

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	A.Q. Docket No. 08-0010
Jim Hendren,)	
)	
Respondent)	Default Decision and Order

1. The Complaint, filed on October 31, 2007, alleged violations during 2003 by the Respondent of the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*) and regulations promulgated thereunder (9 C.F.R. § 71.18 regarding identification, § 77.10 regarding tuberculosis, and § 78.9 regarding brucellosis).

Parties and Counsel

2. The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, is the Complainant (frequently herein “Complainant” or “APHIS”). APHIS is represented by Ms. Darlene M. Bolinger, Esq., with the Office of the General Counsel (Regulatory Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250.
3. Jim Hendren is the Respondent (frequently herein “Respondent Hendren” or “Respondent”), with a mailing address in Vinita, Oklahoma 74301.

Procedural History

4. APHIS's Motion for Adoption of Proposed Default Decision and Order, filed February 26, 2008, is before me. Respondent Hendren was served with a copy of that Motion by certified mail on March 20, 2008 and did not respond.

5. Respondent Hendren was served with a copy of the Complaint, together with a copy of the Hearing Clerk's notice letter and a copy of the Rules of Practice, by certified mail on November 7, 2007.

6. Respondent Hendren's answer was due to be filed no later than November 27, 2007, 20 days after service of the Complaint. 7 C.F.R. § 1.136(a). Respondent Hendren never filed an answer.

7. Respondent Hendren was informed in the Complaint, and in the Hearing Clerk's letter accompanying the Complaint, that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. § 1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

8. Accordingly, the material allegations in the Complaint are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. § 1.130 *et seq.* and 9 C.F.R. § 99.1 *et seq.*

Findings of Fact

9. Respondent Jim Hendren has a mailing address in Vinita, Oklahoma 74301.
10. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.
11. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.
12. On or about September 27, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.
13. On or about October 11, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.
14. On or about October 11, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation

of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.

15. On or about October 11, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.

16. On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 71.18(a)(1)(iii) because the cows were not officially identified, and the official identification was not recorded on the owner statement.

17. On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, in violation of 9 C.F.R. § 77.10(d) because the cows were moved without the required certificate stating that the cattle were negative to an official TB test within 60 days prior to the movement.

18. On or about October 19, 2003, Respondent Hendren moved interstate 9 cows from Texas, a Class A state, to Kansas, a Class Free state, in violation of 9 C.F.R. § 78.9(b)(3)(ii) because the cows were not accompanied during the movement by a certificate indicating, inter alia, the consignor, the consignee, or that the cows had been tested for brucellosis and the results of the brucellosis testing.

Conclusions

19. The Secretary of Agriculture has jurisdiction over Respondent Jim Hendren and the subject matter involved herein.
20. Respondent Jim Hendren, while moving 27 head of cattle during September and October of 2003, violated, as to each of the 27 head, the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*) and regulations promulgated thereunder, specifically 9 C.F.R. § 71.18(a)(1)(iii), 9 C.F.R. § 77.10(d), and 9 C.F.R. § 78.9(b)(3)(ii).
21. Civil penalties are authorized by Section 10414 of the Animal Health Protection Act, 7 U.S.C. § 8313(b). In the case of an individual, \$50,000 per violation is authorized.
22. APHIS recommends that a \$4,500 civil penalty be imposed as appropriate and warranted under the circumstances.
23. Factors in determining civil penalties are enumerated in 7 U.S.C. § 8313(b)(2). Regarding gravity, identification of animals being moved is essential to the ability to trace an animal backward and forward: (a) traceback to the herd of origin, to determine which animals may have been in contact with a diseased animal or may have shared a contaminated feed supply; (b) trace forward, to locate an animal moved from a premises of concern. Tuberculosis eradication and Brucellosis eradication are obviously extremely important objectives of regulations that the Respondent violated. APHIS's Motion is valuable in showing the need for compliance with the regulations that the Respondent violated. See attached Appendix B.

24. I conclude that a \$4,500 civil penalty (for the violations of 3 regulations each, for each of the 27 head, which can be considered as 81 or more violations) is in accordance with 7 U.S.C. § 8313(b) and is appropriate and proportionate and will achieve the remedial purposes of the Animal Health Protection Act and is adequate to deter Respondent Hendren and others from committing like violations.

Order

25. Respondent Jim Hendren is hereby assessed a civil penalty of **\$4,500** (four thousand five hundred dollars). Respondent shall pay the \$4,500.00 by cashier's check or certified check or money order, made payable to the order of the "**Treasurer of the United States**" and forwarded within sixty (60) days from the effective date of this Order to:

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

Respondent Hendren shall include on the cashier's check or certified check or money order the docket number of this proceeding, **A.Q. Docket No. 08-0010**.

