UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
MR. ALLEN BARRY,	)	**Docket No. CWA-05-2010-0008**
MR. TIM BARRY	)	
d/b/a ALLEN BARRY LIVESTOCK,	)	
	)	
RESPONDENTS	)	

DEFAULT ORDER AND INITIAL DECISION

Respondents Mr. Allen Barry and Mr. Tim Barry d/b/a Allen Barry Livestock (collectively "Respondents") are hereby found in default because each Respondent has failed to submit a prehearing exchange or statement that it is electing only to conduct cross-examination of the Complainant's witnesses, a motion to enlarge the applicable deadlines, or a signed consent agreement and final order, as required by multiple Orders of this Tribunal.

This case arises under the authority of Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), 40 C.F.R. §§ 22.1 through 22.32.

The United States Environmental Protection Agency ("EPA" or "Complainant") filed the Administrative Complaint ("Complaint") against Respondents with the Regional Hearing Clerk on March 17, 2010. Public Notice of this case was provided, and the Illinois Environmental Protection Agency was notified of the Complaint and the State of Illinois was invited to consult with EPA regarding the assessment of the administrative penalty. Complaint at ¶¶ 13, 14. The Complaint alleges multiple violations of Respondents' National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, and proposes a civil administrative penalty of $75,000.

The Complaint was served on Respondents on August 14, 2010 by certified mail, return receipt requested.

On October 1, 2010, Attorney James E. Meason filed both an appearance on Respondents' behalf and a Joint Answer to Complaint ("Answer"). Respondents' Answer denied liability and asserted that the waters at issue in this case are not "navigable waters" within the meaning of Section 402(a)of the CWA. Respondents did not request a hearing or claim an inability to pay the proposed penalty in their Answer. The case was referred to this Office, the Office of Administrative Law Judges, on October 4, 2010, and was assigned to this Tribunal for litigation on November 5, 2010.

On November 30, 2010, this Tribunal issued an Order directing Respondents to file a statement no later than December 23, 2010, clarifying whether they wished to have a hearing before an Administrative Law Judge ("ALJ"). The Order also directed the parties to hold a settlement conference on or before January 21, 2011, with Complainant to file a status report on or before January 26, 2011. On January 25, 2011, Complainant filed the requested status report with the Regional Hearing Clerk. This report indicated that Complainant had made multiple telephone calls to Respondents' counsel and mailed two letters regarding settlement, but Respondents had not made any reply. Respondents also failed to file, either with Complainant or with this Tribunal, a statement clarifying whether they wished to have a hearing.

On January 31, 2011, the undersigned issued an Order to Show Cause instructing Respondents to file by February 18, 2011, a statement explaining why they failed to comply with the Tribunal's Order of November 30, 2010, and why a default order should not be entered against them. Respondents served a Response to the Order to Show Cause on February 18, 2011, apologizing for their failure and explaining that their counsel, Attorney Meason, is a Commander in the United States Navy Reserve. Attorney Meason stated that he had received on December 6, 2010 orders of involuntary mobilization to active duty, and was to report on June 17, 2011 for a year of active duty. Attorney Meason claimed that he also was distracted by his duties as a single parent of three school-aged children. While Attorney Meason had "successfully handled scores of cases" since December 6, 2010, he had simply failed to meet his responsibilities in this action. However, because Attorney Meason's failure had only caused a delay of one month, and because Respondents had a meritorious defense, Respondents requested that they not be found in default and that a new expedited schedule be imposed. Respondents did not indicate whether they were requesting a

hearing.

Respondents did eventually file on March 3, 2011, a written request for a hearing. Respondents only did so after having been contacted telephonically by the undersigned's staff attorney. On March 4, 2011, the undersigned issued a new Order directing the parties to hold a settlement conference by March 18, 2011, and directing Complainant to file a status report on or before March 25, 2011. Complainant did file a timely status report, indicating that Attorney Meason did not reply to Complainant's communications until March 22, 2011, after the deadline for a settlement conference had passed. The parties were able to hold brief settlement discussions on March 23, 2011, but did not reach any agreement.

