

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

REGIONAL HEARING CLERK  
2011 OCT 25 PM 2:54

IN THE MATTER OF: )

Mr. Allen Barry, Mr. Tim Barry )  
d/b/a Allen Barry Livestock, )  
1448 Route 72 East )  
Leaf River, IL 61010 )

) Docket No. CWA 05-210-008  
)  
)  
)  
)  
)

Respondents.

NOTICE OF FILING

To: Honorable Barbara A. Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900L/Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

Michael F. Iasparro  
Hinshaw & Culbertson LLP  
Counsel for Respondent  
100 Park Ave  
P.O. Box 1389  
Rockford, IL 61105-1389

PLEASE TAKE NOTICE that the Complainant has today filed with the Regional Hearing Clerk the Complainant's Response to Respondents' Motion to Set Aside Default Order and Initial Decision, a copy of which is attached and hereby served upon you.

Dated: October 25, 2011

Respectfully submitted,

Luis Oviedo  
Associate Regional Counsel  
U.S. EPA Region 5 (C-14J)  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590  
Ph: (312) 353-9538  
FAX: (312) 582-5805

**Bcc:** V. Aistars (WD-15J)

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**IN THE MATTER OF:** )  
 ) **Docket No. CWA-05-2010-008**  
**Mr. Allen Barry, Mr. Tim Barry** )  
**d/b/a Allen Barry Livestock,** )  
 ) **Hon. Barbara A. Gunning**  
**Respondents.** )  
 )

**COMPLAINANT'S RESPONSE TO MOTION  
TO SET ASIDE DEFAULT ORDER AND INITIAL DECISION**

The United States Environmental Protection Agency, Region 5 (U.S. EPA or Complainant), through its undersigned attorney, hereby submits its Response to Respondents' Motion to Set Aside the Default Order and Initial Decision of Administrative Law Judge Barbara A. Gunning ("ALJ") in this case, and in support thereof states as follows:

Respondents owned and operated a livestock confined animal feeding operation (CAFO) that failed to comply with the terms of its NPDES Permit No. IL0067229 and an administrative order for compliance issued by Complainant on October 17, 2007. The Complaint alleged that the Complainant documented through multiple inspections that, between March 27, 2007 and February 19, 2002, Respondent discharged pollutants from its facility to a tributary of Mill Creek, a waters of the United States as listed in Respondents' NPDES Permit. Complainant proposed a total penalty of \$75,000.

On October 1, 2010 Respondents filed a Joint Appearance and Answer through Attorney James Meason, but did not request a hearing or assert an inability to pay. On January 25, 2011, Complainant filed its status report on settlement, pursuant to the ALJ's order, reporting that Respondents had failed to engage in discussions per the deadlines set in that order. An Order to

Show Cause was entered against Respondents on January 31, 2011 for failure to comply with the tribunal's order of November 30, 2010. After their response, the tribunal issued a new order allowing the parties time to hold and report on settlement discussions. Respondent was, again, unresponsive and ultimately the parties did not reach settlement. A pre-hearing order was issued on March 30, 2011 with strict deadlines and consequences. Complainant complied with all deadlines. Respondent did not file anything, not even a request for extension of time. On July 6, 2011, the tribunal issued a second Order to Show Cause against Respondents. Respondents filed a Joint Answer to the Order to Show Cause, and the ALJ in this case allowed them yet additional time to comply with the filing of their prehearing exchange or present a signed consent agreement and final order. On August 9, 2011, Attorney David Smith filed his appearance in this case, and despite being aware of the extensions and deadlines, both Respondents and their counsel still failed to participate in the proceedings and comply with the orders. On September 9, 2011, after two orders to show cause and prolonged and chronic non-compliance with the rules of these proceedings, the tribunal entered its Default Order and Initial Decision upholding the Complainants' assessment of a \$75,000 penalty in this case. On October 21, 2011, Complainant was served with Respondents' Motion to Set Aside Default Order and Initial Decision in this case.