Finality

26. This Decision and Order shall be final and effective thirty five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

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

Done at Washington, D.C.
this 22nd day of April 2008

Jill S. Clifton
Administrative Law Judge

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

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed

in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	A.Q. Docket No. 08-0010
)	
Jim Hendren,)	
)	
Respondent)	Motion for Adoption of
)	Proposed Default Decision and Order

Complainant respectfully moves for the adoption of the attached Default Decision and Order assessing the respondent a civil penalty of four thousand and five hundred dollars (\$4,500.00), pursuant to section 1.139 of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.139) because the respondent has not filed an answer to the complaint in this matter.

I. Introduction

The complaint in this proceeding, filed by the Administrator of the Animal and Plant Health Inspection Service, on October 31, 2007, was served by certified mail on the respondent on November 7, 2007. Pursuant to section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), the respondent was informed in the complaint and the letter accompanying the complaint that an answer should be filed with the Hearing Clerk within twenty (20) days after service of the complaint, and that failure to file an answer within twenty (20) days after

service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing.

Respondent's answer was due no later than twenty days after service of the complaint (7 C.F.R. § 1.136(a)). However, as of the date of the filing of this motion, respondent has not filed an answer as specified in (7 C.F.R. § 1.136(b)). Respondent's failure to file the required answer within the time provided under section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) constitutes an admission of the allegations in the complaint pursuant to section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) and a waiver of hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Therefore, respondent should be deemed to have admitted that on or about September 27, 2003, October 11, 2003 and October 19, 2003, respondent moved, in total, 27 cows from Texas to Kansas in violation of 9 C.F.R. 71.18(a)(1)(iii), 77.10(d) and 78.9(b)(3)(ii). Consequently an effective sanction is warranted by the facts.

The applicable penalty provisions are found in the section 8313 of the AHPA (7 U.S.C. 8313). Complainant believes that 7 U.S.C. 8313(b)(2) of the AHPA presents two distinct categories for consideration in determining the civil penalty to be imposed. First, the AHPA (7 U.S.C. 8313) specifically states that the Secretary **shall** take into account the nature, circumstance, extent, and gravity of the violation. Secondly, the AHPA states that the Secretary **may** take into account the violator's ability to pay, the effect of the penalty on the violator's ability to do business, any history of prior violations by the violator, the violator's degree of culpability, and any other factors the Secretary considers appropriate.

Consequently, the Complainant took into consideration the mandatory factors surrounding the nature, circumstance, extent, and gravity of the violation or violations. Additionally, the Complainant, as appropriate, considered permissive factors such as the violator's ability to pay; ability to continue to do business; history of prior violations; and degree of culpability. (7 U.S.C. 8313(b)(2)).

II. Background:

A. Movement Without Official Identification

Pursuant to the regulations in Title 9 of the Code of Federal Regulations, chapter I, the Animal and Plant Health Inspection Service (APHIS) regulates the interstate movement of certain animals to prevent the spread of livestock and poultry diseases within the United States. Chapter I, sub chapter C (parts 70 through 89) contain the interstate movement regulations. The interstate movement regulations, as well as, some of the indemnity regulations (title 9, Code of Federal Regulations, Chapter I, sub chapter B (parts 49 through 55), contain requirements for the official identification of animals.

The key to an effective program, which designed to prevent the spread of livestock and poultry diseases, is the proper identification of animals. There are three basic identification methods. 1) Individual official animal identification is needed for tracking animals that, while moving through the production chain, are destined to be commingled with animals from other farms, ranches, or other outside sources. 2) Group/lot identification is used in species that are generally assembled in groups within the same production system and tracked through records of group movement. 3) Premises identification is the identification of

premises that manage or hold livestock with a single and unique number. Either individual, group/lot or premises identification provides an unique identifier. The unique identifiers, once applied to the animal, are usually tamper-resistant and have a high retention rate in the animal.

Proper identification, in either form, is essential to the process of tracing an animal either backward or forward. Traceback of an animal permits the Agency to track an animal's location over its lifespan and permits the Agency to determine which animals may have been in contact with the diseased animal or may have shared a contaminated feed supply. The ability to trace an animal forward provides the Agency with information on the location of an animal moved from a premises of concern that may have been exposed to a disease. Consequently, USDA's ability to trace diseased animals back to their herds of origin and to trace other potentially exposed animals forward is dependent upon the animals being properly identified. See 69 Fed. Reg. 64644. In both the Brucellosis and Tuberculosis eradication programs, proper identification is vital to the goal of control and eradication of the disease. Respondent, on three separate occasions failed to officially identify cows moved from Texas to Kansas as required by the regulations. His actions effectively hamper the Agency's ability to trace animals and potentially facilitate the spread of brucellosis and tuberculosis.

