

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) A.Q. Docket No. 02-0005  
)  
Eddie Robinson Squires, )  
)  
Respondent ) **Decision and Order**

**PROCEDURAL HISTORY**

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on March 21, 2002. Complainant instituted the proceeding under section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111 (repealed 2002));<sup>1</sup> sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120 (repealed 2002));<sup>2</sup> regulations issued under the Act of February 2, 1903, and the Act of May 29, 1884 (9 C.F.R. pts. 71, 78 (1999)) [hereinafter

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<sup>1</sup>At all times material to this proceeding, the Act of February 2, 1903, as amended [hereinafter the Act of February 2, 1903], was in effect; however, effective May 13, 2002, the Farm Security and Rural Investment Act of 2002 repealed section 2 of the Act of February 2, 1903 (Pub. L. No. 107-171, § 10418(a)(7), 116 Stat. 134, 507 (2002)).

<sup>2</sup>At all times material to this proceeding, the Act of May 29, 1884, as amended [hereinafter the Act of May 29, 1884], was in effect; however, effective May 13, 2002, the Farm Security and Rural Investment Act of 2002 repealed sections 4 and 5 of the Act of May 29, 1884 (Pub. L. No. 107-171, § 10418(a)(8), 116 Stat. 134, 508 (2002)).

the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about November 20, 1997, April 30, 1998, June 4, 1998, August 13, 1998, August 20, 1998, August 24, 1998, August 27, 1998, September 3, 1998, September 10, 1998, October 22, 1998, and November 12, 1998, Eddie Robinson Squires [hereinafter Respondent] moved livestock interstate in violation of section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations (Compl. ¶¶ II-XXXVIII).

The Hearing Clerk served Respondent with the Complaint and a service letter on July 28, 2003.<sup>3</sup> Respondent failed to answer the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated August 19, 2003, informing him that an answer to the Complaint had not been received within the time required in the Rules of Practice.

On March 8, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Adoption of Proposed Default Decision and Order” and a “Proposed Default Decision and Order.” The Hearing Clerk

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<sup>3</sup>United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 4770.

served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order and a service letter on March 12, 2004.<sup>4</sup> On March 29, 2004, Respondent filed objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order.

On April 8, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a "Default Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding that Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations as alleged in the Complaint; and (2) assessing Respondent a \$3,175 civil penalty (Initial Decision and Order at 8-9).

On May 6, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed "Complainant's Brief in Support of His Response to Respondent's Appeal to the Secretary from the Decision of the Administrative Law Judge and Complainant's Brief in Support of His Cross Appeal." On June 23, 2004, Respondent filed a response to Complainant's cross-appeal. On June 28, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

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<sup>4</sup>United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 7764.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except for the amount of the civil penalty the ALJ assessed against Respondent. Therefore, except for the amount of the civil penalty assessed against Respondent and minor modifications, I adopt the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

**APPLICABLE STATUTORY AND REGULATORY PROVISIONS**

21 U.S.C.:

**TITLE 21—FOOD AND DRUGS**

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**CHAPTER 4—ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS**

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**SUBCHAPTER III—PREVENTION OF INTRODUCTION  
AND SPREAD OF CONTAGION**

**§ 111. Regulations to prevent contagious diseases**

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

**§ 120. Regulation of exportation and transportation of infected livestock and live poultry**

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

**§ 122. Offenses; penalty**

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. §§ 111, 120, 122 (repealed 2002).

28 U.S.C.:

**TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE**

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**PART VI—PARTICULAR PROCEEDINGS**

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**CHAPTER 163—FINES, PENALTIES AND FORFEITURES**

**§ 2461. Mode of recovery**

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FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

- (1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;
- (2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;
- (3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and
- (4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

- (1) allow for regular adjustment for inflation of civil monetary penalties;
- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

- (1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) “civil monetary penalty” means any penalty, fine, or other sanction that—
- (A)(i) is for a specific monetary amount as provided by Federal law; or
  - (ii) has a maximum amount provided for by Federal law; and
  - (B) is assessed or enforced by an agency pursuant to Federal law; and
  - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION  
ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL  
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment.

Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

#### ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

### **TITLE 7—AGRICULTURE**

#### **SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE**

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#### **PART 3—DEBT MANAGEMENT**

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## Subpart E—Adjusted Civil Monetary Penalties

### § 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties— . . . .*

. . . .

(2) *Animal and Plant Health Inspection Service. . . .*

. . . .

(xi) Civil penalty for a violation of the Act of February 2, 1903 (commonly known as the Cattle Contagious Disease Act), codified at 21 U.S.C. 122, has a maximum of \$1,100.

7 C.F.R. § 3.91(a), (b)(2)(xi).

9 C.F.R.:

**TITLE 9—ANIMALS AND ANIMAL PRODUCTS**

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,  
DEPARTMENT OF AGRICULTURE**

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**SUBCHAPTER C—INTERSTATE TRANSPORTATION OF ANIMALS  
(INCLUDING POULTRY) AND ANIMAL PRODUCTS**

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**PART 71—GENERAL PROVISIONS**

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**§ 71.18 Individual identification of certain cattle 2 years of age or over  
for movement in interstate commerce.**

(a) No cattle 2 years of age or over, except steers and spayed heifers and cattle of any age which are being moved interstate during the course of normal ranching operations without change of ownership to another premises owned, leased, or rented by the same individual as provided in §§ 78.9(a)(3)(ii), 78.9(b)(3)(iv), and 78.9(c)(3)(iv) of this chapter, shall be moved in interstate commerce other than in accordance with the requirements of this section. Any movement in interstate commerce of any cattle shall also comply with the other applicable provisions in this part and other parts of this subchapter.

(1) When permitted under such other provisions, cattle subject to this section:

(i) May be moved in interstate commerce from any point to any destination, if such cattle, when moved in interstate commerce, are identified by a Department-approved backtag affixed a few inches from the midline and just behind the shoulder of the animal, or by such other means approved by the Administrator, upon request in specific cases, and if except as provided in paragraph (a)(5) of this section such cattle when moved interstate are accompanied by a statement signed by the owner or shipper of the cattle, or other document stating: (A) The point from which the animals are moved interstate; (B) the destination of the animals; (C) the number of

animals covered by the statement, or other document; (D) the name and address of the owner at the time of the movement; (E) the name and address of the previous owner if ownership changed within four months prior to the movement of the cattle; (F) the name and address of the shipper; and (G) the identifying numbers of the backtags or other approved identification applied: *Provided*, That identification numbers are not required to be recorded on such statement or document for cattle moved from a stockyard posted under the provisions of the Packers and Stockyard Act, 1921, as amended (7 U.S.C. 181 *et seq.*), directly to a recognized slaughtering establishment as defined in § 78.1 of this chapter[.]

.....  
 (3) Each person who ships, transports, or otherwise causes the cattle to be moved in interstate commerce is responsible for the identification of the cattle as required by this section.

#### **§ 71.19 Identification of swine in interstate commerce.**

(a)(1) Except as provided in paragraph (c) of this section, no swine may be sold, transported, received for transportation, or offered for sale or transportation, in interstate commerce, unless each swine is identified at whichever of the following comes first:

(i) The point of first commingling of the swine in interstate commerce with swine from any other source[.]

.....  
 (3) Each person who buys or sells, for his or her own account or as the agent of the buyer or seller, transports, receives for transportation, offers for sale or transportation, or otherwise handles swine in interstate commerce, is responsible for the identification of swine as provided by this section.

(b) Means of swine identification approved by the Administrator are:

(1) Official eartags, when used on any swine;

(2) United States Department of Agriculture backtags, when used on swine moving to slaughter;

(3) Official swine tattoos, when used on swine moving to slaughter, when the use of the official swine tattoo has been requested by a user or the State animal health official, and the Administrator authorizes its use in writing based on a determination that the tattoo will be retained and visible on the carcass of the swine after slaughter, so as to provide identification of the swine;

- (4) Tattoos of at least 4-characters when used on swine moving to slaughter, except sows and boars as provided in § 78.33 of this chapter;
- (5) Ear notching when used on any swine, if the ear notching has been recorded in the book of record of a pure-bred registry association;
- (6) Tattoos on the ear or inner flank of any swine, if the tattoos have been recorded in the book of record of a swine registry association; and
- (7) For slaughter swine and feeder swine, an eartag or tattoo bearing the premises identification number assigned by the State animal health official to the premises on which the swine originated.