#### Failure to Show Good Cause

According to the Consolidated Rules, when the Presiding Officer finds that a default has occurred, she "shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. 40 C.F.R. §22.17(c). Under EPA precedent, a "good cause" determination, predicate to finding a

party in default, takes the “totality of the circumstances” into consideration. *In re Pyramid Chemical Company*, 11 E.A.D. 657, 661 (EAB 2004). The Environmental Appeals Board has considered a number of factors under the “totality of the circumstances” test including the nature of the procedural omission prompting the default and whether there exists a valid excuse or justification for not complying with the procedural requirement. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005). The Board has also considered whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *Id.* With regard to this factor, it is the respondent’s burden to demonstrate a “strong probability” that litigating the defense will produce a favorable outcome. *Id.*

Under Environmental Appeals Board precedent, “an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorneys’ failings.” *In re Pyramid Chemical Company*, 11 E.A.D. at 667 (EAB 2004). As a general matter, a client voluntarily chooses its attorney as its representative and thus cannot avoid the consequences of the acts or omissions of its freely selected agent. *Id.* Only in limited circumstances has the Board recognized the failure of an attorney as the basis for excusing a party from timely compliance with procedural requirements (such as physical incapacitation during a crucial period in litigation), *see In re B&L Plating*, 11. E.A.D. 183, 191 n.15 (EAB 2003). Such circumstances do not exist here. It is undisputed that Respondents received copies of the orders in this case, and bears responsibility to recognize the failure of counsel to act on Respondents’ behalf and to take appropriate timely action. *See In re Pyramid Chemical Co.*, 11 E.A.D. at 668.

Here, counsel for Respondents state that they are “new counsel” with “meritorious arguments” that warrant setting aside the ALJ’s Order. In fact, he is the third attorney in a series

that began work for Respondents on this case over four years ago. Attorney David Smith first purported to represent Respondents in initial discussions in this case in October 2007. Exhibit 1.

Attorney Jim Meason then became involved in the case in May 2010. Exhibit 2. He delayed in filing a formal appearance, however, until October 1, 2010, after June 23, 2010 correspondence and insistence from Complainant urging him to do so. Exhibit 3. Attorney David Smith later filed his letter “re-appearance” (*sic*) on April 12, 2010, and a formal appearance on August 5, 2011. Exhibit 4. No one in this successive and sometimes overlapping line of lawyers has been able to obtain any cooperation from Respondents. The current attorney claims that he can surely now provide the documents needed from Respondents to substantiate inability to pay or mitigate the penalty. He further claims that, four years after the September 14, 2007 administrative order for compliance was issued to his clients, Respondents have derived little or no economic benefit from the violations. Respondents do not offer any new arguments nor do they assert substantiation for any new facts that are tantamount to good cause. Attorney David Smith initiated discussions with Respondents as far back as four years ago, based on the same allegations, but for unknown reasons was simply never able to obtain Respondents’ or their CPA’s cooperation in submitting either compliance or financial documents, or otherwise presenting a case. Regardless of whether Respondents’ Motion correctly casts fault solely on Attorney Jim Meason by alleging that Respondents had “difficulty working with Attorney Meason, given his military service,” it is evident that Respondents share in flouting the series of orders issued by the ALJ and the Agency in this case, and the Part 22 Rules. For the foregoing reasons, Respondents have failed to demonstrate good cause for setting aside the ALJ’s Order.

Respondents' Motion is Fails to Comply with 40 CFR §20.16(a)

All motions, except those made orally on the record during a hearing, shall, *inter alia*, be accompanied by any affidavit, certificate, or other evidence or legal memorandum relied upon. 40 C.F.R. §20.16(a). Respondents' Motion, albeit introducing no new arguments or evidence, relies on representations that are entirely unsupported by any affidavit or exhibit. In fact, there is no attachment whatsoever support Respondents' factual assertions, nor is there any caselaw cited in support of the Motion. They reference a single Attachment A in paragraph 8.b. of their Motion, but nothing is attached. Notwithstanding, Respondents make several conclusory remarks to advance their argument: "Attorney Jim Meason stated that all corrective action had been completed to the satisfaction of EPA ..." Motion at par. 6. "Examples of facts supporting Respondents' inability to pay are as follows ..." Motion at par. 8. "In short, Respondents do not have the ability to pay a \$75,000 fine, something which there is documentation to establish and which the undersigned counsel is prepared to prove." Motion at par. 9.

