

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

2016 OCT 20 PM 1:48

RECEIVED

P.Q. Docket Nos. 15-0104; 15-0105

In re:

Redland Nursery, Inc.

and

John C. DeMott

Respondents

DECISION AND ORDER

This proceeding was instituted by a complaint filed on April 28, 2015 by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("Complainant"), alleging that Respondents, Redland Nursery, Inc. and John C. DeMott ("Respondents") violated the Act and regulations. Complainant seeks civil penalties against Respondents for violations of the Plant Protection Act, as amended and supplemented (7 U.S.C. §§ 7701 *et seq.*) (Act) and regulations promulgated thereunder, in accordance with the applicable rules of practice (7 C.F.R. §§ 380.1 *et seq.* and 7 C.F.R. §§ 1.130 *et seq.*).

I. PROCEDURAL HISTORY

The Complaint instituting this proceeding alleges that Respondents engaged in the business of growing, handling, or moving regulated articles interstate without a compliance

agreement with the USDA APHIS for the interstate movement of regulated articles pursuant to 7 C.F.R. §§ 301.81 *et seq.*, in violation of 7 C.F.R. §§ 301.81 *et seq.*, and in violation of Consent Decision and Order P.Q. Docket No. 10-0331, effective October 11, 2011. CX-6.

In a previous USDA APHIS enforcement action, filed on June 14, 2010 APHIS charged Respondents with seventy one (71) counts of moving regulated articles interstate in violation of a domestic quarantine to prevent the dissemination of a plant pest, imported fire ants. (7 C.F.R. § 301.81). The case was resolved by the Consent Decision in which the Respondents consented, signed, and stipulated to and (*In re Redland Nursery, Inc., and John C. DeMott*, P.Q. Docket No. 10-0331) that became effective October 11, 2011. CX-6.

The Order jointly and severally assessed the Respondents a civil penalty of \$50,000, payment of which was held in abeyance provided Respondents did not violate 7 C.F.R. § 301.81, related to the interstate movement of regulated articles, for a three year period, beginning from the effective date of the Order. CX-6. The Order further cancelled Respondents' compliance agreement entered into with APHIS on April 17, 2006 to move imported articles regulated pursuant to 7 C.F.R. § 301.81 *et seq.* CX-6. Pursuant to the Order, the rubber stamp associated with Respondents' compliance agreement was actually confiscated by Lucita Aguilera of the Florida Department of Agriculture and Consumer Services, Division of Plant Industries on October 17, 2011. CX-7. A Redland Nursery representative signed the Special Inspection Certificate Receipt providing the stamp to Ms. Aguilera. CX-7. The Respondents were prohibited from entering into a new compliance agreement with APHIS for one year, beginning from the effective date of the Order. CX-6. The Consent Order became effective October 11, 2011. CX-6.

On April 28, 2015, in the instant action, the Hearing Clerk mailed a letter of service, the Complaint, and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) (“Rules of Practice”) to Respondents by certified mail, return receipt requested. The letter of service, Complaint, and copy of the Rules of Practice were delivered to Respondents on May 4, 2015. By operation of the Rules of Practice, the Complaint was served as of that date. Respondents filed an Answer on May 26, 2015 admitting most of the jurisdictional facts, admitting the procedural history, and denying the factual allegations.

The Complaint alleges that while subject to Consent Order P.Q. Docket No. 10-0331, Respondents operated without a compliance agreement, in violation of the Act and Regulations, and in violation of the Consent Order. Furthermore, one of the four shipments made in violation of the Act and Regulations was actually infested with imported fire ants. At all times material herein, Respondent DeMott was the Registered Agent, President, and a Director of Redland Nursery, Inc. CX-1. He was also the Registered Agent, a Director, Secretary, and Treasurer of To Be Farms. CX-2. The Complaint alleges that while under Consent Order P.Q. Docket No. 10-0331, Respondent continued shipping regulated articles from Redland Nursery but used the To Be Farms, Inc. compliance agreement and associated stamp to move the regulated articles outside of the quarantined area.

The Complaint was served on Respondents on May 4, 2015. In accordance with section 1.136 (7 C.F.R. § 1.136) of the Rules of Practice, Respondents’ Answer was due within twenty (20) days from the date of service. Respondents answered the complaint on May 26, 2015. Respondents admitted all of the jurisdictional facts set forth in Section I, paragraph (d) sections 4 – 6 of the Complaint that Respondent DeMott was:

4. Knowledgeable that the subject plants or plant products were subject to a federal quarantine as regulated articles.
5. Operating without a compliance agreement with the USDA APHIS for the interstate movement of articles regulated pursuant to 7 C.F.R. § 301.81 *et seq.*
6. Selling regulated articles in non-quarantine states.

The Answer did not deny the same for Respondent Redland Nursery. Respondents additionally admitted to the summary of Consent P.Q. Docket No. 10-0331 in Section II and the allegation in Section III, paragraph 2 that Respondents shipped regulated articles to non-quarantined areas using the To Be Farms compliance agreement and associated stamp, in accordance with 7 C.F.R. § 301.81-6. The Respondents otherwise denied all of the violations of the Act and Regulations set forth in Section III of the Complaint. The Answer did not raise any affirmative defenses but claimed that more information was needed to respond to the allegations.

On May 27, 2015, Judge Bullard ordered the parties to file a list of exhibits and witnesses and exchange copies of the exhibits and list of witnesses with Respondents. Complainant filed a list of exhibits and witnesses by the September 25, 2015 deadline set in the May 27 Order. Complainant sent copies of the exhibits and list of witnesses via UPS the same day. Respondents filed their list of exhibits and witnesses on December 10, 2015, after the November 27, 2015 deadline set in the May 27 Order.

A. Notice of Hearing

A pre-hearing conference call was held on February 26, 2016 with Administrative Law Judge Bullard, attorney for Complainant Elizabeth Kruman, and Respondent Mr. John DeMott. All parties agreed that the hearing would be conducted on Tuesday, July 12, 2016 in Dade County, Florida. The location of the hearing was selected to be close to the Respondents' place

of domicile. Following the conference call, on March 2, 2016, Judge Bullard issued an “Order Setting Hearing” documenting the conference call held on February 26, confirming the July 12, 2016 date for hearing, and setting the hearing for 9:00 a.m. in Dade County, Florida. In that Order, the Judge stated that “I shall notify the parties of the manner and site of the hearing under separate Order issued close in time to the date of the scheduled hearing.” (March 2, 2016 Order Setting Hearing).