....

(e)(1) Each person who buys or sells, for his or her own account or as the agent of the buyer or seller, transports, receives for transportation, offers for sale or transportation, or otherwise handles swine in interstate commerce, must keep records relating to the transfer of ownership, shipment, or handling of the swine, such as yarding receipts, sale tickets, invoices, and waybills upon which is recorded:

- (i) all serial numbers and other approved means of identification appearing on the swine that are necessary to identify it to the person from whom it was purchased or otherwise obtained; and
- (ii) the street address, including city and state, or township, county, and state, and the telephone number, if available, of the person from whom the swine were purchased or otherwise obtained.

(2) Each person required to keep records under this paragraph must maintain the records at his/her or its place of business for at least 2 years after the person has sold or otherwise disposed of the swine to another person, and for such further period as the Administrator may require by written notice to the person, for the purposes of any investigation or action involving the swine identified in the records. The person shall make the records available for inspection and copying during ordinary business hours (8 a.m. to 5:30 p.m., Monday through Friday) by any authorized employee of the United States Department of Agriculture, upon that employee's request and presentation of his or her official credentials.

**PART 78—BRUCELLOSIS**

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**SUBPART B—RESTRICTIONS ON INTERSTATE MOVEMENT OF CATTLE  
BECAUSE OF BRUCELLOSIS**

.....

**§ 78.9 Cattle from herds not known to be affected.**

Male cattle which are not test eligible and are from herds not known to be affected may be moved interstate without further restrictions. Female cattle which are not test eligible and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 of this part and this section. Test-eligible cattle which are not brucellosis exposed and are from herds not known to be affected may be moved interstate only in accordance with § 78.10 and as follows:

(a) *Class Free States/areas.* Test-eligible cattle which originate in Class Free States or areas, are not brucellosis exposed, and are from a herd not known to be affected may be moved interstate from Class Free States or areas only as specified below:

.....

(3) *Movement other than in accordance with paragraphs (a)(1) and (a)(2) of this section.* Such cattle may be moved interstate other than in accordance with paragraphs (a)(1) and (2) of this section only if:

.....

(iii) Such cattle are moved interstate accompanied by a certificate which states, in addition to the items specified in § 78.1, that the cattle originated in a Class Free State or area.

**SUBPART D—RESTRICTIONS ON INTERSTATE MOVEMENT OF SWINE  
BECAUSE OF BRUCELLOSIS**

**§ 78.30 General restrictions.**

.....

(b) Each person who causes the movement of swine in interstate commerce is responsible for the identification of the swine as required by this subpart. No such person shall remove or tamper with or cause the removal of or tampering with an identification tattoo or approved swine

identification tag required in this subpart except at the time of slaughter, or as may be authorized by the Administrator upon request in specific cases and under such conditions as the Administrator may impose to ensure continuing identification.

### **§ 78.31 Brucellosis reactor swine.**

.....  
 (b) *Identification.* Brucellosis reactor swine shall be individually identified by attaching to the left ear a metal tag bearing a serial number and the inscription, "U.S. Reactor," or a metal tag bearing a serial number designated by the State animal health official for identifying brucellosis reactors.

(c) *Permit.* Brucellosis reactor swine shall be accompanied to destination by a permit.

.....  
 (e) *Segregation en route.* Brucellosis reactor swine shall not be moved interstate in any means of conveyance containing animals which are not brucellosis reactors unless all the animals in the shipment are for immediate slaughter, or unless the brucellosis reactor swine are kept separate from other animals by a partition securely affixed to the sides of the means of conveyance.