B. Movement from Texas to Kansas without the required health certification under the Brucellosis Eradication Program

Brucellosis, a serious, infectious, and contagious disease of animals and man, is also known as contagious abortion or Bang's disease. 55 Fed. Reg. 39005. In humans, it's known

as undulant fever because of the severe intermittent fever accompanying human infection. The disease is caused by a group of bacteria known scientifically as the genus *Brucella*. Three species of *Brucella* cause the most concern: *B. abortus*, principally affecting cattle, bison, and cervids; *B. suis*, principally affecting swine and reindeer but also cattle and bison; and *B. melitensis*, principally affecting goats. *B. Melitensis* is not present in the United States. 55 Fed. Reg. 39005.

Although brucellosis can infect other animals, its main threat is to cattle, bison, and swine. In cattle and bison, the disease primarily localizes in the reproductive organs or the udder. Bacteria are shed in milk or via the aborted fetus, afterbirth, or other reproductive tract discharges. Brucellosis infection in animals causes decreased milk production, weight loss, loss of young, infertility, and lameness. Therefore, it is a very costly disease of animals. Furthermore, the rapidity with which brucellosis spreads and the fact that it is transmissible to humans makes it a serious disease of not only animals but also humans and therefore it is the target of control and eradication. 55 Fed. Reg. 39005.

Before 1934, control of brucellosis was limited mainly to individual herds. Today, there is a Cooperative State–Federal Brucellosis Eradication Program to eliminate the disease from the country. The livestock and dairy industries and the American consumers have realized great financial savings from the success of the Cooperative State–Federal Brucellosis Eradication Program. Annual losses from lowered milk production, aborted calves and pigs, and reduced breeding efficiency have decreased from more than \$400 million in 1952 to less than \$1 million in the early 1990s. Studies conducted prior to the 1990s have shown that, if

brucellosis eradication program efforts were stopped, the costs of producing beef and milk would increase by an estimated \$80 million annually in less than 10 years. 55 Fed. Reg. 39005.

Furthermore, although, at the beginning of the program, brucellosis was widespread throughout U.S. livestock, eradication efforts have had dramatic results. In 1956, 124,000 affected herds were found by testing in the United States. By 1992, this number had dropped to 700 herds, and today the United States is brucellosis free. See 55 Fed. Reg. 39005 and <http://www.usda.gov>.

Federal regulations implementing the National Cooperative State/Federal Brucellosis Eradication program are contained in 9 C.F.R., part 78, which governs the interstate movement of cattle, bison, and swine in order to help prevent the interstate spread of brucellosis. The regulations also govern states, areas, herds, and individual animals. The brucellosis requirements for interstate movement are based upon the disease status of the individual animals and the status of the herd, area, or State from which the animal originates. The regulations found in 9 C.F.R. Part 78 provide for a system of classifying States or portions of States according to the rate of *Brucella abortus* infection present and the general effectiveness of the brucellosis control and eradication programs conducted in the State or area. The classifications are Class Free, Class A, Class B, Class C and quarantined. Like all animal disease eradication efforts, success of the program depends on the support, participation, and compliance of the handlers of livestock. 55 Fed. Reg. 39005.

Respondent on three occasions moved cows from Texas, a Class A State, to Kansas, a Class Free State, in violation of the regulations because the cows were not accompanied by the required health certificate indicating the disease status of the cows.

C. Movement from Texas to Kansas without the required health certification under the Tuberculosis Eradication Program ¹

Tuberculosis (TB) is also a contagious disease of both animals and humans. It is caused by three specific types of bacteria that are part of the Mycobacterium group: Mycobacterium bovis, M. avium, and M. tuberculosis. Bovine TB, caused by M. bovis, can be transmitted from livestock to humans and other animals. No other TB organism has as great a host range as bovine TB, which can infect all warm blooded vertebrates. M. avium can affect all species of birds, as well as hogs and cattle. M. tuberculosis primarily affects humans but can also be transmitted to hogs, cattle, and dogs. 71 Fed. Reg. 13926 (March 20, 2006).