On March 30, 2011, this Tribunal issued a Prehearing Order ("PHO") setting forth the schedule for the parties' information exchange, with which the parties were instructed to strictly comply. Complainant was to submit its prehearing exchange on May 13, 2011, and Respondents were to submit their prehearing exchange(s) no later than June 10, 2011. In lieu of a prehearing exchange, either or both Respondents could serve a statement clearly indicating that they elected to only cross-examine Complainant's witnesses and forego the presentation of direct or rebuttal evidence. The PHO expressly stated that failure to file a timely prehearing exchange or statement in lieu of an exchange could result in an entry of default.

Complainant filed its prehearing exchange on May 11, 2011. Respondents did not file a prehearing exchange or a statement in lieu of a prehearing exchange, nor did they file a motion requesting that the deadline be enlarged. On June 24, 2011, Complainant filed a rebuttal prehearing exchange in which it noted Respondents' pattern of delay and non-responsiveness. Complainant's counsel stated that he repeatedly contacted Respondents' counsel to elicit any information that Respondents intended to present in their defense, and on December 1, 2010, Complainant wrote to Respondents' counsel asking him whether his client intended to submit any documentation supporting any inability to pay. According to Complainant's counsel, Respondents and their counsel did not reply to any of these communications. Complainant requested an order barring Respondents from submitting any evidence to the Tribunal, including but not limited to any information relating to their financial condition or inability to pay the proposed penalty, and granting Complainant leave to file a motion for accelerated decision.

Upon being contacted telephonically by the undersigned's staff attorney, Attorney Meason sent a letter dated June 30, 2011 to the Tribunal and Complainant. Attorney Meason wrote that he was on active duty with the Navy and was undergoing his initial training out of state. He stated that all corrective action had been completed to the satisfaction of the EPA, and only the penalty phase of the proceeding remained. Attorney Meason indicated that he had requested certain financial documents from Respondents' accountant that he intended to submit "in support of a civil penalty proposal," but the accountant had forgotten to provide these documents. Attorney Meason requested two additional weeks to obtain these documents.

On July 6, 2011, the undersigned issued a second Order to Show Cause. The Order to Show Cause noted that Respondents had failed to file either a prehearing exchange or a statement electing to only conduct cross-examination, as required by the PHO. The Order acknowledged Attorney Meason's letter of June 30, 2011, but determined that this letter did not address the overdue prehearing exchange or comply with the PHO. The letter was also not a motion requesting an extension of the filing deadline. The Order directed Respondents to file a statement on or before July 20, 2011, showing cause why they failed to meet the filing deadlines set by the PHO and explaining why a default order should not be entered against them.

On July 19, 2011, Respondents filed a Joint Answer to Order to Show Cause. First, Respondents claimed that the Servicemembers' Civil Relief Act ("SCRA") protected them because their attorney had been called to active military service. Respondents argued that Attorney Meason had done his best, and that Respondents had attained full compliance with the statutory and regulatory requirements. Respondents also claimed that Complainant had mischaracterized the status of the proceedings, attacked Complainant's lack of professionalism, and referred to a settlement proposal dated July 18, 2011. Respondents claimed that their cattle feed lot operation had "all but shut down," that Respondent Allen Barry is of advanced age, and that Respondent Timothy Barry is disabled and had a Chapter 7 bankruptcy discharge granted on April 19, 2011. Respondents indicated that new counsel would be filing an appearance with the Tribunal, and requested thirty days to file copies of documents they had previously provided to Complainant.

The undersigned issued an Order on Joint Answer to Order to Show Cause on July 21, 2011. The Order held that the SCRA did not apply to this proceeding because no party to the action is an active-duty servicemember, and that Respondents had violated the

PHO before Attorney Meason was called to active duty. While Respondents had not shown good cause for their failure to meet the deadlines set by the PHO, the undersigned nonetheless granted them three additional weeks to comply with the PHO. Respondents were ordered to file either their prehearing exchange or a signed consent agreement and final order no later than August 12, 2011. Respondents were reminded that any substitute counsel must file a Notice of Appearance with the Tribunal.