### **§ 78.33 Sows and boars.**

(a) Sows and boars may be moved in interstate commerce for slaughter or for sale for slaughter if they are identified in accordance with § 71.19 of this chapter either:

(1) Before being moved in interstate commerce and before being mixed with swine from any other source; or

(2) After being moved in interstate commerce but before being mixed with swine from any other source only if they have been moved directly from their herd of origin to:

(i) A recognized slaughtering establishment; or

(ii) A stockyard, market agency, or dealer operating under the Packers and Stockyards Act, as amended (7 U.S.C. 181 *et seq.*).

(b) Sows and boars may be moved in interstate commerce for breeding only if they are identified in accordance with § 71.19 of this chapter before being moved in interstate commerce and before being mixed with swine from any other source, and the sows and boars either:

(1) Are from a validated brucellosis-free herd or a validated brucellosis-free State and are accompanied by a certificate that states, in addition to the items specified in § 78.1, that the swine originated in a validated brucellosis-free herd or a validated brucellosis-free State; or

(2) Have tested negative to an official test conducted within 30 days prior to interstate movement and are accompanied by a certificate that states, in addition to the items specified in § 78.1, the dates and results of the official tests.

(c) Sows and boars may be moved in interstate commerce for purposes other than slaughter or breeding without restriction under this subpart if they are identified in accordance with § 71.19 of this chapter.

9 C.F.R. § 71.18(a)(1)(i), (a)(3), .19(a)(1)(i), (a)(3), (b), (e)(1)-(2); 78.9(a)(3)(iii), .30(b), .31(b)-(c), (e), .33 (1999) (footnotes omitted).

**ADMINISTRATIVE LAW JUDGE'S  
INITIAL DECISION AND ORDER  
(AS RESTATED)**

**Statement of the Case**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation of the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

### **Findings of Fact**

1. Respondent is an individual with a mailing address of 600 Raintree Drive, Matthews, North Carolina 28105.
2. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.
3. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.
4. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.
5. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

6. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 71.19(e)(1) and (e)(2) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for sale without keeping records related to such swine.

7. On or about November 20, 1997, Respondent, in violation of 9 C.F.R. § 78.31(b), (c), and (e) (1999), moved one brucellosis reactor swine interstate from Stallings, North Carolina, to York, South Carolina.

8. On or about April 30, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately seven cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

9. On or about April 30, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately seven test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

10. On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately nine cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

11. On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately nine test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

12. On or about June 4, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately nine swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

13. On or about June 4, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately nine swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

14. On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately four cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

15. On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately four test-eligible cattle interstate from

Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

16. On or about August 13, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

17. On or about August 13, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately 11 swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

18. On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately three cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

19. On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately three test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

20. On or about August 20, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

21. On or about August 20, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

22. On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved approximately five cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

23. On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved approximately five test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

24. On or about August 24, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved approximately five swine interstate from

Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

25. On or about August 24, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved approximately five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

26. On or about August 27, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

27. On or about August 27, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

28. On or about September 3, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least three cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

29. On or about September 3, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least three test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

30. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least two cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

31. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least two test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

32. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

33. On or about September 10, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such

swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

34. On or about October 22, 1998, Respondent, in violation of 9 C.F.R. § 71.19(a)(1)(i) and (a)(3) (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, without such swine being identified as approved by the Administrator as described in 9 C.F.R. § 71.19(b) (1999), as required.

35. On or about October 22, 1998, Respondent, in violation of 9 C.F.R. §§ 78.30(b) and 78.33 (1999), moved at least five swine interstate from Stallings, North Carolina, to York, South Carolina, for slaughter or for sale for slaughter without such swine being identified in accordance with 9 C.F.R. § 71.19 (1999) before being moved interstate and before being mixed with swine from any other source.

36. On or about October 22, 1998, Respondent, in violation of 9 C.F.R. § 71.19(e)(1) and (e)(2) (1999), moved approximately seven swine interstate from Stallings, North Carolina, to York, South Carolina, for sale without keeping records related to such swine.