Bovine tuberculosis in infected animals and humans manifests itself in lesions of the lung, bone, and other body parts. The disease causes weight loss and general debilitation, and can be fatal. See 71 Fed. Reg. 13926 (March 20, 2006). Bovine TB was once the most prevalent infectious disease of cattle and swine in the United States, and caused more losses among U.S. farm animals in the early part of this century than all other infectious diseases combined. As a result of its debilitating effect on the Nation's livestock, in 1917, a Cooperative State-Federal Tuberculosis Eradication Program was implemented. The result of

¹For more information on the Tuberculosis Eradication Program, see http://www.aphis.usda.gov/animal_health/animal_diseases/tuberculosis/

this cooperative effort is the near eradication of bovine TB from the Nation's livestock population. See 65 Fed. Reg. 11912, 11915.

Federal regulations implementing the National Cooperative State/Federal Bovine Tuberculosis Eradication Program are contained in 9 C.F.R., part 77. See 65 Fed. Reg. 11912, 11915. Similar to brucellosis, the tuberculosis requirements for interstate movement are based upon the diseases status of the individual animals and the status of the herd, area, or State from which the animal originates. For example, USDA has established five status levels, or stages, for states and zones as they make progress eradicating bovine tuberculosis. These five stages are generally based upon the herd prevalence of bovine tuberculosis. The five stages are: Non-accredited, Accredited Preparatory, Modified Accredited, Modified Accredited Advanced, and Accredited-free. State status for cattle and bison and for captive cervids are established independently of each other. Currently, for cattle and bison, we have 49 States and Territories which are Accredited-Free. Three States currently have either total or partial Modified Accredited or Modified Accredited Advanced Status. Like Brucellosis, and many other animal disease eradication efforts, success of the TB eradication efforts depends on the support, participation, and compliance of individuals, such as the respondent, since they are the handlers of the livestock. See 65 Fed. Reg. 11912, 11915.

Respondent on three occasions moved cows from Texas, a modified accredited advanced state, to Kansas, an accredited free state, without the required health certificate showing the disease status of the animals.

III. Nature, gravity, circumstance and extent

The current primary driving forces behind the development of livestock identification systems include disease control and eradication, disease surveillance and monitoring, emergency response to foreign animal diseases, regionalization, global trade, livestock production efficiency, consumer concerns over food safety, and emergency management programs. For more information, see http://www.aphis.usda.gov/animal_health/animal_diseases/animal_id. Respondent Hendren failed to comply with the identification requirements on September 27, 2003. He failed to comply with the identification requirements on October 11, 2003. He again failed to comply with the identification requirements on October 19, 2003. As a result of this failure approximately 27 cows were moved from a Tuberculosis modified accredited advanced state to a Tuberculosis accredited free state without being officially identified. Texas is also a Brucellosis Class A state and Kansas is a Brucellosis Free state. Therefore, Respondent Hendren moved approximately 27 cows from a state with both Tuberculosis and brucellosis infection to a state that is free of both tuberculosis and brucellosis infection without the required accompanying documentation needed to indicate the brucellosis and tuberculosis status of these cattle, their state of origin, and their identification. As a result the Department's ability to trace these animals have been hampered and both the brucellosis and tuberculosis eradication program potentially impacted.

Neither brucellosis nor tuberculosis at the time of the movement in question had been completely eliminated in this country. The danger still existed that either disease could spread among livestock. Therefore, it was and is imperative to maintain compliance with the regulatory requirements. Violations, such as those committed by the respondent, which involve either the identification or interstate movement regulations could set back the substantial efforts of both eradication programs, potentially lead to the dissemination of brucellosis and/or tuberculosis, and endanger not only animal health, but also human health. Consequently the nature, circumstance, extent and gravity of Respondent's violations warrant the imposition of the requested civil penalty, to serve as a deterrent to Respondent and other potential violators similarly situated.

IV. Permissive Factors

A. Ability to Pay and Effect on ability to continue to do business.

The recommended civil penalty of four thousand and five hundred (\$4,500.00) dollars is a reasonable and judicious recommendation, which is warranted by the facts and consistent with the Department's sanction policy. The Complainant has no reason to believe that the amount of the civil penalty is excessive. The Secretary has consistently placed the burden of production on the respondent to come forward with some evidence indicating an inability to pay or an inability to continue to do business, that is, if the respondent wished such factors considered. Furthermore, where the violator fails to produce any evidence warranting a reduction, it is presumed that the facts warrant no reduction. In re: A.P. "Sonny" Holt, Richard Wall and Wayne Putnam, 49 Agric. Dec. 853 (1990) citing other cases. The reason

for so allocating the burden of production is because “only the respondent has such information . . .” In re: A.P. “Sonny” Holt, Richard Wall and Wayne Putnam, 49 Agric. Dec. 853, 867 (1990).