It is noteworthy that Respondent Tim Barry claims to have filed for bankruptcy on January 11, 2011 (Motion at par. 8.b.), some ten months after the March 17, 2010 administrative complaint and penalty assessment in this case was filed, yet Complainant was surreptitiously never served with proper notice of the pending bankruptcy.

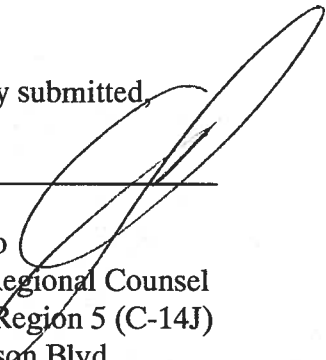
Moreover, if any evidence does exist to support the arguments they are repeating yet again in the instant Motion, Respondents were obligated to identify and produce it in response to U.S. EPA's Administrative Order and this Court's Order of March 30, 2011 and its successive extensions. Respondent failed to do so, and were rightfully defaulted. They now want another bite at the apple, without presenting any new facts. The default by Respondents constituted an

admission of all facts alleged in the complaint and a waiver of respondents' right to contest such factual allegations. 40 C.F.R. §22.17. Therefore, to set aside the Order and allow Respondents yet another opportunity would greatly prejudice Complainants.

**VII. CONCLUSION**

Respondents fail to demonstrate good cause to set aside the Order in this case. Respondents' actions have remained consistent with a pattern and practice that began at least four years ago with their violations of their Permit, and continued through their disregard to the orders issued in this case. Accordingly, Complainant respectfully requests that the Court to deny Respondents' Motion.

Respectfully submitted,



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Luis Oviedo  
Associate Regional Counsel  
U.S. EPA, Region 5 (C-14J)  
77 W. Jackson Blvd.  
Chicago, IL 60604



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**IN THE MATTER OF:**

**Mr. Allen Barry, Mr. Tim Barry  
d/b/a Allen Barry Livestock,  
1448 Route 72 East  
Leaf River, IL 61010**

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**Docket No. CWA 05-210-008**

**Respondents.**

**EXHIBITS**

1	Correspondence from Attorney David Smith to U.S. EPA	October 9, 2007
2	Correspondence from Attorney James E. Meason to U.S. EPA	May 28, 2010
3	Correspondence from U.S. EPA to Attorney James E. Meason, and fax transmission confirmation	June 23, 2010
4	Correspondence from Attorney David Smith to U.S. EPA	April 12, 2010

LAW OFFICES  
SMITH HAHN MORROW & FLOSKI

GERALD K. GARARD (1908-1979)  
RICHARD J. HAHN (1958-2002)

DAVID A. SMITH  
ERIC D. MORROW  
DOUGLAS P. FLOSKI

*Professional Corporation*  
129 SOUTH FOURTH STREET  
POST OFFICE BOX 10  
OREGON, ILLINOIS 61061-0010  
815/732-6124  
FAX 815/732-7528

131 WEST SECOND STREET  
BYRON, ILLINOIS 61010-1007  
815/234-5454  
FAX 815/234-2632

ROBERT C. MOEHLE, of Counsel

October 9, 2007

Ms. Cheryl L. Newton  
Acting Director, Water Division  
U.S. Environmental Protection Agency  
Region 5  
77 W. Jackson Boulevard  
Chicago, IL 60604-3590  
*Via Certified Mail: 7007 0710 0005 2925 7932*



Re: Mr. Allen Barry d/b/a Allen Barry Livestock (IL0067229), Order for Compliance and Request for Information Pursuant to 33 U.S.C. §§ 1318 and 1319(a), Docket No. V-W-07-AO-06

Dear Ms. Newton:

In response to your letter concerning the above matter dated September 14, 2007, I immediately called and left a message with Mr. Valdis Aistars that Mr. Barry intended to comply with your Order. This letter confirms that phone call.

I believe the site inspection was made March 27, 2007, over five months ago. Your Order requires the permit holder to respond in varying time periods, some as short as five days. Neither Mr. Barry nor anyone on his staff has the training and expertise to respond to many of the ordered items. We are searching for a consultant to assist us in this regard. I am sure your records indicate Northern Illinois experienced one of its wettest summers on record and some of the precipitation exceeded an expected 25 year, 24 hour event.