37. On or about November 12, 1998, Respondent, in violation of 9 C.F.R. § 71.18(a)(1)(i) and (a)(3) (1999), moved at least six cattle, 2 years of age or older, interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being identified by a United States Department of Agriculture-approved backtag and accompanied by an owner/shipper statement or other required document, as required.

38. On or about November 12, 1998, Respondent, in violation of 9 C.F.R. § 78.9(a)(3)(iii) (1999), moved at least six test-eligible cattle interstate from Stallings, North Carolina, to York, South Carolina, without such cattle being accompanied by a certificate, as required.

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the Findings of Fact, during the approximately 1-year period from November 20, 1997, through November 12, 1998, Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)); sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)); and the Regulations.
3. As shown in the Findings of Fact, during the approximately 1-year period from November 20, 1997, through November 12, 1998, Respondent's violations occurred on approximately 11 days involving at least 43 cattle and at least 53 swine.

### **ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER**

#### **Respondent's Appeal Petition**

Respondent raises six issues in his appeal petition. First, Respondent asserts "[he] did not know that [he] was doing anything wrong" (Respondent's Appeal Pet. at 1).

Section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), and sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), are published in the United States Statutes at Large, and Respondent is presumed to know the

law.<sup>5</sup> Moreover, the Regulations are published in the *Federal Register*; thereby, constructively notifying Respondent of the requirements for the interstate movement of cattle and swine.<sup>6</sup> Therefore, Respondent's lack of actual knowledge that "[he] was doing [something] wrong" is not a defense to Respondent's violations of section 2 of the Act of February 2, 1903 (21 U.S.C. § 111 (repealed 2002)), sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120 (repealed 2002)), and the Regulations.

Second, Respondent contends "[a]ll of the other local farmers were doing the same thing" (Respondent's Appeal Pet. at 1). I infer Respondent contends that all of the other farmers in Stallings, North Carolina, were committing the same violations as Respondent and Complainant did not institute disciplinary administrative proceedings against these other violators.

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<sup>5</sup>See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

<sup>6</sup>See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), cert. denied, 396 U.S. 867, and cert. denied, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

Even if I found that all farmers in Stallings, North Carolina, committed the same violations as Respondent and disciplinary proceedings had not been instituted against them, I would not dismiss the Complaint. Agency officials have broad discretion in deciding against whom to institute disciplinary proceedings. Even if Respondent could show that he was singled out for a disciplinary action, such selection would be lawful so long as the administrative determination to selectively enforce the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations was not arbitrary.<sup>7</sup> Respondent has no right to have the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations go unenforced against him, even if Respondent can demonstrate that “all of the other local farmers” violated the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations and no disciplinary proceedings have been instituted against them. The Act of February 2, 1903, the Act of May 29, 1884, and the Regulations do not need to be enforced everywhere to be enforced somewhere.

Sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Respondent in this

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<sup>7</sup>See *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251-52 (1967); *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413-14 (1958) (per curiam); *In re Robert Houriet*, 58 Agric. Dec. 306, 313 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 278-79 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1908 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *reprinted in* 58 Agric. Dec. 991, *cert. denied*, 528 U.S. 1021 (1999); *In re American Fruit Purveyors, Inc.*, 38 Agric. Dec. 1372, 1385 (1979), *aff'd per curiam*, 630 F.2d 370 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981).

proceeding) proves that the prosecutor (Complainant in this proceeding) singled out a respondent because of membership in a protected group or exercise of a constitutionally protected right.<sup>8</sup>

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.<sup>9</sup> Respondent bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.<sup>10</sup> In order to prove a selective enforcement claim, Respondent must show one of two sets of circumstances. Respondent must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.<sup>11</sup> Respondent has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Respondent must

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<sup>8</sup>*Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

<sup>9</sup>*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

<sup>10</sup>*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

<sup>11</sup>*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

show: (1) he exercised a protected right; (2) Complainant's stake in the exercise of that protected right; (3) the unreasonableness of Complainant's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Respondent for exercise of the protected right.<sup>12</sup> Respondent has not shown, or even alleged, any of these circumstances.