On Thursday, June 9, 2016, I personally held a second pre-hearing conference call with Elizabeth Kruman and John DeMott after I was assigned the case following Judge Bullard’s retirement. On that conference call, I reconfirmed that the hearing would be held in Dade County, Florida on Tuesday July 12, 2016. On Thursday July 7, 2016, a Notice of Hearing was filed again reconfirming the date of the hearing as starting on July 12, 2016 at 9:00 a.m. and further providing that the hearing would be held at the Claude Pepper Federal Building, 51 S.W. 1st Avenue, Miami, FL 33130, the same location that had previously been communicated to the Respondents via email. (Notice of Hearing, July 7, 2016). The Certificate of Service indicated that the Respondents were served by regular mail and email. (Notice of Hearing, July 7, 2016; *See also* July 14 Order Denying Respondents’ Request for Rescheduled Hearing and August 2 Order Denying Respondents’ Petition for Rehearing).

B. Failure to Appear for Duly Noticed Hearing

As duly noticed, the oral hearing was held as scheduled on Tuesday July 12, 2016 in Miami, Florida at the U.S. Tax Court, Claude Pepper Federal Building, 51 S.W. 1st Avenue. Respondents failed to appear at the hearing. Tr. at 4-5. I deemed the Respondents’ failure to appear without good cause after having been duly noticed a waiver of objection. (Tr. at 4, line 17; 7 C.F.R. § 1.141(e)). On July 14, 2016, Respondents filed email correspondence with this

office regarding their failure to appear for the scheduled hearing, which I construed as a request for a rescheduled hearing. (Email Correspondence to Chief Judge, July 14, 2016). On July 14, 2016, I issued an Order Denying Respondents' Request for Rescheduled Hearing finding that Respondents had been duly notified of the hearing, failed to appear without good cause, and were deemed to have waived the right to an oral hearing. (July 14 Order Denying Respondents' Request for Rescheduled Hearing). Further, all facts presented at hearing were deemed admitted and all material allegations contained in the Complaint were deemed admitted in accordance with the Rules of Practice. (7 C.F.R. § 1.141(e); *see also* Tr. at 10, line 21-22; Tr. at 11, line 1; Order Denying Respondents' Request for Rescheduled Hearing) .

Respondents subsequently filed a Petition for Rehearing. Complainant responded with an Opposition to Respondents' Petition for Rehearing on July 20, 2106. After full consideration of the Respondents' Petition for Rehearing and Complainant's Response in Opposition, I determined that the Petition for Rehearing was not supported by good cause and I issued an Order Denying Respondents' Petition for Rehearing on August 2, 2016. Further, I found that "[g]iven the above recited procedural history of this case, and the fact that the record is replete with numerous pleadings and emails providing detailed contact information for OALJ/HCO as well as for Counsel for the Complainant, Respondents' contentions that they were unaware of how to contact anyone at USDA for assistance is simply not credible." (August 2 Order Denying Respondents' Petition for Rehearing). Respondents were duly notified of the time, place, and manner of the hearing in accordance with the Rules of Practice, 7 C.F.R. § 1.141(b).

II. SUMMARY OF APPLICABLE LAW

- A. Respondents' were afforded ample notice of the scheduled hearing and their failure to appear entitles Complainant to a default decision, or in the alternative a favorable decision on the record

“[U]nder the Administrative Procedure Act, parties subject to adjudications before an agency are entitled to a hearing and decision on notice.... To pass constitutional muster, notice must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *United States v. Korn*, No. 1:09-CV-537-CWD, 2010 WL 5110048, at *5 (D. Idaho Dec. 6, 2010) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865 (1950)). The procedural history of this case amply demonstrates that Respondents were apprised of the scheduled hearing on several different occasions and in a number of different ways as detailed in the Order Denying Respondents’ Request for Rescheduled Hearing, July 14, 2016 and Order Denying Respondents’ Petition for Rehearing, August, 2, 2016. Respondents’ failed to appear for the hearing without good cause after being duly notified of the time, place, and manner of the hearing and as such are deemed to have admitted all facts presented at the hearing. (7 C.F.R. § 1.141(e)(1); Tr. at 4). Further, “[s]uch failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint.” (7 C.F.R. § 1.141(e)(1)).

Despite their failure to appear for the hearing, Respondents have not waived “their right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in §1.145.” (7 C.F.R. § 1.141(e)(1)).

B. Imported fire ants are subject to a Federal quarantine

USDA APHIS has established a quarantine program to prevent the spread of imported fire ants (or “fire ants”) throughout the United States given the significant harm they can cause to agricultural operations and human health. 7 C.F.R. § 301.81 *et seq.* Fire ants are easily spread

through the transport of articles that can harbor the noxious pest, also referred to as regulated articles. Fire ants can cause harm to cropping systems, interfere with the harvesting of crops, international agriculture, and in urban settings can be particularly harmful. Tr. at 19-20. Children and the elderly are particularly susceptible to the harm caused by fire ants. Tr. at 20. Mr. Ronald Weeks, National Operations Manager at USDA APHIS for the Imported Fire Ant Program described fire ants in the following way: “[t]hey have an aggressive and nasty sting, and have medical implications...they attack in masse” Tr. at 20-21. Given the harm that fire ants present, USDA APHIS’ quarantine program aims to prevent the spread of this noxious pest beyond the areas where it is already present. Once an infestation is established in a new location, controlling and eradicating the fire ants is difficult and requires complete eradication of the entire colony to be successful. Tr. at 21. Further, Mr. Weeks testified to the following regarding the difficulty of controlling the spread of fire ants as they establish in new locations:

JUDGE McCARTNEY: So, in your experience then, has this particular pest been relatively intractable in terms of trying to contain it once infestation has occurred?

THE WITNESS: Yes, Your Honor. This pest is one of USDA's largest -- one of our most long-lived programs and one of our largest, unfortunately, failed eradication programs. That is the reason the federal quarantine now only looks at the human assisted movement because they are so entrenched and so biologically adept to be evasive.

JUDGE McCARTNEY: Is that why it is all the more important to adhere to the quarantine rules and regulations?

THE WITNESS: Yes, Your Honor. We have prediction models that we don't believe the fire ant has reached its entire potential range, and we are trying to buy as much time as possible before they creep their way into there if they can, and human assisted movement is, by far, the biggest movement from our experience and research. The biggest vehicle for their expansion, in other words.

Tr. at 22-23. Control of the human-assisted movement of fire ants is essential to ensuring that fire ants do not spread beyond their current range. Tr. at 23. This “aggressive and noxious plant

pest” is unable to spread naturally to new areas of the country without human assistance. Tr. at 23, lines 10-12; at 24, lines 1-2.