Respondent Hendren chose not to file an answer. Respondent Hendren has not provided any evidence that warrants a reduction in the civil penalty. There is no record, testimony, or other evidence for the Secretary to review to determine if the respondent has an ability to pay the full requested amount or the requested amount in installments. See In re Garland Samuel, 57 Agric. Dec. 905 (1988) citing: In re Barry Glick, 55 Agric. Dec. 275, 283 (1996) (holding that 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 in full or in installments). Nor is there any record, testimony, or other evidence for the Secretary to evaluate to determine if the requested civil penalty would have an effect on the respondent's ability to do business. The presumption, under these circumstances, is that the facts of this case warrant no reduction.

B. Any history of prior

Respondent Hendren's violations, admitted by virtue of its default, constitute repeated violations, a pattern of violations, that warrant the recommended civil penalty. In In re:

David M. Zimmerman, 57 Agric. Dec. 1038, 1051 (1998), the Judicial Officer stated that “[a]n ongoing pattern of violations establishes ‘a history of previous violations’ It is appropriate to view the evidence . . . as establishing prior violations in determining the appropriate level of the civil penalty.”

Respondent’s violations were repeated violations and the repetitious and willful nature of the violations constitutes a history of violations that bears directly on the civil penalty to be assessed and supports Complainant’s request. “Repeated means more than once. Therefore, multiple failures to clean primary enclosures constitute repeated violations of section 3.11(a) of the Regulations and Standards (9 C.F.R. 311(a)).” In re: Jewel Bond, AWA Docket No. 04-0024 (May 19, 2006). A “finding of ‘repeated violations’ is appropriate wherever there is more than one violation of the Act.” In re: Atlantic Produce Co., 35 Agric. Dec. 1631, 1640 (1976), *aff’d per curium*, 568 F.2d 772 (4th Cir.)(Table), *cert. denied*, 439 U.S. 819 (1978) (citing In re: Harrisburg Daily Market, 20 Agric. Dec. 955 (1961), *aff’d sub. nom. Harrisburg Daily Market v. Freedman*, 309 F.2d 647 (D.C. Cir. 1962), *cert. denied* 372 U.S. 976 (1963)). Furthermore, it has been “the policy of this Department to impose severe sanctions for violations of any of the regulatory programs administered by the Department that are repeated or that are regarded by administrative officials and the Judicial Officer as serious, in order to serve as an effective deterrent not only to the respondents, but also to other potential violators.” In re: Spencer Livestock Commission Co., and Mike Donaldson, 46 Agric. Dec. 268, 431 (1987). While later decisions modified the “severe” sanction policy of the Department, the modified policy did not change the core principle that in deciding upon an

appropriate penalty, the judge should consider all relevant factors, including whether the violations are repeated as well as whether the violations are serious. *See In re: S.S. Farms Linn County, Inc., et al.*, 50 Agric. Dec. at 497.

C. The degree of culpability.

The complaint alleges that respondent moved 9 cows from Texas to Kansas in violation of 9 C.F.R. 71.18(a)(1)(iii), 77.10(d) and 78.9(b)(3)(ii) on three different dates, September 27, 2003, October 11, 2003 and October 19, 2003. Respondent is culpable for the movement. Pursuant to section 8313(c) of the AHPA, when construing and enforcing the AHPA, the act, omission, or failure of any officer, agent, or person acting for or employed by any other person within the scope of his or her employment or office, shall be deemed also to be the act, omission, or failure of the other person. Accordingly, whether Respondent acted on his on behalf or had agents acting on his behalf, Respondent is the culpable party in these violations. There is no evidence in the record before the Judge to suggest that any one other than Respondent Hendren is the culpable party.

V. Conclusion and Civil Penalty Recommendation.

The AHPA provides for the assessment of a civil penalty of up to \$50,000 in the case of an individual, and up to \$250,000 in the case of any other person, including a corporation, for each violation. The civil penalty requested herein is well within the low end of the range in the case of violations by an individual or corporation. The requested civil penalty is consistent with civil penalties assessed under the Department's regulatory statutes.

In determining the amount of “an effective sanction” appropriate “weight” should be given to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose. In re: S.S. Farms Linn County, Inc., et al., 50 Agric. Dec. 476, 497 (1991). Complainant recommends that a \$4,500 civil penalty be assessed against Respondent for his violations of the regulations. As explained above the recommended civil penalty of \$4,500.00 is appropriate and warranted under the circumstances. Therefore, complainant respectfully requests that the attached Default Decision and Order be adopted.

Respectfully submitted,

s/ Darlene Bolinger

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