Your Order also notes the fact that Mr. Barry's facility applied for renewal of his 1996 permit in March of 2001, but no action has been taken on that renewal application for over six years. It seems the time requirements of your Order have little consideration for the delays experienced by Mr. Barry in dealing with your office.

Very truly yours,

SMITH, HAHN, MORROW & FLOSKI, P.C.

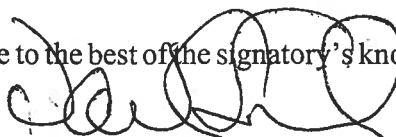
David A. Smith

DAS:cbd

cc: Valdis Aistars, Water Enforcement & Compliance Div. - *Certified Mail: 7007 0710 0005 2925 7949*  
Mike Garretson, IEPA - *Certified Mail: 7007 0710 0005 2925 7956*  
Allen Barry

EXH. 1

All statements contained herein are true and accurate to the best of the signatory's knowledge and belief.

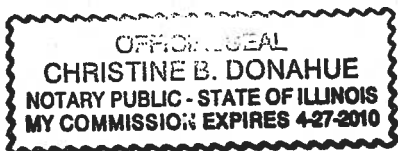


David A. Smith

Subscribed and sworn to before me  
this 9 day of October, 2007.



Notary Public



James E. Meason  
Attorney at Law  
113 W. Main Street. Rockton. Illinois. 61072. (815) 624-6517

May 28, 2010

Luis Oviedo, Esq.  
Associate Regional Counsel  
Region 5, U.S. Environmental Protection Agency  
77 W. Jackson Blvd.  
Chicago, IL 60604-3590

**Re: Mr. Allen Barry d/b/a Allen Barry Livestock (IL0067229)**  
**Docket No. V-W-07-AO-06**

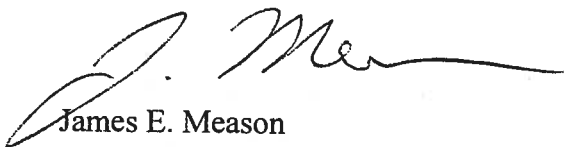
Dear Mr. Oviedo:

As noted in the voicemail message I left you yesterday, Tim Barry has retained me to represent his family in the above noted matter. All future correspondence should be addressed to me.

I understand this matter has some history, and I am getting up to speed as quickly as I can. I pledge I will work with the agency to a mutually beneficial resolution of this matter in a timely fashion. You and I have never met, if memory serves me correctly. I have practiced in the environmental law field since 1992.

Should you have any questions, please do not hesitate to call me at your earliest convenience.

Respectfully yours,



James E. Meason

cc: T. Barry

*c:\my documents\law\barry\environmental\oviedo ltr re introduction*

EXH. 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

JUN 23 2010

REPLY TO THE ATTENTION OF:  
C-14J

VIA FAX, ELECTRONIC AND U.S. MAIL

Mr. James E. Meason  
Attorney at Law  
113 W. Main Street  
Rockton, Illinois 61072  
815-624-5955 (FAX)  
jimmeason@yahoo.com

Re: In re: Allen Barry and Tim Barry d/b/a Allen Barry Livestock (IL 0067229)  
Docket No. V-W-07-AO-06

Dear Mr. Meason:

During our telephone discussion on May 27, 2010, you advised me that you would take affirmative steps to confer with us at the Agency. I have not yet heard from you regarding your clients' availability for a conference. Compliance with the terms of the Administrative Order and the CWA was required within the time periods specified in the Order. In addition, we have not received your appearance or response to the Administrative Complaint that has been filed against your client. Finally, this letter confirms that, to date, your client has not asserted any inability to pay defense in this case.

Since your client has not been responsive, we intend to move for a default judgment against them in this case. I am providing you with this written notice as a professional courtesy, and in hopes that you will escalate your efforts toward prompt resolution of this case.