- C. It is a violation of the Plant Protection Act and regulations to move regulated articles outside of the imported fire ant quarantine through and into an area outside of the quarantine without a limited permit or compliance agreement.

The Plant Protection Act, as amended and supplemented, gives USDA APHIS the authority to regulate the movement of certain articles and establish domestic quarantines to prevent the dissemination of plant pests within the United States. 7 U.S.C. § 7712, 7 C.F.R. § 301.81. The Secretary is authorized to issue regulations requiring that an article moved in interstate commerce be “accompanied by a certificate of inspection issued (in a manner and form required by the Secretary) by appropriate officials of the ... State from which the plant, plant product, biological control organism, noxious weed, article, or means of conveyance is to be moved.” 7 U.S.C. § 7712(c). Pursuant to this authority, section 301.81-3 *et seq.* of the regulations establishes quarantines in States or portions of States that are infested with imported fire ants. Respondents’ place of business is located in Homestead, Florida. The entire State of Florida is quarantined. 7 C.F.R. § 301.81-3; Tr. at p. 27 lines 20-21. The southeastern United States, where imported fire ants are particularly prevalent, has been quarantined since approximately the 1970s. Tr. at 28, lines 2-4. APHIS established a quarantine for imported fire ants to help ensure that the noxious plant pest did not spread beyond the range in which it was already established, but simultaneously allow for continued trade and support the growth of related industries. Tr. at 25.

Information about the quarantine and how to comply with the restrictions of the quarantine is readily available to the public. Tr. at 28-33; CX-45. At the time the shipments of nursery stock that are the subject of the complaint in this matter were made, the program aide,

“Imported Fire Ant 2007: Quarantine Treatments for Nursery Stock and Other Regulated Articles” was available to the Respondents, specifically, and the general public. Tr. at 29; CX-45. This program aide was collaboratively developed by APHIS with input from industry and state partners who assist in determining the most effective and most feasible treatment methods. Tr. at 29, lines 6-14. This program aide and subsequent updates are available to assist “producers of sod, nursery stock, industry dealers, and growers.” Tr. at 30, lines 9-10. It is standard practice for the State of Florida Division of Plant Industry to provide the link to the electronic version of the the program aide when they receive their compliance agreement.

The quarantine for imported fire ants prohibits the movement of regulated articles unless movement is made in compliance with the regulations. 7 C.F.R. 301.81. Regulated articles can only be moved from an area that is quarantined into or through an area that is not quarantined with a “certificate or limited permit issued and attached in accordance with §§ 301.81–5 and 301.81–9 of [7 C.F.R. § 301.81].” 7 C.F.R. § 301.81-4(a); Tr. at 25. When moving regulated articles interstate, the certificate or limited permit issued to authorize such movement must be attached to the container the regulated article is in, attached to the article if it is not in a container, or attached to the waybill, “[p]rovided, that the descriptions of the regulated article on the certificate or limited permit, and on the waybill, are sufficient to identify the regulated article.” 7 C.F.R. § 301.81-9. The carrier moving the regulated article must “furnish the certificate or limited permit authorizing interstate movement of a regulated article to the consignee at the shipment's destination.” 7 C.F.R. § 301.81-9.

Without a compliance agreement or limited permit, the regulated article can be moved from a quarantined area to a non-quarantined area only if the regulated article came into the

quarantined area from an area that was not quarantined, the point of origin is on the waybill that is attached to the regulated article, and

“[t]he regulated article is moved through the quarantined area (without stopping except for refueling, or for traffic conditions, such as traffic lights or stop signs), or has been stored, packed, or parked in locations inaccessible to the imported fire ant, or in locations that have been treated in accordance with part 305 of this chapter, while in or moving through any quarantined area; and (iv) The article has not been combined or commingled with other articles so as to lose its individual identity...”

7 C.F.R. § 301.81-4(a)(2).

A limited permit requires inspection and possibly treatment of the regulated articles in order to move the articles outside of the quarantine. Tr. at 33, lines 11-17. Limited permits are issued on a per shipment basis and require that a State inspector personally inspect and certify each shipment of regulated articles to be sent outside of the quarantine. Tr. at 43, lines 5-15; CX-46, p. 83. The issuance of a limited permit requires an individual inspector to verify that the shipment is free of imported fire ants, provide the shipper instructions on how to handle the shipment, and provide certification that the shipment can move outside of the quarantine. Tr. at 43, lines 5-15.

Certification to move regulated articles outside of the quarantine area can also be provided through a compliance agreement. “A compliance agreement is an agreement to allow [movement of] regulated articles following certain stipulations or protocols or measures that are agreed upon based on the federal regulations...to move regulated materials outside of the quarantined area.” Tr. at 33, lines 11-17. Compliance agreements are issued by the State to entities moving regulated articles outside of the quarantine. Compliance agreements are specific to the regulated article being moved. Tr. at 35-36; CX-48, pp. 59-81. The compliance agreement provides the appropriate treatment method for the specific regulated article. Tr. at 35. The treatment methods vary based on the regulated article and thus a single entity may have multiple

compliance agreements for the different kinds of regulated articles they are moving. Tr. at 36-37. Compliance agreements are issued to an entity after the State has conducted an inspection, reviewed treatment protocols, and observed the entity's handling of the regulated articles. Tr. at 37, lines 12-16. To obtain a compliance agreement, a person must "review with an inspector each stipulation of the compliance agreement, have facilities and equipment to carry out disinfestation procedures or application of chemical materials in accordance with part 305 of this chapter, and meet applicable State training and certification standards as authorized by the Federal Insecticide, Fungicide, and Rodenticide Act." 7 C.F.R. § 301.81-6. Further, entering into a compliance agreement requires compliance with 7 C.F.R. § 301.81 *et seq.* 7 C.F.R. § 301.81-6.

Compliance agreements are not transferable between entities. Tr. at 37. A producer moving regulated articles outside of the quarantine must "have a compliance agreement to move anything out or a limited permit to move anything out of the quarantine." Tr. at 44, lines 2-4. Regardless of whether another nursery has treated and certified the regulated articles, the producer actually moving the regulated articles must "have a compliance agreement to move anything out or a limited permit to move anything out of the quarantine" to show "the ability to handle, process, and follow certain protocols while you're facilitating that movement." Tr. at 44, lines 2-9.

