

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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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
)
)
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)
)

Respondents.

NOTICE OF FILING

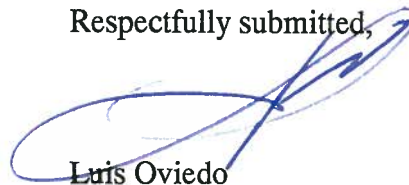
To: Honorable Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900L/Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

James E. Meason
Counsel for Respondent
113 W. Main Street
Rockton, IL 61072

PLEASE TAKE NOTICE that the Complainant has today filed with the Regional Hearing Clerk an Initial Prehearing Exchange, a copy of which is attached and hereby served upon you.

Dated: May 11, 2011

Respectfully submitted,



Luis Oviedo
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U.S. EPA Region 5 (C-14J)
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S INTITAL PREHEARING EXCHANGE

The United States Environmental Protection Agency, Region 5 (U.S. EPA or Complainant), through its undersigned attorney, respectfully submits this initial prehearing exchange in accordance with the Presiding Officer's March 30, 2011, Prehearing Order and 40 C.F.R. § 22.19(a).

I. Witnesses for Complainant

This section includes the names of witnesses Complainant intends to call, together with a brief narrative summary of each witness' expected testimony as required by Paragraphs 1.a and b of the Presiding Officer's March 30, 2011, Prehearing Order and 40 C.F.R. § 22.19(a)(2)(i):

- A. Valdis Aistars, *Environmental Engineer, Water Enforcement Division, U.S. EPA Region 5*. Mr. Aistars' duties include serving as an enforcement officer and case developer in the investigation of NPDES permit violations under the Clean Water Act (CWA). Mr. Aistars will testify about his review of the evidence compiled as a result of EPA's inspection of Respondent's animal feeding operations, and the factual basis for his determination that Respondents are in violation of the CWA and its implementing regulations. Mr. Aistars will testify about his efforts to contact Allen Berry and Tim Berry, and communications he has had with them during the course of his work on this case, regarding obtaining information about the facility owned and/or operated by Respondents.

He will also testify about how EPA calculated the penalty proposed in the Complaint, applying the statutory penalty factors set forth in Section 309(g)(2)(B) of the CWA, 15 U.S.C. § 1319(g)(2)(B), as explained by EPA's Interim Clean

Water Act Penalty Policy, dated March 1, 1995, and as set forth in greater detail in Section IV, below.

If necessary, Mr. Aistars will testify regarding the delegation of authority pertaining to the Complainant in this matter.

If necessary, Mr. Aistars will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

If necessary, Mr. Aistars will provide testimony to rebut any testimony proffered by the Respondent.

- B. Cheryl Burdett, *Life Scientist, Water Enforcement Division, U.S. EPA Region 5*. Ms. Burdett's duties include serving as an enforcement officer and case developer in the investigation of NPDES permit violations under the Clean Water Act (CWA). Ms. Burdett will testify about her review of the evidence compiled as a result of EPA's inspection of Respondent's animal feeding operations, and the factual basis for her determination that Respondents are in violation of the CWA and its implementing regulations. Ms. Burdett will testify about her efforts to contact Allen Berry and Tim Berry, and communications she has had with them during the course of her work on this case, regarding obtaining information about the facility owned and/or operated by Respondents.

She will also testify about how EPA calculated the penalty proposed in the Complaint, applying the statutory penalty factors set forth in Section 309(g)(2)(B) of the CWA, 15 U.S.C. § 1319(g)(2)(B), as explained by EPA's Interim Clean Water Act Penalty Policy, dated March 1, 1995, and as set forth in greater detail in Section IV below.

If necessary, Ms. Burdett will testify regarding the delegation of authority pertaining to the Complainant in this matter.

If necessary, Ms. Burdett will provide testimony sufficient to authenticate certain exhibits contained in this prehearing exchange.

If necessary, Ms. Burdett will provide testimony to rebut any testimony proffered by the Respondent.