Sincerely yours,

  
Luis Oviedo  
Associate Regional Counsel

cc: V. Aistars

EXH 3

## Result Summary

Job Number	28727	Submitted	6/24/2010 9:27:38 AM
Subject		Recipients	1
Total Pages	1	Successful	0

## Recipient Results

Name	Number/ Address	Result	Elapsed Time
	(815) 624-5955	Can't complete call: Non-Fax Result, Line Status:331	00:22



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5  
71 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

JUN 23 2010

REPLY TO THE ATTENTION OF:  
C-145

### VIA FAX, ELECTRONIC AND U.S. MAIL

Mr. James E. Meenan  
Attorney at Law  
113 W. Main Street  
Rockton, Illinois 61172  
815-624-5955 (FAX)  
jmeenan@yaho.com

Re: Allen Barry and Tim Barry d/b/a Allen Barry Livestock (IL 1067272)  
Docket No. VJW-07-80169

Dear Mr. Meenan:

During our telephone discussion on May 27, 2010, you advised me that you would take affirmative steps to confer with us at the Agency. I have not yet heard from you regarding your clients' availability for a conference. Compliance with the terms of the Administrative Order and the CWA was required within the time periods specified in the Order. In addition, we have not received your appearance or response to the Administrative Complaint that has been filed against your client. Finally, this letter certifies that, to date, your effort has not asserted any inability to pay defense in this case.

Since your client has not been responsive, we intend to move for a default judgment against them in this case. I am providing you with this written notice as a professional courtesy, and I hope that you will escalate your efforts toward prompt resolution of this case.

Sincerely yours,

Luís Oviedo  
Associate Regional Counsel

cc: V. Alstath

LAW OFFICES  
SMITH HAHN MORROW & FLOSKI

*Professional Corporation*  
129 SOUTH FOURTH STREET  
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OREGON, ILLINOIS 61061-0010  
815/732-6124  
FAX 815/732-7528

131 WEST SECOND STREET  
BYRON, ILLINOIS 61010-1007  
815/234-5454  
FAX 815/234-2632

GERALD K. GARARD (1908-1979)  
RICHARD J. HAHN (1958-2002)

DAVID A. SMITH  
ERIC D. MORROW  
DOUGLAS P. FLOSKI

DEBORAH S. MAAS

April 12, 2010

Mr. Luis Oviedo  
Associate Regional Counsel (C-14J)  
Region 5  
77 West Jackson Boulevard  
Chicago, IL 60604-3590

Re: Allen Barry d/b/a Allen Barry Livestock  
Docket No. V-W-07-AO-06

Dear Luis:

Received a call from Allen's son, Tim, last Monday saying that I needed to again become involved in the compliance matter. Unfortunately, letters sent from you or your office to Allen are unopened or misplaced and Tim, who is trying to assist his father with these matters, is unaware of the new correspondence. At least if I am back in the circle, I will make sure that copies of any correspondence or documents coming from your office are shared with Tim and Allen, with my note summarizing what they need to do.

Barrys have hired a new consultant. His name and address is Alan M. Madison, 24459 1500 East Street, Walnut, IL 61376. Hopefully this person will be more understanding of the situation and give better response to your office concerning these pending matters.

Please accept this letter as my reappearance in this matter on behalf of Allen Barry d/b/a Allen Barry Livestock (IL0067229).

Very truly yours,

SMITH, HAHN, MORROW & FLOSKI, P.C.



David A. Smith

DAS/cbd

cc: Mr. Allen Barry  
Mr. Tim Barry

EXH 4.

*In the Matter of: Tim Barry and Allen Barry d/b/a Allen Barry Livestock*  
*Docket No.: CWA-05-2010-0008.*

REGIONAL HEARING CLERK  
U.S. EPA REGION 5

2011 OCT 25 PM 2:54

**CERTIFICATE OF SERVICE**

I, Donald Ayres, certify that I filed the original and one copy of Complainant's RESPONSE TO MOTION TO SET ASIDE DEFAULT AND INITIAL DECISION with U.S. EPA Region 5's Regional Hearing Clerk. In addition, I delivered, by pouch mail, a true and accurate copy to:

Honorable Barbara A. Gunning  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
Mail Code 1900L/Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

I also mailed a true and accurate copy, by certified mail, return receipt-requested, to:

Michael F. Iasparro, Esq.  
Hinshaw & Culberton LLP  
100 Park Ave.  
P.O. Box 1389  
Rockford, IL 61105-1389

dated: October 25, 2011

  
\_\_\_\_\_  
Donald Ayres, Paralegal