Compliance agreements are renewed annually. Tr. at 37, line 19. The unique identifier associated with a specific compliance agreement remains the same upon subsequent renewal. Tr. at 40, lines 9-15. Further, Mr. Weeks testified as follows:

JUDGE McCARTNEY: The renewal process you said after inspection, so this is to ensure full compliance with the provisions of the agreement?

THE WITNESS: Yes, Your Honor, and the business practice hasn't changed or if there's been a change in the treatments that they're communicated.

Tr. at 37-28.

Having a compliance agreement allows the person holding the compliance agreement to certify shipments of regulated articles outside of the quarantine, rather than having a State inspector inspect each individual shipment. When a compliance agreement is issued, the person or entity entering into the compliance agreement is also issued a rubber stamp that is used to indicate certification of the shipment per the terms of the compliance agreement. Tr. at 38. Each stamp contains a “unique identifier” that is specific to the State issuing the compliance agreement and specific to the entity. Tr. at 39. Once a producer has entered into a compliance agreement, they retain possession and control of the stamp. Tr. at 40, lines 3-8. A single unique identifier is provided by the State to a producer, regardless of how many different compliance agreements they have. Tr. at 41-42. A person operating under a compliance agreement must make the following determinations about a regulated article being moved outside of the quarantine prior to moving it:

- (1) Is eligible for unrestricted movement under all other applicable Federal domestic plant quarantines and regulations;
- (2) Is to be moved interstate in compliance with any additional conditions deemed necessary under section 414 of the Plant Protection Act (7 U.S.C. 7714) to prevent the spread of the imported fire ant; and
- (3)(i) Is free of an imported fire ant infestation, based on his or her visual examination of the article; (ii) Has been grown, produced, manufactured, stored, or handled in a manner that would prevent infestation or destroy all life stages of the imported fire ant; (iii) Has been treated in accordance with part 305 of this chapter; or (iv) If the article is containerized nursery stock, it has been produced in accordance with § 301.81-11.

7 C.F.R. § 301.81-5(a). If a person operating under a compliance agreement determines that the above listed requirements have been met, the stamp with the entity-specific unique identifier is applied to the bill of lading. The stamp indicates that “those regulated articles on the bill of lading...originated where that stamp unique identifier is...and that they meet all the applicable regulations and certification for their transport” Tr. at 40, lines 20-22, at 41, lines 2-3. The

unique identifier serves the important purpose of indicating the origin of the regulated articles in the event that there is an infestation found so that the source of the infestation can be identified. Tr. at 41, lines 4-16.

It is beneficial to both the government and producers to enter into compliance agreements rather than having an inspection conducted for each individual shipment of regulated articles outside of the quarantine. Tr. at 42. Once entered into, compliance agreements can be cancelled. 7 C.F.R. § 301.81-7.

III. FINDINGS OF FACT

Respondents are deemed to have waived the right to an oral hearing and are deemed to have admitted all facts presented at hearing. (7 C.F.R. § 1.141(e)(1)). Complainant elected to present evidence in the form of affidavits and oral witness testimony at the hearing at the scheduled time and place. (7 C.F.R. § 1.141(e)). Accordingly, the following findings of fact are hereby **ADOPTED**:

1. Redland Nursery, Inc. (Corporate Respondent) is a corporation, incorporated under the laws of the State of Florida, with its principal place of business and business mailing address at 18455 S.W. 264th Street, Homestead, Florida 33031. Redland Nursery was incorporated on April 6, 1978. CX-1; CX-48

2. To Be Farms, Inc. is a corporation, incorporated under the laws of the State of Florida, with its principal business address at 15200 S.W. 264th Street, Homestead, Florida, 33031. To Be Farms was incorporated on June 21, 1985. CX-2; CX-49.

3. Respondent John C. Demott (Respondent Demott) is an individual with a business mailing address of 18455 S.W. 264th Street, Homestead, Florida 33031. He is a Registered

Agent, President and Director of Redland Nursery, Inc. and Registered Agent, a Director, Secretary, and Treasurer of To Be Farms. CX-48; CX-49.

4. Redland Nursery is a plant nursery engaged in the business of buying and selling plant products.

5. In April and May 2012, Redland Nursery and John DeMott were operating pursuant to Consent Decision and Order, P.Q. Docket No. 10-0331, effective on October 11, 2011. CX-6; Tr. at 69-71.

6. Respondent DeMott has been engaged in the ornamental plant industry for many years and is an experienced businessman, knowledgeable about plants, plant products, and the Imported Fire Ant quarantine in place regulating the movement of certain regulated articles. CX-6.

7. Redland Nursery had a valid compliance agreement until October, 2011 with the unique identifier FL-0034 assigned to the nursery. CX-4; CX-6; Tr. at 70.

8. On October 17, 2011 the rubber stamp associated with Redland Nursery was collected by Lucita Aguilera of the Florida Department of Agriculture and Consumer Services, Division of Plant Industry. CX-5; Tr. at 70.

9. Redland Nursery and John C. DeMott did not have a compliance agreement with the United States Department of Agriculture (USDA), Animal Plant Health Inspection Service (APHIS), for the interstate movement of articles regulated pursuant to 7 C.F.R. § 301.81 *et seq.* from October, 2011 through at least October, 2012. CX-6; CX-7; Tr. at 71.

10. To Be Farms, Inc. had a valid compliance agreement as of March 28, 2012 with the unique identifier FL-1531 assigned to the nursery. CX-5.

11. Respondents made at least four (4) shipments of regulated articles in April and May, 2012 from Redland Nursery in Homestead, Florida to buyers in Maryland and Delaware, outside of the imported fire ant quarantine. CX-9 – CX-44.

12. On April 17, 2012, Respondents shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Fager's Island in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-9 – CX-15.

13. The April 17 shipment was billed to Fager's Island on a Redland Nursery invoice. CX-9; Tr. at 72, lines 10-13.

14. The bill of lading for the April 17 shipment indicates Redland Nursery as the location the plants were shipped from. CX-10; Tr. at 73.

15. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the April 17 shipment. CX-10; Tr. at 74-5.

16. Fager's Island paid Redland Nursery for the regulated articles in the April 17 shipment. CX- 11; CX-13; Tr. at 75-6.

17. On May 2, 2012, Redland Nursery shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Dead Freddie's Island Grill in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-16; CX-17.

18. The May 2 shipment was billed to Dead Freddie's Island Grill on a Redland Nursery invoice. CX-17; Tr. at 79-80.

19. The bill of lading for the May 2 shipment indicates Redland Nursery as the location the plants were shipped from. CX-17; Tr. at 80; 82.

20. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the May 2 shipment. CX-17; Tr. at 81.

21. Redland Nursery arranged for the transport of the regulated articles delivered to Dead Freddie's Island Grill on May 2. CX-18; Tr. at 81.

22. Dead Freddie's Island Grill paid the transporter, Mercer Transportation, for the delivery of regulated articles on May 2. CX- 20; Tr. at 82-3.

23. On May 11, 2012, Redland Nursery shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to the Sea Shell Shop in Rehoboth, Delaware, outside of the imported fire ant quarantine. CX-23 – CX-25.

24. The load sheet for the May 11 shipment is from Redland Nursery and indicates that the regulated articles shipped to the Sea Shell Shop were picked up at two locations, Redland Nursery and 3 D's. CX-23; Tr. at 86-7.

25. The bill of lading for the May 11 shipment indicates Redland Nursery as the location the plants were shipped from. CX-25; Tr. at 89.

26. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the May 2 shipment. CX-25; Tr. at 88.

27. The Sea Shell Shop paid Redland Nursery for the shipment of regulated articles delivered on May 11. CX-26; Tr. at 89-90.

28. To fill the May 11 order, Redland Nursery purchased some plants from 3 D's in Miami, Florida, within the imported fire ant quarantine. CX-28; Tr. at 99.

29. To fulfill the order from Redland Nursery, 3 D purchased plants from L&S Krome in Miami, Florida, within the imported fire ant quarantine. CX-27; CX-41; Tr. at 98-9.

30. 3 D's treated the plants sold to Redland Nursery but did not have the appropriate compliance agreement to do so. CX-39; CX-40; Tr. at 49-50; 99-100.

31. Imported fire ants were actually found when the May 11 shipment from Redland Nursery to the Sea Shell Shop was unloaded. CX-30 – CX-34; Tr. at 104-05; 107-08.

32. The root ball of the infested plant was sprayed with insecticide at the time of unloading. CX-32; Tr. at 105. Additional insecticide treatment was later applied as well. CX-33; CX-34; Tr. at 107-08.

33. On May 23, Respondents shipped regulated articles from Redland Nursery in Homestead, Florida, within the imported fire ant quarantine, to Fager's Island in Ocean City, Maryland, outside of the imported fire ant quarantine. CX-42 – CX-44.

34. The May 23 shipment was billed to Fager's Island on a Redland Nursery invoice. CX-42; Tr. at 109.

35. The bill of lading for the May 23 shipment indicates Redland Nursery as the location the plants were shipped from. CX-43; Tr. at 110-11.

36. The To Be Farms, Inc. imported fire ant stamp appears on the back of the bill of lading for the April 17 shipment. CX-43; Tr. at 110-11.

37. Fager's Island paid Redland Nursery for the regulated articles in the April 17 shipment. CX-44; Tr. at 111-12.

38. Respondent DeMott failed to appear for the hearing held on July 12, 2016 in Miami, Florida. Tr. at 4.

IV. CONCLUSIONS OF LAW

The record evidence and the testimony presented at hearing, summarized herein above, fully supports a finding that the Respondents' actions in regards to the shipments identified in the Complaint were in flagrant violation of the Act, regulations, and signed Consent Decision and

Order. Their reckless disregard for a Federal quarantine in place to prevent the human-assisted spread of a noxious plant pest resulted in exactly the kind of harm that the quarantine is intended to prevent – the spread of the pest. During USDA APHIS's investigation into Respondents' activities, investigators met with purchasers of plants from Redland Nursery, drivers who moved the plants from Florida to Delaware and Maryland, and obtained records from Redland Nursery directly. These records, CX-1 through 49 – excluding CX-15, CX-19, CX-24, and CX-38 which were not moved into evidence at the hearing – were admitted into evidence without objection. Tr. at 10-11. The record evidence and the testimony presented at hearing demonstrate that, notwithstanding Respondents' denials in their Answer, there are no factual contentions and therefore no dispute of material facts and Complainant is entitled to a favorable decision. In addition, because the Respondents failed to appear, Complainant is entitled to a default decision.

A. Respondents violated Consent Decision and Order, P.Q. Docket No. 10-0331 by making shipments of regulated articles to buyers outside of the Imported Fire Ant quarantine when operating without a compliance agreement.

Respondents entered into Consent Decision and Order, P.Q. Docket No. 10-0331, effective October 11, 2011. CX-6; Tr. at 69-71. From April through June 2006, when the events giving rise to the Complaint that resulted in the 2011 Consent Decision took place, Redland Nursery had a valid compliance agreement. CX-5. The Consent Decision is signed by John C. DeMott in his individual capacity, and on behalf of Redland Nursery, Inc. CX-6. In the Consent, Respondents admitted to the jurisdictional facts and agreed to a civil penalty of \$50,000, held entirely in abeyance, "provided respondents do not violate 7 C.F.R. § 301.81, related to the interstate movement of imported fire ant regulated articles, for a three-year period beginning from the effective date of this Consent Decision and Order." CX-6; Tr. at 70. The Consent also cancelled the Respondents' compliance agreement with APHIS to move regulated articles

pursuant to 7 C.F.R. § 301.81-6 for one year from the effective date of the Consent. CX-6. Inspector Lucita Aguilera picked up Redland Nursery's imported fire ant stamp on October 17, 2011 and a representative from Redland Nursery signed the form indicating that the stamp associated with the compliance agreement had been collected by the State of Florida. CX-7; Tr. at 70. Respondents were required to wait one year, until October, 2012, to apply for a new compliance agreement with the State of Florida. CX-6. Respondents did not have a valid compliance agreement allowing them to move regulated articles outside of the quarantine area from October 2011 through October 2012. Redland Nursery did not enter into a new compliance agreement until April 2013. Tr. at 71, lines 19-22. The uncontroverted facts set forth in Section II demonstrate a violation of the Consent Decision.

B. Respondents violated the Plant Protection Act and regulations by moving regulated articles outside of the imported fire ant quarantine, through and into areas outside of the quarantine, without a limited permit or compliance agreement and fraudulently used the compliance agreement of another entity to move the regulated articles.

A person operating under a compliance agreement can issue the certificate that will allow for the interstate movement of a regulated article. 7 C.F.R. § 301.81-5. Persons who grow, handle, or move regulated articles interstate may enter into a compliance agreement, so long as they have "facilities and equipment to carryout disinfestation procedures or application of chemical materials in accordance with 7 C.F.R. Part 305 and meet the applicable State training and certification standards..." 7 C.F.R. § 301.81-6. Once a person is operating under a compliance agreement, they must agree to comply with the provisions of 7 C.F.R. § 301.81 *et seq.* and any additional conditions imposed. 7 C.F.R. § 301.81-6.

