

HINSHAW

& CULBERTSON LLP

October 6, 2011

La Dawn Whitehead
Regional Hearing Clerk
U.S. Environmental Protection Agency
77 W. Jackson Blvd., E-19J
Chicago, IL 60604

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ATTORNEYS AT LAW

100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389

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

Dear Clerk:

Enclosed please find an Entry of Appearance and Motion to Set Aside Default Order and Initial Decision to be filed with respect to the above matter. Once filed, please return a file-stamped copy of each document in the enclosed envelope.

If you have any questions, please feel free to contact me. Thank you for your attention in this matter.

Very truly yours,

HINSHAW & CULBERTSON LLP



Michael F. Iasparro
miasparro@hinshawlaw.com

MFI:riy
Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)

MR. ALLEN BARRY,)

MR. TIM BARRY)

d/b/a ALLEN BARRY LIVESTOCK,)

RESPONDENTS.)

Docket No.: CWA-05-2010-0008

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ENTRY OF APPEARANCE

The undersigned, MICHAEL F. IASPARRO, of Hinshaw & Culbertson LLP, hereby enters his appearance for ALLEN BARRY, TIM BARRY d/b/a ALLEN BARRY LIVESTOCK.

Dated: October 6, 2011


Michael F. Iasparro

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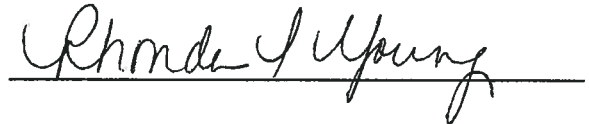
AFFIDAVIT OF SERVICE

The undersigned certifies that on October 6, 2011, a copy of the attached *Entry of Appearance* was served on the following:

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

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by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.



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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

MR. ALLEN BARRY,
MR. TIM BARRY
d/b/a ALLEN BARRY LIVESTOCK

RESPONDENTS.

Docket No.: CWA-03-2010-0108

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MOTION TO SET ASIDE DEFAULT ORDER AND INITIAL DECISION

NOW COME the RESPONDENTS, by and through their attorney, MICHAEL F. IASPARRO of HINSHAW & CULBERTSON LLP, and for their Motion to Set Aside Default Order and Initial Decision, state as follows:

1. On September 9, 2011, Administrative Law Judge Barbara A. Gunning (“ALJ”) entered a Default Order and Initial Decision in this matter, finding Respondents to be in default for their failure to file a prehearing exchange as required by two prior orders, and assessing against Respondents a penalty of \$75,000, as proposed in the Complaint.

2. Pursuant to 40 CFR § 22.27(c)(3), an Initial Decision of a Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless a party moves to set aside a default order that constitutes an initial decision. The default order constituting an initial decision has not become a final order, as 45 days after its service upon the parties would be October 24, 2011.

3. Pursuant to 40 CFR § 22.17(c), for good cause shown, the Presiding Officer may set aside a default order.

4. Good cause exists for this Tribunal to set aside the default order and initial decision in this case. New counsel have appeared for Respondents with relevant experience to litigate this matter in a timely fashion. In addition, Respondents have meritorious arguments in

mitigation of the penalty imposed, including that they derived little or no economic benefit from the alleged violations and that the gravity of the violations does not warrant such a severe penalty. Moreover, Respondents have a meritorious argument that they have an inability to pay the penalty proposed in the Complaint and assessed in the Default order and Initial Decision.

5. As pointed out by the ALJ in the Default Order and Initial Decision, Respondents' prior counsel, Attorney James Meason, has, for significant portions of the period of time that this case has been pending, been serving our country in the United States military, including preparing for a deployment to Afghanistan in June 2011. Attorney Meason's military duties certainly cannot, and should not, be characterized as any sort of personal indifference on his part to his representation of Respondents. In any event, such should not be held against Respondents.

6. Remediation of the Respondents' property is not an issue. Respondents have, to the satisfaction of USEPA, complied with all of USEPA's suggested remedial measures. The only issue remaining, as made clear in the September 9 Order, is the amount of any penalty to be imposed against Respondents. As the September 9 Order states, in a June 30, 2011 letter to the Tribunal and Complainant, Attorney Meason stated that "all corrective action had been completed to the satisfaction of the EPA, and only the penalty phase of the proceeding remained." Order at 4.

7. In addition to their own difficulty working with Attorney Meason, given his military service, the \$75,000 penalty assessed in the September 9 Order will impose an undue hardship on Respondents, who have already been through very trying financial challenges in recent years. The undersigned counsel is ready and able to make that case to this Tribunal, and to demonstrate Respondents' inability to pay such a penalty, which will surely force Respondents into even further financial hardship.

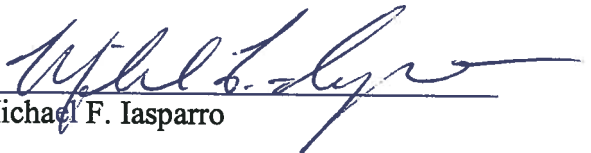
8. Examples of the facts supporting Respondents' inability to pay are as follows:
- a. Due to his son Tim's financial difficulties (caused by a downturn of the horse business), Respondent Allen Barry pledged his undivided half interest of the only remaining property dually owned by Respondents, consisting of 267 acres, to help secure his son's loans. Unfortunately, the sale of that property became necessary and occurred on February 12, 2010, with Respondent Allen Barry receiving only a small amount to cover his sale expenses and some tax on the long term capital gain of the property. Most all of the proceeds went to pay Respondent Tim Barry's loan.
 - b. On January 11, 2011, Respondent Tim Barry, AKA Barry Livestock, filed a voluntary petition for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Northern District of Illinois. Respondent Tim Barry's bankruptcy was discharged on April 19, 2011. A copy of the docket sheet with respect to that case is attached as Exhibit A. Respondent Tim Barry's financial decline has been extremely difficult for his father, Respondent Allen Barry, who is in his upper 80's in age and in declining health.
 - c. In addition, the Barry Livestock operation has suffered substantial losses in recent years, including losses of \$286,859 in 2005; \$419,214 in 2006; \$62,069 in 2007; \$358,737 in 2008; \$58,694 in 2009; and \$210,036 in 2010. Schedules showing the same will be made available for the Tribunal's in camera inspection upon request.

9. 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.

For these reasons, Respondents request that this Tribunal set aside the Order of Default and Initial Decision of September 9, 2011, and for such other relief as is deemed just and necessary.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: 
Michael F. Iasparro

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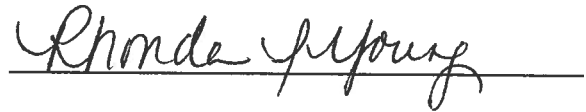
AFFIDAVIT OF SERVICE

The undersigned certifies that on October 6, 2011, a copy of the attached *Motion to Set Aside Default Order and Initial Decision* was served on the following:

Luis Oviedo, Esq.
Associate Regional Counsel
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Chicago, IL 60604-3590



by depositing a copy thereof, enclosed in an envelope in the United States Mail at Rockford, Illinois, proper postage prepaid, before the hour of 5:00 P.M., addressed as above.

A handwritten signature in black ink, appearing to read "Rhonda Young", written over a horizontal line.

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