Complainant reserves the right not to call any of the above-listed witnesses at hearing. In addition, Complainant reserves the right to expand, or otherwise modify the scope, extent, and

areas of testimony of any of these witnesses where appropriate. Such changes may be occasioned by the discovery of new evidence or witnesses, the unavailability of one or more witnesses, prehearing stipulations of fact between the parties, rulings on motions, or any other legitimate purpose.

II. Documents to be Produced at Hearing

Complainant intends to introduce the following documents into evidence at hearing. Copies of these documents are attached to this prehearing exchange. Included with these documents are those required to be exchanged under Paragraph 1.c of the Presiding Officer's March 30, 2011, Prehearing Order and 40 C.F.R. § 22.19(a)(2)(ii).

- CX-1 NPDES Permit No. IL0067229 issued to Allen Barry Livestock, September 26, 1996.
- CX-2. NPDES Permit No. IL0067229 renewal application dated March 30, 2001.
- CX-3. Inspection Report for Allen Barry Livestock, March 27, 2007.
- CX-4. Administrative Order for Compliance and Request for Information AO V-W-07-AO-06 of September 14, 2007.
- CX-5. Letter from U.S. EPA to Allen Barry Livestock re: Non-compliance with Administrative Order and Request for Information, January 14, 2008.
- CX-6. U.S. EPA Conversation Record, Valdis Aistars to Allen Barry, March 4, 2008.
- CX-7. Inspection Report for Allen Barry Livestock, April 15, 2008.
- CX-8. U.S. EPA Region 5 Laboratory Analytical Reports, April 30, 2008.
- CX-9. U.S. EPA Region 5 Laboratory Analytical Reports, May 30, 2008.
- CX-10 U.S. EPA Region 5 Information Request Response from Allen Barry to U.S. EPA, July 25, 2008.

- CX-11 Letter from David A. Smith to Illinois EPA re: corrective action, August 13, 2008.
- CX-12. Letter from EPA to Allen Barry re: violation of Administrative Order, April 22, 2009.
- CX-13. Letter from U.S. EPA to Allen Barry Livestock re: Notice of Intent to File Administrative Complaint, December 4, 2009.
- CX-14. U.S. EPA Public Notice of Proposal to Assess Civil Penalty, March 18, 2010.
- CX-15. Allen Barry Livestock Statutory Penalty Memorandum.
- CX-16 State of Illinois Environmental Protection Agency, Inspection Report, February 19, 2002.

III. Judicial Notice

Complainant requests the Presiding Officer to take judicial notice of the following:

- A. The Clean Water Act (CWA), 33 U.S.C. § 1251 *et seq.*, as amended, and its legislative history; and
- B. The National Pollutant Discharge Elimination System, codified at 40 C.F.R. Part 122, as amended.
- C. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, as amended, including 61 Fed. Reg. 9064, March 6, 1996;
- D. Federal Register notices;
- E. Delegations of Authority.

IV. Penalty

Under 40 C.F.R. § 22.19(a)(3), EPA must explain in its prehearing exchange how it calculated the proposed penalty in accordance with the criteria set forth in the CWA.

Section 309(g) of the Clean Water Act (Section 309(g), 33 U.S.C. § 1319(g), authorizes the imposition of a civil penalty of up to \$10,000 per day for each day during which a violation of a requirement of Section 402 of the CWA and its implementing regulations at 40 C.F.R. Part 122 (the National Pollutant Discharge Elimination System (NPDES)). 33 U.S.C. § 1342. Class II Penalties may not exceed a total of \$125,000.00. CWA Section 309(g)(2)(B). The Civil Monetary Penalty Inflation Adjustment Act and its implementing regulations increased this maximum penalty amount to \$11,000 per violation for violations that occur after January 30, 1997, up to a maximum of \$157,500. 31 U.S.C. § 3701 and 40 C.F.R. Part 19 (2004).

Complainant relied on the statutory factors of the Clean Water Act in its calculation of the proposed penalty in this matter. The statutory factors are set forth in Section 309(g)(3) of CWA, 33 U.S.C. § 1319(g)(3), and include the nature, circumstances, extent, and gravity of the violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, the economic benefit or savings resulting from the violations, and such other matters as justice may require.