Compliance agreements are entity specific and are non-transferable. CX-4; Tr. at 37. A compliance agreement allows a person or business to certify that they have properly treated the regulated article to prevent the spread of fire ants. By entering into a compliance agreement with

APHIS, an entity agrees to “handle, process, move regulated articles in accordance with the provision of applicable plant quarantines.” CX-4; CX-5. Once a person or entity has entered into a compliance agreement with APHIS, they are given a stamp with a “unique identifier” that is specific to that entity. CX-3. The stamp serves as a certificate to be used when moving regulated articles outside of the quarantined area. 7 C.F.R. § 301.81-6. A person operating under a compliance agreement also must certify that the regulated article is free of imported fire ant infestation, “has been grown, produced, manufactured, stored, or handled in a manner that would prevent infestation or destroy all life stages of the imported fire ant,” and has been treated in accordance with 7 C.F.R. Part 305 before moving a regulated article interstate. 7 C.F.R. § 301.81-5(a).

The certificate that authorizes interstate movement of regulated articles must be attached to the container the regulated article is in, attached to the article itself, or attached to the waybill. 7 C.F.R. § 301.81-9. If the certificate is attached to the waybill, the waybill must provide a description of the regulated article that sufficiently identifies the regulated article. 7 C.F.R. § 301.81-9.

All shipments of regulated articles outside of the quarantine area made by Redland Nursery in April and May of 2012 include an imported fire ant compliance agreement stamp on the back of the bill of lading that accompanied the shipment; however, it was the stamp of another nursery. In an attempt to continue to ship regulated articles from the quarantined area into a non-quarantined area, the Respondents used the stamp of another nursery, To Be Farms, Inc. while their compliance agreement was cancelled. The two corporations are wholly separate and distinct entities. CX-48; CX-49. Redland Nursery is located in Homestead, Florida and is a producer and distributor of tropical foliage and other plants. Redland Nursery was first organized

as a for-profit corporation in the State of Florida in 1978 and remains in active status. CX-1; CX-48; Tr. at 63. To Be Farms was organized as a corporation in the State of Florida in 1985, with a different principal address, and also remains an active corporation. CX-49; Tr. at 63-4. At all times material to this matter, Respondent DeMott was the President and Director of Redland Nursery. CX-1; Tr. at 61-2. The two nurseries, Redland Nursery and To Be Farms, separately enter into compliance agreements with the State. CX-3; CX-4; CX-5. Upon entering into their compliance agreements, each entity received a corresponding stamp with its entity-specific unique identifier – Redland Nursery has the unique identifier FL-0034 and To Be Farms has the unique identifier FL-1531. Tr. at 68; CX-4; CX-5. At all times material to the allegations in the Complaint, To Be Farms had a single compliance agreement for containerized nursery stock. CX-5; Tr. at 68.

Respondent Redland did not have a compliance agreement with APHIS at all times material to this matter. CX7-. However, as stated above, a stamp associated with a compliance agreement for imported fire ants appears on the back of all waybills for the transactions identified in the complaint. The stamp that appears on the back of the waybills is associated with To Be Farms, Inc. with imported fire ant number FL-1531. To Be Farms, Inc. entered into a compliance agreement with APHIS on March 28, 2012, CX-5, when Redland Nursery, Inc. did not have a compliance agreement or associated stamp because of the terms of the 2011 Consent. CX-6. Respondent Redland was not permitted to enter into a new compliance agreement until October, 2012, and therefore, not permitted to ship regulated articles outside of the quarantine without a limited permit.

Respondents made at least four shipments of regulated articles in April and May, 2012 from Redland Nursery when they were operating without a compliance agreement to buyers in

Maryland and Delaware. CX-9 – CX-44; 7 C.F.R. § 301.81-2. One shipment from Redland Nursery actually contained imported fire ants. CX- 23 – 41. Each of the transactions identified in the Complaint was subject to the Secretary’s jurisdiction under the Act.

i. *Shipment #1 to Fager’s Island – Ocean City, Maryland*

On April 17, 2012, Respondent Redland shipped 198 “Beach Trees” to Fager’s Island in Ocean City, Maryland from Homestead, Florida, Redland Nursery’s physical location. CX-9 – CX-15. An invoice from Redland Nursery accompanied the shipment. CX-9; Tr. at 72, lines 10-13. The bill of lading that accompanied the shipment from Florida to Maryland identifies Redland Nursery, Inc. in Homestead, Florida as the location the plants were shipped from. CX-10; Tr. at 73. Seven stamps appear on the back of the bill of lading: five are associated with Redland Nursery and two are associated with To Be Farms. CX-10; Tr. at 74-75. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-10. The front of the bill of lading identifies Redland Nursery, Inc. as the only location plants were shipped from. CX-10. Fager’s Island Administrative Assistant Barbara Corbett provided an affidavit stating that Fager’s Island owner placed an order for plants with John DeMott and payment was made to Redland Nursery for the plants. CX-11; CX-14. Ms Corbett further stated that Fager’s Island has “never done business with To Be Farms.” CX-14; Tr. at 77-8. Further, she provided that “[t]hey order [their plants] directly from Redland.” CX-14; Tr. at 78, lines 19-20. TQL is the broker company that arranged for the movement of plants from Florida to Maryland. CX-12; CX-15; Tr at 73-4. Sho Tyme Xpress Trucking LLC actually moved the plants and stated in an affidavit that plants were picked

up from Redland Nursery. CX-15. Redland Nursery was paid by Fager's Island for the shipment. CX-11; CX-13; Tr. at 75-6. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent decision.

ii. *Shipment #2 to Dead Freddie's Island Grill – Ocean City, Maryland*

On May 2, 2012, Respondent Redland shipped 55 live plants from Redland Nursery, Inc. in Homestead, Florida to Dead Freddie's Island Grill in Ocean City, Maryland. CX-16; CX-17. An invoice from Redland accompanied the shipment. CX-16; Tr. at 79. The bill of lading also accompanying the shipment had seven rubber stamp images, five belonging to Redland Nursery and two belonging to To Be Farms, Inc. CX-17; Tr. at 79-80. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-17; Tr. at 81. The front of the bill of lading identifies Redland Nursery as the only location where the plants shipped from. CX-17; Tr. at 80; 82. Redland Nursery arranged the transport of plants from Redland to Dead Freddie's with Mercer Transportation. CX-18; Tr. at 82. Dead Freddie's paid Mercer Transportation for the shipment. CX-20; Tr. at 82-3.