Third, Respondent asserts he cannot be found to have violated the Act of February 2, 1903, or the Act of May 29, 1884, because Congress repealed those acts in 2002 (Respondent's Appeal Pet. at 1).

The Farm Security and Rural Investment Act of 2002 repealed section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884, effective May 13, 2002.<sup>13</sup> Respondent committed violations of the Act of February 2, 1903, and the Act of May 29, 1884, in 1997 and 1998, when both acts were still in effect.

The general savings statute provides, as follows:

**§ 109. Repeal of statutes as affecting existing liabilities**

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of

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<sup>12</sup>*Id.*

<sup>13</sup>See notes 1 and 2.

sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

The Farm Security and Rural Investment Act of 2002 does not expressly provide for release or extinguishment of liability for violations of the Act of February 2, 1903, or the Act of May 29, 1884. As a result, Respondent's acts prior to the effective date of the repeal supports a conclusion that he violated section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884.<sup>14</sup>

Fourth, Respondent asserts, after he was informed of his violations of the Regulations, he stopped selling livestock (Respondent's Appeal Pet. at 1).

As an initial matter, Respondent's violations were not premised upon his sale of livestock, but, instead, upon his interstate movement of livestock. Nonetheless, I infer Respondent asserts that he has ceased the activities which gave rise to his violations of the Regulations. Respondent's cessation of the activities resulting in his violations of the Regulations is not a defense to his past violations of the Regulations.<sup>15</sup>

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<sup>14</sup>*Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 432-42 (1972); *United States v. Jackson*, 835 F.2d 1195, 1196 (7th Cir. 1988).

<sup>15</sup>*See In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997) (stating neither the respondent's disposal of animals nor the respondent's intention to terminate her license is a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as amended); *In re Dora Hampton*, 56 Agric. Dec. 301, 320 (1997) (stating the respondent's intention to dispose of her animals is not a defense to the respondent's violations of the Animal Welfare Act, as amended, or the regulations and standards issued under the Animal Welfare Act, as

(continued...)

Fifth, Respondent asserts 7 days a week from 6:00 a.m. to 11:00 p.m., he provides care to his daughter who has cerebral palsy and his mother who has lost a leg (Respondent's Appeal Pet. at 1-2).

Respondent's apparent dedication to his mother's and daughter's care is commendable, and I sympathize with the burden Respondent bears. However, even if I were to find that Respondent provides significant care to his disabled daughter and his disabled mother, Respondent's familial responsibilities are neither defenses to his violations of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations, nor mitigating circumstances to be considered when determining the amount of the civil penalty to be assessed against Respondent.

Sixth, Respondent contends he cannot pay a civil penalty (Respondent's Appeal Pet. at 2).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases; however, the burden is on the respondents in animal quarantine cases and plant quarantine cases to prove, by producing documentation, the lack of ability to pay the civil penalty.<sup>16</sup> Respondent has failed to

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<sup>15</sup>(...continued)  
amended).

<sup>16</sup>*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 634-35 (2001); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 208-09 (2001); *In re Cynthia Twum Bofo*, 60 Agric. (continued...)

produce any documentation supporting his assertion that he cannot pay a civil penalty, and Respondent's undocumented assertion that he lacks the ability to pay the civil penalty falls far short of the proof necessary to establish an inability to pay the civil penalty.<sup>17</sup>

### **Complainant's Cross-Appeal**

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<sup>16</sup>(...continued)

Dec. 191, 197-98 (2001); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

<sup>17</sup>*In re Herminia Ruiz Cisneros*, 60 Agric. Dec. 610, 635 (2001) (holding the undocumented assertion by the respondent that she was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Rafael Dominguez*, 60 Agric. Dec. 199, 209 (2001) (holding the undocumented assertion by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Cynthia Twum Boafo*, 60 Agric. Dec. 191, 198 (2001) (holding undocumented assertions by the respondent that she was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding undocumented assertions by the respondent that he was unable to pay the civil penalty fall far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).