On August 9, 2011, Attorney David A. Smith filed an Entry of Appearance with this Tribunal. On August 18, 2011 and September 1, 2011, the undersigned's staff attorney contacted Attorney Smith's office, requesting Attorney Smith to contact him. On September 6, 2011, the undersigned's staff attorney contacted Attorney Smith by email to inform him that the Tribunal had not yet received any of the documents required by the PHO or the Order on Joint Answer to Order to Show Cause. The undersigned's staff attorney noted that Attorney Smith had been provided with a copy of the PHO, and reminded him that failure to comply with the PHO could be ground for default. Attorney Smith responded with an email stating that Attorney Meason had only given two-weeks' notice before withdrawing from the case, and that Attorney Smith had entered his appearance simply to maintain an attorney of record. Attorney Smith was attempting to locate counsel with more relevant experience, and in the meantime would do what he could to comply with the outstanding Orders.

Section 22.17 of the Rules of Practice applicable to this proceeding, 40 C.F.R. § 22.17, provides, in pertinent part:

> (a) *Default*. A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations.
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> . . . .
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> (c) *Default order*. 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. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated

> Rules of Practice. The relief proposed in the complaint . . . shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.
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> . . . .
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> (d) *Payment of penalty; effective date of compliance* . . . . Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c).

40 C.F.R. § 22.17.

There is a strong preference in the law for cases to be resolved on their merits. *In re Fulton Fuel Co.*, CWA Appeal No. 10-03, 2010 EPA App. LEXIS 41, *7 (EAB 2010). However, the Rules provide for default as an essential tool to prevent litigants from abusing the administrative litigation process. *Id.* at *8 (citing *In re JHNY, Inc.*, CAA Appeal No. 04-09, 2005 EPA App. LEXIS 22, *30 (EAB 2005)). The administrative litigation process was "developed as a truncated alternative to Article III courts that intends expedition and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure . . . ." *JHNY*, 2005 EPA App. LEXIS 22, *23. In this context, the "prehearing exchange plays a pivotal function" by compelling the parties to identify and exchange all evidence to be used at hearing in a single submission. *Id.* at *23. The "prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the court an opportunity for informed preparation for hearing." *Id.* at **23-24. Because the prehearing exchange plays a central role in making administrative litigation the swift and efficient proceeding it is intended to be, "failure to comply with an ALJ's order requiring exchange is one of the primary justifications for entry of default." *Id.* (citing 40 C.F.R. § 22.17(a)).

In this case, Respondents have not once filed a proper motion requesting enlargement of any deadline. *See* 22 C.F.R. §§ 22.7(b), 22.16. They have nevertheless been granted numerous extensions after they have allowed deadlines to pass unheeded. These extensions have been squandered. As of September 9, 2011, three months after the initial deadline for their prehearing exchange, two months after Attorney Meason asked for thirty-days in which to submit documents he had allegedly provided to Complainant, and one month after the deadline set by this Tribunal's Order on Joint Answer to Order to Show Cause, Respondents have still not filed any document that could qualify

as a prehearing exchange or meet the requirements of the PHO.

When called to account for their failure to comply with the Orders and deadlines set by this Tribunal, Respondents first blamed the interference of Attorney Meason's military and family duties while simultaneously indicating that he had "successfully handled scores of [other] cases" in spite of those duties. Respondents have also blamed Complainant for their situation, though Respondents have failed to cogently explain how Complainant has prevented them from providing this Tribunal with prehearing exchange documents or a statement electing to only cross-examine Complainant's witnesses at hearing and forego the presentation of direct or rebuttal evidence. Now, Respondents blame their state of non-compliance on their current counsel's inexperience with the subject matter of this proceeding.

To the extent that Respondents might attempt to blame counsel for their repeated failure to comply with this Tribunal's orders, such argument would be unavailing. The Environmental Appeals Board has expressed its general agreement "with the principle that 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." *In re Pyramid Chem. Co*, 2004 EPA App. LEXIS 32, **28-29 (EAB 2004). "'Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have notice of all facts, notice of which can be charged upon the attorney.'" *Id.* at *29 (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962)) (internal quotation marks omitted). Even if this were not the case, Respondents' original counsel was given four months to prepare and submit a prehearing exchange, but failed to do so. Respondents then obtained new counsel, and again failed to meet the already-extended deadline established by this Tribunal's Order on Joint Answer to Order to Show Cause. The challenges faced by Respondents' attorneys may indeed be *causes* of Respondents' failure to comply with the prehearing exchange requirements established by the Rules and by the Orders of this Tribunal. They are not, however, good causes excusing what has become a pattern of silence and delay.

