violations of the Animal Welfare Act and the regulations thereunder as detailed above. Respondent is assessed a civil penalty of \$2,500, which shall be paid by a certified check, cashier's check or money order made payable to the order of "Treasurer of the United States."

Respondent shall cease and desist from violating the Animal Welfare Act and the regulations and standards thereunder. In particular, Respondent shall cease and desist from violating the seven regulations cited in my Conclusions of Law.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 7th day of March, 2006

MARC R. HILLSON
Chief Administrative Law Judge