Complainant raises one issue in Complainant's Cross-Appeal. Complainant contends the ALJ's assessment of a \$3,175 civil penalty against Respondent is error and Respondent should be assessed an \$18,500 civil penalty.

Respondent is deemed by his failure to file an answer to have admitted that, during the period November 20, 1997, through November 12, 1998, he moved at least 43 cattle and at least 53 swine interstate, in violation of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations.

A sanction by an administrative agency must be warranted in law and justified in fact.<sup>18</sup> The Secretary of Agriculture has authority to assess a civil penalty not exceeding

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<sup>18</sup>*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (per curiam); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (per curiam); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 206 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for  
(continued...)

\$1,100 for each violation of the Regulations.<sup>19</sup> I find Respondent committed at least 126 violations of the Regulations<sup>20</sup> and Respondent could be assessed a \$138,600 civil penalty. Therefore, assessment of an \$18,500 civil penalty against Respondent for violations of the Regulations is warranted in law.

Moreover, the assessment of an \$18,500 civil penalty is justified by the facts. The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50

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<sup>18</sup>(...continued)

Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

<sup>19</sup>21 U.S.C. § 122 (repealed 2002); 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(xi).

<sup>20</sup>I find each animal that Respondent moved interstate without the required identification constitutes a separate violation of the Regulations. Respondent moved interstate at least 95 animals without required identification. I find each required document Respondent failed to have accompany the interstate movement of cattle and swine constitutes a separate violation of the Regulations. Respondent failed to have 21 required documents accompany the interstate movement of cattle and swine. In addition: Respondent committed seven violations of 9 C.F.R. §§ 78.30(b) and 78.33 (1999) by moving swine interstate for slaughter or for sale for slaughter without the required identification; Respondent committed two violations of 9 C.F.R. § 71.19(e)(1) and (2) (1999) by failing to keep and maintain records related to the interstate movement of swine; and Respondent committed one violation of 9 C.F.R. § 78.31(e) (1999) by failing to segregate a brucellosis reactor swine moved interstate with animals that are not brucellosis reactor animals.

Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry.

The Act of February 2, 1903, the Act of May 29, 1884, and the Regulations are designed to prevent the interstate spread of animal diseases. The success of the program designed to protect United States agriculture by preventing the interstate spread of animal diseases is dependent upon compliance with the Regulations by persons such as Respondent. Respondent's violations of the Regulations directly thwart the remedial purposes of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations and could have caused losses of billions of dollars and eradication expenses of tens of millions of dollars.

Complainant could have sought the maximum civil penalty of \$1,100 for each of Respondent's violations. Instead, Complainant seeks a civil penalty of approximately \$146.82 for each of Respondent's violations of the Regulations. However, Complainant

states that an \$18,500 civil penalty will serve the remedial purposes of the Act of February 2, 1903, the Act of May 29, 1884, and the Regulations and deter Respondent and other similarly situated persons from future violations of the successor statute to the Act of February 2, 1903, and the Act of May 29, 1884,<sup>21</sup> and the Regulations.<sup>22</sup> Civil penalties assessed by the Secretary of Agriculture are not designed to punish persons who are found to have violated the Regulations. Instead, civil penalties are designed to deter future violations by persons found to have violated the Regulations and other potential violators.

For the foregoing reasons, the following Order should be issued.

### **ORDER**

Respondent is assessed an \$18,500 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

United States Department of Agriculture  
APHIS Field Servicing Office  
Accounting Section  
P.O. Box 3334  
Minneapolis, Minnesota 55403

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<sup>21</sup>Animal Health Protection Act (7 U.S.C.A. §§ 8301-8320 (West Supp. 2004)).

<sup>22</sup>Despite the repeal of section 2 of the Act of February 2, 1903, and sections 4 and 5 of the Act of May 29, 1884, the Regulations remain in effect (7 U.S.C.A. § 8317 (West Supp. 2004)).

Payment of the civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to A.Q. Docket No. 02-0005.

Done at Washington, DC

August 9, 2004

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William G. Jenson  
Judicial Officer