In a signed affidavit, Mr. Stephen Carullo, owner of Dead Freddie's Island Grill, stated that he ordered the plants directly from John DeMott at Redland Nursery. CX-21; Tr. at 83-4. Mr. DeMott provided plant recommendations for Mr. Carullo. Tr. at 84, lines 2-8. Mr. Carullo further stated that he has "never done business with To Be Farms, Inc., 2B, 3D, or Triple D."

CX-21; Tr. at 84. The shipment of plants to Dead Freddie's was delivered by Terrance Payne.

CX-22; Tr. at 85. In a conversation with the APHIS investigator, Mr. Payne "indicated that the entire shipment was picked up [at] Redland Nursery, Inc. in Homestead, Florida, and delivered directly to [Dead Freddie's]." Tr. at 85, lines 11-14; CX-22. The plants were picked up from a single location and the only identified source of the plants is Redland Nursery, Inc. CX-22; Tr. at 85. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, Respondents continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent decision.

iii. *Shipment #3 to Sea Shell Shop – Rehoboth, Delaware*

On May 11, 2012, Respondent Redland shipped 48 live plants from Redland Nursery in Homestead, Florida to the Sea Shell Shop in Rehoboth, Delaware, outside of the imported fire ant quarantine. CX-23 – 25. The load sheet included with the order indicates what plants were contained in the shipment and where the shipment came from. CX-23; Tr. at 86. The load sheet was generated by Redland Nursery. CX-23. Tr. at 86. The plants to fulfill this order were loaded at two locations, Redland and 3 D's. CX-23. Tr. at 86-7. The back of the bill of lading has seven stamps, five belonging Redland Nursery and two belonging to To Be Farms, Inc. CX-25. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-25; Tr. at 88. The plants were shipped from Redland Nursery. CX-25; Tr. at 89, lines 12-14 ("Q: Based on this Bill of Lading, can you tell where the

plants in the shipment came from? A: Shipped from Redland Nursery, Inc.”). Further, the Sea Shell Shop paid Redland Nursery for the plants purchased. CX-26; Tr. at 89-90. Sea Shell Shop co-owner James Derrick provided that “[w]e [Sea Shell Shop] have been ordering live plants including palm trees from Redland Nurseries, Inc. for approximately 10 years.” CX-35 p.3.; Tr. at 91-3.

A portion of the plants in the May 11 order delivered to Sea Shell Shop were purchased by Redland from another nursery to fulfill the order. CX-27 – 28. However, Redland Nursery was ultimately responsible for moving the regulated articles outside of the quarantine. CX-23 – 25. Twenty plants were purchased by Redland Nursery from 3 D’s Nursery. CX-28; Tr. at 99, lines 2-6. To fill the Redland order, 3 D’s purchased plants from L&S Krome Property, Inc. CX-27; CX-41. Both 3 D’s and L&S Krome are Florida corporations selling and moving regulated articles within the quarantine. The invoice for the sale from L&S Krome to 3 D’s has “Joyner Transportation” written on it with the DOT number, indicating that Joyner Transport had picked up that order and delivered it to John Derrick, whose signature also appears on the invoice. CX-27; Tr. at 98-9. 3 D’s and L&S Krome are two separate businesses. CX-39; Tr. at 49-50. In a signed affidavit, Mr. de la Cruz, the foreman at 3 D’s Nursery, stated that 3 D’s Nursery did sell 20 Queen Palm trees to Respondent Redland and that the trees were treated with insecticide talstar 15% X 1000 gallons (Bifentrin) Orthene HD X 100. CX-39; Tr. at 49-50. Joyner Transportation was responsible for moving this order from Homestead, Florida to Rehoboth, Delaware. CX-29.

Redland Nursery purchased regulated articles from 3 D’s Nursery to fulfill an order that was ultimately being sent outside of the quarantine. The twenty queen palms that Redland Nursery purchased were balled-and-burlapped plants, not containerized nursery stock. Tr. at 100,

lines 10. 3 D Nursery's compliance agreement is only for containerized nursery stock. CX-40; Tr. at 99-100. Due to the fact that the treatment protocols vary based on the kind of regulated article, the plants sold from 3 D's Nursery to Redland were not properly treated in accordance with the requirements of a compliance agreement for balled-and-burlapped articles. Tr. at 101, lines 1 – 5 ("JUDGE: [...]...is the reason that it has to be specific to the regulated item because the protocols for ensuring the safe transport [are] different for the regulated items? A: Correct. So the type of insecticides those would be different. JUDGE: Very different depending on what the item is? A: Correct."). Furthermore, even if 3 D's had the appropriate compliance agreement to move the twenty queen palms outside of the quarantine, Redland Nursery actually moved the regulated articles outside of the quarantine and thus was the entity required to have the appropriate compliance agreement to do so. Tr. at 102. At the time of the shipment to the Sea Shell Shop, Redland Nursery's compliance agreement had been revoked. CX-6. Additionally, the bill of lading for the shipment to Sea Shell Shop does not include the imported fire ant compliance agreement stamp belonging to 3 D's Nursery or L&S Krome, so the origin of the plants contained in the shipment is not easily determined. CX-25; Tr. at 101-02. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations and unlawfully used the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent decision.

iv. *Shipment #4 to Fager's Island – Ocean City, Maryland*

On May 23, 2012, Respondent Redland Nursery shipped 16 plants from Homestead, Florida to Fager's Island in Ocean City, Maryland. CX-42 – 44. Included in the shipment to Fager's Island was a Redland Nursery invoice for the purchase. CX-42; Tr. at 109. The bill of

lading that accompanied the shipment from Florida to Maryland identifies Redland Nursery, Inc. in Homestead, Florida as the location the plants were shipped from. CX-43; Tr. at 110-11. The back of the bill of lading has seven stamps, five Redland Nursery stamps and two To Be Farms stamps. CX-43; Tr. at 110-11. The bill of lading includes certifications from Redland Nursery for General Nursery Stock Inspection, Reniform Nematode, Texas Certificate, Burrowing Nematode, and North Carolina Tropical Spiderwort. Certifications belonging to To Be Farms are included for General Nursery Stock Inspection and Imported Fire Ants. CX-43. Tr. at 111. The front of the bill of lading identifies Redland Nursery, Inc. as the only location plants were shipped from. CX-43; Tr. at 110, lines, 12-17. Fager's Island paid Redland Nursery directly for the shipment of plants. CX-44; Tr. at 111-12. Fager's Island Administrative Assistant Barbara Corbett provided an affidavit stating that Fager's Island owner placed an order for plants with John DeMott and payment was made to Redland Nursery for the plants. CX-14. Ms. Corbett further stated that Fager's Island has "never done business with To Be Farms." CX-14.