Respondents' inability or refusal to comply with the PHO and the Order on Joint Answer to Order to Show Cause has unnecessarily prolonged this proceeding for three months beyond the deadline set forth in the PHO. This delay frustrates the streamlined purpose of this administrative litigation. Furthermore, Respondents' apparent refusal to submit any documentation supporting their Answer precludes the undersigned

from determining whether Respondents have a meritorious defense. Respondents have failed to comply either with the information exchange requirements of Rule 22.19(a), the PHO, or the Order on Joint Answer to Order to Show Cause issued by this Tribunal. After considering the totality of the circumstances, the undersigned has determined that the record does not show good cause why a default order should not be issued. *See* 40 C.F.R. § 22.17(c).

The Complaint in this case seeks $75,000 against Respondents, which is less than the amount allowed pursuant to the governing statute.[1] As stated in the Complaint and Complainant's prehearing exchange, Complainant calculated the proposed penalty taking into account the statutory factors in Section 309(g)(3) of the CWA, namely, "the nature, circumstances, extent and gravity of the violation, or violations, and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require."

In its prehearing exchange, Complainant stated that Respondents were specifically requested to provide financial information if they believed they would have an inability to pay but they did not provide any information or facts in response. Complainant noted that Respondents own substantial assets in the form of business property and have received additional funds from the sale of business assets. Accordingly, Complainant did not adjust the initial gravity-based penalty based on Respondents' ability to pay.

Although Respondents' counsel stated in the July 19, 2011 Joint Answer to Order to Show Cause that Timothy Barry had a Chapter 7 bankruptcy discharge granted on April 19, 2011, documentation of such was not filed as part of a prehearing

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[1] Section 309(g)(2)(B) of the CWA provides that the amount of a class II civil administrative penalty "may not exceed $10,000 per day for each day during which the violation continues," except that the maximum amount shall not exceed $125,000. 33 U.S.C. § 1319(g)(2)(B). The rules for Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. part 19, provide that penalties under Section 309(g)(2)(B) of the CWA which are effective after March 15, 2004 are increased to $11,000 per day, and that the maximum penalty shall not exceed $157,500. 40 C.F.R. part 19.

exchange.[2] In the Prehearing Order, Respondents were specifically directed to furnish supporting documentation such as certified copies of financial statements or tax returns if making an inability to pay claim. No prehearing exchange was filed by either Respondent.

With respect to the appropriateness of a proposed penalty,

> the Complainant has the initial burden of production to establish that the penalty is appropriate and as part of that burden, that a respondent generally has the ability to pay the proposed penalty. The burden of production then shifts to the respondent to establish with specific information that the proposed penalty assessment is excessive or incorrect. If a respondent satisfies its burden of production, the Complainant must rebut respondent's contentions through rigorous cross-examination or through the introduction of additional information.

Chempace Corporation, 9 E.A.D. 119, 133 (EAB 2000) (footnotes omitted).

Here, Respondents have furnished no such supporting documentation. Thus, Respondents are deemed to have waived any objection to the penalty based upon the factor of ability pay. *See In the Matter of New Waterbury, Ltd.*, 5 E.A.D. 529, 542. (EAB 1994). Moreover, the Rules of Practice at Section 22.17(c), 40 C.F.R. § 22.17(c), provide that when the Administrative Law Judge finds that default has occurred, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act.

I find Respondents to be in default for their failure to file a prehearing exchange as required under the March 30, 2011 Prehearing Order, and under the July 21, 2011 Order on Joint Answer to Order to Show Cause. Default by Respondents constitutes admission of all facts alleged in the Complaint and waiver of Respondents' rights to contest such factual allegations. 40 C.F.R. § 22.17(a). The facts alleged in the instant Complaint establish Respondents' violations of the CWA as

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[2] Information or documents filed with Complainant in connection with settlement discussions are not made a part of the record of proceeding.

charged. Finally, upon review, I conclude that the penalty requested by Complainant is not "clearly inconsistent" with the record of the proceeding or the CWA. 40 C.F.R. § 22.17(c). Accordingly, the civil administrative penalty of $75,000 proposed in the Complaint and in Complainant's Prehearing Exchange is assessed against Respondents.