Under the CWA, EPA determines penalties in two stages: 1) the determination of a “gravity-based penalty,” and 2) adjustments to the gravity-based penalty. EPA calculates the gravity-based penalty by considering: 1) the nature of the violations; 2) the circumstances of the violations; and 3) the extent of harm that may result from the violations. CX-15.

The nature of the violation is the essential character of the violation and incorporate the concept of whether the violation relates to a pollutant control, monitoring and maintaining data, or some other requirement under a NPDES Permit. CX-15. The “circumstances” reflect the probability of harm resulting from a particular type of violation. The “extent” factor considers the degree, range or scope of a violation.

Once the gravity-based penalty is determined for a given violation, EPA applies upward or downward adjustments to the penalty in consideration of the following factors with respect to the violator: 1) ability to pay/ability to continue in business; 2) history of prior violations; 3) degree of culpability; and 4) such other factors as justice may require, which include: no known risk of exposure, the violator’s attitude, consideration of supplemental environmental projects, audit policy, voluntary disclosure, size of business, adjustment for small independent owners and lessors, and the economic benefit of noncompliance. CX-15.

In this case, the State of Illinois Environmental Protection Agency issued notice to Respondents on February 29, 2002, notifying them of their failure to comply with the same conditions of Respondents’ NPDES Permit that are at issue here. CX-16. IEPA subsequently referred the matter to the U.S. EPA. On September 14, 2007, Respondents were issued an Administrative Order for Compliance (“Order”), following an inspection by EPA conducted on March 27, 2007 (CX-4 and CX-3). The Order identified violations of five conditions in Respondents’ Permit and required that Respondents return to compliance with their Permit by (1) ceasing and desisting all unpermitted discharges from the facility’s animal confinement areas to Mill Creek, (2) submit compliance related documentation, (3) submit a Comprehensive Nutrient

Management Plan (CNMP), and (4) submit a record of costs required to ensure compliance with the Permit. Approximately five months later, on January 14, 2008, EPA sent letter notification to Respondents that they were still in violation of the AOC. CX-5. On April 15, 2008, EPA inspectors conducted another inspection of the Respondents' facility and found that none of the violations had been corrected. CX-7. On April 22, 2009, EPA sent yet another letter to Respondents, notifying them that they were still in non-compliance with both their Permit and the AOC. CX-12. By letter dated December 4, 2009 (CX-13), EPA advised Respondent that it was planning to file a civil administrative complaint against Respondent for alleged violations of Section 402 and that Section 309(g) authorizes the assessment of a civil administrative penalty. EPA asked Respondent to identify any factors Respondent thought EPA should consider before issuing the complaint. EPA also asked that if Respondent believed there were financial factors relevant to Respondent's ability to pay a civil penalty, Respondent submit specific financial documents. CX-13. Respondent provided no facts or information to support any such claims. EPA filed its Complaint in this matter on March 17, 2010.

The Complaint in this case alleges that Respondents failed to comply with Special Conditions 1 (Vegetative Cover Requirement), and Sections 1(a) and (c) (Discharge Limitations), 3(b)(c) and (d) (Monitoring Requirements), and 5 (Recordkeeping) of the Permit.

A. Gravity-Based Penalty

The Respondents' violation was significant because, although EPA conservatively only counted thirty-six days of violation, the duration of the violation actually exceeded 36 months. In addition, EPA conservatively combined a total of four NPDES Permit infractions (Sections

1(a) and (c), Sections 3(b), (c) and (d), and Section 5), including a Special Permit Condition (Special Condition 1) into a single violation. Moreover, IEPA's reports indicate that Respondents' violations relate to chronic problems going as far back as 2002, pursuant to a documented inspection report. CX-16.