For all shipments from Redland Nursery, the bill of lading has the To Be Farms, Inc. imported fire ant compliance agreement stamp. The stamp is not transferable, CX-5. Redland Nursery was not permitted to unlawfully stamp the bill of lading with the To Be Farms, Inc. stamp in order to move the regulated articles outside of the quarantine. Despite the fact that Respondent Redland did not have a valid compliance agreement at the time of the shipment, they continued to move regulated articles outside of the quarantine area to non-quarantined destinations using the imported fire ant compliance agreement stamp associated with another entity in violation of the Act, regulations, and 2011 Consent decision.

C. Respondents actually shipped imported fire ants to a non-quarantined area.

The regulated articles shipped to the Sea Shell Shop on May 11, 2012 were actually infested with imported fire ants upon arrival in Rehoboth, Delaware. CX-30; CX-32. When the plants were delivered, Delaware Department of Agriculture employees Jimmy Kroon, State Survey Coordinator, and Entomologist Heather Harmon Disque were present at Sea Shell Shop. CX-32. As the plants were being unloaded, they observed “ants crawling into and out of the root ball of a Queen Palm Tree” and suspected that some of the ants could be imported fire ants. CX-32; Tr. at 104-05. Mr. Kroon informed co-owner John Derrick of the Sea Shell Shop that there were possibly imported fire ants among the observed ants. CX-32; Tr. at 103-05. In an effort to mitigate any harm, the Sea Shell Shop co-owner, Mr. John Derrick “sprayed the root ball with Carbaryl insecticide while it was on the concrete.” CX-32; Tr. at 105. The tree with ants observed in the root ball was planted into a “pre-dug hole in the ground in the middle of an island at the entrance of the parking lot to prevent spread if possible. The Sea Shell Shop employee sprayed the root ball again once it was in the ground.” CX-32; Tr. at 105. Although action was taken at the time of discovery of the pest, Mr. Kroon further instructed the Sea Shell Shop that additional insecticide should be applied to the plants. CX-32; Tr. at 105, lines 10 – 17.

Samples of ants were taken and tested and positively identified as *Solenopsis invicta*, imported fire ants. CX-30; CX-32; Tr. at 105-06. The Sea Shell Shop had the plants at their place of business treated for imported fire ants after the initial treatment. CX-33; CX-34; Tr. at 107-08.

V. SANCTION AND ORDER

Pursuant to the terms of Consent Decision and Order P.Q. Docket No. 10-0331, upon violation, the fifty thousand dollar (\$50,000) civil penalty shall be jointly and severally assessed and due and payable. CX-6. Complainant’s request, pursuant to section 424 of the Act, that an additional civil penalty of eighty thousand dollars (\$80,000) be jointly and severally assessed (7

U.S.C. § 7734) is fully supported by the record evidence and witness testimony provided at hearing and is hereby **GRANTED**. (Tr. at 117, lines 13-18). The civil penalty requested herein is well within the statutorily authorized civil penalty range in light of the violations by the Respondents. The requested civil penalty is consistent with civil penalties assessed under the Department's regulatory statutes.

Section 424 of the Act authorizes the Secretary to assess a civil penalty not to exceed \$500,000 for all violations adjudicated in a single proceeding. 7 U.S.C. § 7734(b)(1); Tr. at 118, lines 1-7. In recommending a sanction, APHIS considers what sanction would be appropriate to encourage compliance with the Act and regulations. Tr. at 118-19. The Secretary must consider the nature, circumstance, extent, and gravity of the violation or violations in determining the appropriate sanction to recommend. 7 U.S.C. § 7734(b)(2). Respondent DeMott is operating a for-profit business and has done so for many years. Tr. at 119. He is knowledgeable of the Act and regulations related to the imported fire ant quarantine and entered into a Consent with the Department which he "willfully and repeatedly violated." Tr. at 120, lines 6-7. The Secretary may also consider the ability of the Respondent to pay, the effect of the sanction on the ability of the Respondent to remain in business, any history of prior violations, the degree to which the Respondent is culpable, and any other factors the Secretary considers appropriate. 7 U.S.C. § 7734(b)(2).

APHIS found the Respondents to be highly culpable. Tr. at 132. The evidence in CX-1 through CX-49 – excluding CX-15, CX-19, CX-24, and CX-38 which were not moved into evidence at the hearing – clearly show that the Respondents were repeatedly willfully shipping regulated articles outside of a quarantined area to non-quarantined areas in flagrant violation of the Act and 7 C.F.R. § 301.81 *et seq.* Respondents used the certification stamp belonging to

another entity in order to make such shipments because their certification stamp was withdrawn as a result of a prior Consent Decision to resolve a complaint filed for similar violations.

Additionally, Respondents actually shipped imported fire ants from the quarantined area to a location in the non-quarantined area. Such flagrant violation of domestic quarantines in place to prevent the spread of plant pests and diseases constitute grave violations of the Act and regulations. As the APHIS Sanction Witness, Natalie Popovic testified “[o]ur goal, overall, is to bring him into compliance with the Plant Protection Act, [yet] enable him to continue operating in business.” Tr. at 119, lines 1-4.

ORDER

Respondents are jointly and severally assessed a civil penalty of eighty thousand dollars (\$80,000) for the violations of the Plant Protection Act proven at hearing. This civil penalty is in addition to the fifty thousand dollar (\$50,000) civil penalty held in abeyance pursuant to Consent Decision and Order P.Q. Docket No. 10-0331 which is now immediately due and payable. The Respondents shall send a certified check or money order for one hundred thirty thousand dollars (\$130,000), payable to the Treasurer of the United States, to:

United States Department of Agriculture
APHIS, U.S. Bank
P.O. Box 979043
St. Louis, MO 63197-9000

within thirty (30) days from the effective date of this Order. The certified check or money order should include the docket numbers of this proceeding.

This Order shall be final and effective thirty-five (35) days after the date of service of this Order on the Respondents unless there is an appeal to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.142).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done this 20th day of October, 2016, in Washington, D.C.



Bobbie J. McCartney
Chief Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building, Room 1031
1400 Independence Avenue, SW
Washington, D.C. 20250-9203
Tel: 202-720-4443
Fax: 202-720-9776