ORDER

1. Respondents are found in default for failing to comply with the Prehearing Order and the Order on Joint Answer to Order to Show Cause of the Administrative Law Judge, and no good cause is shown why a default order should not be issued.

2. Respondents Mr. Allen Barry and Mr. Tim Barry d/b/a/ Allen Barry Livestock are jointly and severally assessed a civil administrative penalty in the amount of $75,000.

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the effective date of the final order by submitting a cashier's check or a certified check in the amount of $75,000, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Mo 63197-9000

Contacts: Craig Steffen (513-487-2091),
Eric Volck (513-487-2105)[3]

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[3]Alternatively, Respondents may make payment of the penalty as follows:

WIRE TRANSFERS:

Wire transfers should be directed to the Federal Reserve Bank of New York

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33

4. A transmittal letter identifying the subject case and EPA docket number (CWA-05-2010-0008), as well as Respondents' names and addresses, must accompany the check.

5. If Respondents fail to pay the penalty within the prescribed statutory period after the entry of the Order, interest on

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33 Liberty Street
New York, NY 10045
(Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency")

OVERNIGHT MAIL:

U.S. Bank
Government Lockbox 979077
US EPA Fines & Penalties
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

Contact: (314-418-1028)

ACH (also known as REX or remittance express):

Automated Clearinghouse (ACH) for receiving US currency

U.S. Treasury REX/Cashlink ACH Receiver
ABA = 051036706
Account No. 310006
Environmental Protection Agency
CTX Format
Transaction Code 22 - checking
Contact: Jesse White (301-887-6548)

ON LINE PAYMENT:

This payment option can be accessed from the information below:

Visit http://www.pay.gov
Enter "sfo 1.1" in the search field.
Open form and complete required fields.

the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Appeal Rights

Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Default Order, which constitutes an Initial Decision pursuant to 40 C.F.R. § 22.17(c), shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board ("EAB") within thirty (30) days after service of this Order, or the EAB elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: September 9, 2011
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Default Order and Initial Decision**, issued by Administrative Law Judge Barbara A. Gunning, dated September 9, 2011, were sent on this 12th day of September 2011, in the following manner to the addressees listed below.

Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

La Dawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region V
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590
Fx: 312.886.0747

Copy by Facsimile and Pouch Mail to:

Luis Oviedo, Esq.
Associate Regional Counsel
ORC, U.S. EPA, Region V
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590
Fx: 312.886.7160

Copy by Facsimile / Regular and Certified Mail to:
[7007 1490 0004 0114 6015]
David A. Smith, Esq.
Smith Hahn Morrow & Floski, P.C.
129 South Fourth Street
P.O. Box 10
Oregon, IL 61061-0010
Fx: 815.732.7528

Copy by Interoffice Hand Delivery to:

Eurika Durr
Clerk of the Board
U.S. EPA, Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, DC 20005

Dated: September 12, 2011
Washington, DC

Favorable Initial Decision In Re: Allen Barry, Tim Barry d/b/a Allen Barry Livestock - CWA-05-2010-0008

Leverett Nelson to: Ben Fields, Ladawn Whitehead, Robert Kaplan 09/12/2011 04:19 PM
Cc: Ignacio Arrazola, Jane Lupton

From: Leverett Nelson/R5/USEPA/US
To: Ben Fields/R3/USEPA/US@EPA, Ladawn Whitehead/R5/USEPA/US@EPA, Robert Kaplan/R5/USEPA/US@EPA
Cc: Ignacio Arrazola/R5/USEPA/US@EPA, Jane Lupton/R5/USEPA/US@EPA

An interesting opinion: Judge Gunning *sua sponte* issued a default order and initial decision, finding a $75,000 was appropriate for this CWA 402 case. The Region brought the 309(g) action against Respondents, who operated a livestock CAFO facility in Illinois in violation of various conditions in their NPDES permit. At the time the action was initiated, it was one of the few permitted CAFO facilities in the State (pre-petition to withdraw). The facility is no longer an operating CAFO.

Respondents failed to comply with numerous deadlines and extensions, despite repeated warnings from the court. Judge Gunning awarded the Agency the full amount of penalty sought. Agency counsel are Luis Oviedo and Rob Thompson.

I apologize for the format of this scan. This is how I received it. The document is not yet posted on the OALJ or administrative docket websites.

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order 9.12.11.pdf