EPA calculated the total initial gravity-based penalty by adding together the thirty six gravity-based penalties for the single count. Each day/month of violation in this case was counted as \$2,000. Applying the penalty adjustment factor of 1.2895 for violations after 3/15/04, the penalty for a full year was calculated as \$30,948 ($\$24,000 \times 1.2895 = \$30,948$). The total initial gravity-based penalty is \$92,844 ($\$25,790$ [2007] + $\$30,948$ [2008] + $\$30,948$ [2009] + $\$5,158$ [2010]).

B. Statutory Adjustment Factors

1. Ability to Pay/Continue in Business

As noted above, on December 4, 2009 EPA issued a prefiling notice letter to Respondents informing Respondents that EPA was prepared to file a civil administrative penalty complaint against it for alleged violations of the NPDES Permit requirements and the ACO. CX-13. The prefiling notice letter also extended an opportunity to Respondent to advise EPA of any factors that they believed EPA should consider before filing a complaint. The prefiling notice letter specifically asked Respondents to provide financial information if Respondents believed they would have an inability to pay a penalty. CX-13. Respondents provided no facts or information to support inability to pay claims in response. EPA has been in constant contact with counsel for Respondents, requesting that they provide specific additional documentation for any possible

inability to pay claims. 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.

2. History of Prior Such Violations

As mentioned above, the State of Illinois Environmental Protection Agency issued notice to Respondents on February 19, 2002, notifying them of their failure to comply with their NPDES Permit for the very same deficiencies. IEPA subsequently referred the matter to the EPA.

3. Degree of Culpability

While EPA has no information that Respondents' violations were intentional, the Respondents had previously received: a State of Illinois Environmental Protection Agency, Inspection Report, February 19, 2002 (CX-16), U.S. EPA Inspection Report, March 27, 2007 (CX-3), Administrative Order for Compliance and Request for Information AO V-W-07-AO-06 of September 14, 2007 (CX-4), a letter from U.S. EPA to Allen Barry Livestock re: Non-compliance with Administrative Order and Request for Information, January 14, 2008 (CX-5), a second Inspection Report for Allen Barry Livestock, April 15, 2008 (CX-10), a letter notice from EPA to Allen Barry re: violation of Administrative Order, April 22, 2009 (CX-12), and Notice of Intent to File Administrative Complaint from U.S. EPA, December 4, 2009 (CX-13).

Respondents have known of the same chronic infractions for over nine years. For no less than four years, Respondents have failed to conduct meaningful discussion or otherwise demonstrate

compliance to EPA. Respondent also flouted the ACO. Nevertheless, EPA has not increased the initial gravity-based penalty for culpability.

4. Other Factors as Justice May Require

a. Cooperation

EPA may reduce the proposed penalty based on a Respondents' cooperation, immediate good faith efforts to comply, and timely efforts to settle the case. EPA does not believe a reduction of the proposed penalty is appropriate based on Respondents' attitude and, therefore, has not adjusted the initial gravity-based penalty downward.

b. Supplemental Environmental Projects (SEPs)

Respondent has indicated that they would be willing to perform a SEP.

c. Size of Business

A violator may request assistance under the EPA's *Policy on Compliance Incentives for Small Businesses* (Small Business Policy). The Small Business Policy provides for the elimination of penalties if a small business meets its four qualifying criteria and agrees to participate in the compliance assistance program or conducts a voluntary self-audit. Respondent has not sought assistance under the Small Business Policy. Therefore, EPA made no adjustment to the proposed penalty based on this factor.

d. Economic Benefit of Noncompliance

EPA believes the proposed penalty captures any economic benefit to Respondents from noncompliance with its Permit. Respondents have benefited from noncompliance by not having to regularly incur the costs of pumping and land applying livestock wastes, maintaining records

of these activities, and not having to provide for adequate operation and maintenance of its facility. The Respondents economic benefit of noncompliance is calculated to be \$22,159 for the time period inclusive of the violations alleged in the Complaint (March 2007 – August 2009).

C. Total Proposed Penalty

In summary, EPA did not increase or decrease the initial gravity-based penalty based on any of the statutory adjustment factors. EPA proposed a \$75,000 penalty in the Complaint.

V. Estimate of Time Needed to Present Case

As required by Paragraph 1.c of the of the Presiding Officer’s March 30, 2011, Prehearing Order, Complainant estimates that it will need approximately one full eight-hour day to present its case-in-chief.

VI. Location of Hearing

As required by Paragraph 1.c of the of the Presiding Officer’s March 30, 2011 Prehearing Order, Complainant suggests that any hearing in this matter be held in Chicago, Illinois, the location of the Complainant and the Respondents’ State of operation.

VII. Application of the Paperwork Reduction Act

As required by Paragraph 5 of the Prehearing Order, the Presiding Officer directed Complainant to provide its position regarding the applicability of the Paperwork Reduction Act, 44 U.S.C. §§ 3501 et seq. (“PRA”), to this proceeding, including whether there is a current Office of Management and Budget (“OMB”) control number involved and whether the provisions of Section 3512 of the PRA may apply to this case.

1. Whether there is a current OMB control number involved.

The Information collection requirements of 40 C.F.R. Part 122.23 (Concentrated Animal Feeding Operations (“CAFO”)) were assigned OMB no. 2040-0250. *See* 40 C.F.R. § 9.1 (2010). CAFO recording and reporting requirements are part of the National Pollutant discharge Elimination System (NPDES) Requirements, 40 C.F.R. Part 122.48, OMB No. 2040-0004. As discussed below, however, the PRA Does not apply to this proceeding.

2. Whether Section 3512 of the PRA applies to this case.

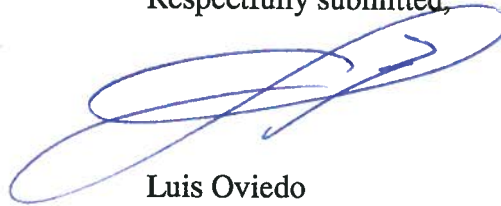
The information required to be submitted pursuant to the Clean Water Act Section 308 Order was not subject to the Paperwork Reduction Act of 1995, 44 U.S.C §§ 3501 -3521 (2008). That Order fell within the exception at 44 U.S.C. § 3518(c)(1)(B)(ii), for the collection of information during the conduct of an administrative action or investigation involving an agency against specific individuals or entities. EPA sought this information through its authority to seek information under Section 308 of the CWA after obtaining information indicating that Respondent was not compliance with its NPDES Permit. “In practice, the administrative enforcement exemption to the PRA has been applied to ICRs [information collection requests or collections of information] that are compulsory in nature and a standard part of any agency’s investigatory program.” *In re: Virgin Petroleum -- Princess, Inc.*, Docket No. RCRA-02-2002-7501, 2003 EPA ALJ LEXIS 65 (ALJ Order on Cross Motions for Accelerated Decisions, September 10, 2003) (quoting *In Re : Zaclon, Inc.*, 7 E.A.D. 482, 493 (EAB 1998)). The request for information was issued for the purpose of determining Respondent’s compliance with 40

C.F.R. Part 122. The Order specified that the information required to be maintained or submitted pursuant to the Order was not subject to the Paperwork Reduction Act. CX-4.

VIII. Rights Reserved

Complainant respectfully reserves the right to call all witnesses called by the Respondent, to recall any of their witnesses in rebuttal, and to modify or supplement the names of witnesses and exhibits prior to the Adjudicatory Hearing, pursuant to 40 C.F.R. Part 22, and upon adequate notice to the Respondent and the Presiding Officer.

Respectfully submitted,



Luis Oviedo
Associate Regional Counsel
U.S. EPA Region 5

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

2011 MAY 11 PM 3:13

CERTIFICATE OF SERVICE


I, Donald Ayres, certify that I filed the original and one copy of Complainant's NOTICE OF FILING and COMPLAINANT'S INITIAL PREHEARING EXCHANGE 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:

James Meason, Esq.
113 W. Main Street
Rockton, IL 61071-2416

dated: May 11, 2011



Donald Ayres, Paralegal