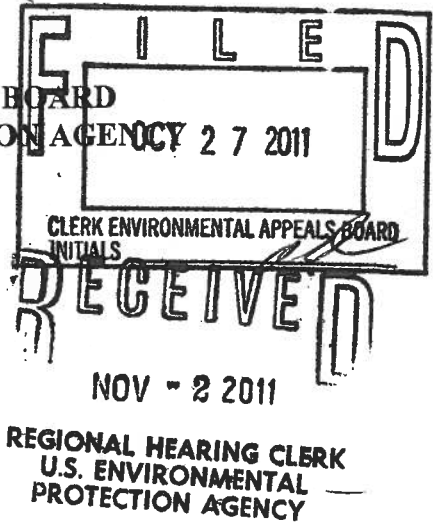


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY 27 2011
WASHINGTON, D.C.



_____))
In re:))
Allen Barry & Tim Barry))
d/b/a Allen Barry Livestock))
_____))
Docket No. CWA-05-2010-0008))
_____))

CWA Appeal No. 11-07

**ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW
AND PENALTY ORDER**

On September 9, 2011, Administrative Law Judge (“ALJ”) Barbara A. Gunning issued a Default Order and Initial Decision (“Default Order”) in the above-captioned matter.¹ The Default Order finds Allen Barry and Tim Barry d/b/a Allen Barry Livestock (“ABL”) in default for “fail[ure] to submit a prehearing exchange or statement that [ABL] is electing only to conduct cross-examination of Complaint’s witnesses, a motion to enlarge the applicable deadlines, or a signed consent agreement and final order.” Default Order & Initial Decision at 1. The Default Order assesses an administrative penalty of \$75,000 for multiple violations of an National Pollutant Discharge Elimination System (“NPDES”) permit issued to ABL under Clean Water Act (“CWA”) section 402, 33.U.S.C. § 1342.

The Environmental Appeals Board (“Board”) agrees with the ALJ’s determination that ABL is in default. However, the Board is electing to review the Default Order sua sponte,²

¹ The Default Order was served on September 12, 2011.

² Under the regulations governing the administrative assessment of civil penalties, 40 C.F.R. pt. 22, the Board has 45 days after service of an initial decision to elect to exercise sua sponte review. 40 C.F.R. § 22.27(c). Since the Default Order was served on September 12, 2011, the Board has until October 27, 2011, to so decide.

40 C.F.R. § 22.30(b), because the Board observes that the Administrative Complaint and the Default Order rely on different administrative penalty caps. *Compare* Initial Decision & Default Order at 8 n.1 *with* Administrative Complaint at 5 ¶ 12.

After accepting as true the facts alleged in U.S. Environmental Protection Agency (“EPA”), Region 5’s (“Region”) administrative complaint and determining that those facts “establish[ed] [ABL’s] violations of the CWA as charged,” the ALJ “conclude[d] that the penalty requested by Complainant is not ‘clearly inconsistent’ with the record of the proceeding or the CWA.” Default Order & Initial Decision at 10. The ALJ then stated, “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.”³ *Id.* at 8 n.1. The ALJ assessed a penalty equal to that proposed in the administrative complaint: \$75,000. *Id.* at 10 (citing 40 C.F.R. § 22.17(c) (“The relief proposed in the complaint * * * shall be ordered unless the relief requested is clearly inconsistent with the record of the proceeding or the [CWA].”)); *see also* Administrative Complaint at 5, ¶ 12.

Although the Board ordinarily requests briefing when granting review, where, as here, the perceived error or lack of clarity derives from the Presiding Officer’s default order itself and the Board does not consider that additional briefing will be of assistance absent a clarification from the Presiding Officer, a direct remand without further briefing is appropriate. *E.g., In re Gaskey Constr. Corp.*, CWA Appeal No. 06-02 at 1 n.1 (Mar. 21, 2006) (Order Electing to Review Sua Sponte and Remanding to Regional Judicial Officer).

³ The Debt Collection Improvement Act of 1996, 31 U.S.C. note, requires each federal agency to issue regulations adjusting for inflation the statutory civil penalties that can be imposed under the laws administered by that agency, and thereafter to periodically review and adjust the penalty provisions at least once every four years. EPA’s adjusted penalty provisions appear in 40 C.F.R. pt. 19.

On December 11, 2008, EPA promulgated the 2008 Civil Monetary Penalty Inflation Adjustment Rule (“2008 Rule”), 73 Fed. Reg. 75,340 (Dec. 11, 2008). The 2008 Rule authorizes CWA class II administrative penalties under CWA section 309(g)(2)(B), 33 U.S.C. § 1319(g)(2)(B), occurring after January 12, 2009, of up to \$16,000 per violation and not to exceed \$177,500. 40 C.F.R. § 19.4 tbl.1. EPA’s Office of Enforcement and Compliance Assurance (“OECA”) further clarified that “the adjusted penalty caps apply if an action is filed or a complaint is amended after January 12, 2009, even if some or all of the violations occurred on or before January 12, 2009.” Memorandum from Granta Y. Nakayama, Assistant Administrator, OECA, U.S. EPA, to Regional Administrators, U.S. EPA, “Amendments to EPA’s Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Adjustment Rule (Effective January 12, 2009)” (Dec. 29, 2008).

Region 5 filed the underlying action after January 12, 2009, on March 17, 2010. In the Board’s view, the correct penalty cap for the violations in this matter are those as adjusted by the 2008 Rule. Therefore, under the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. part 19, penalties under Section 209(G)(2)(B) of the CWA that are effective after January 12, 2009, are increased to \$16,000 per day, and that the maximum penalty shall not exceed \$177,500. 40 C.F.R. § 19.4 tbl.1. The Board affirms the Default Order and Initial Decision in all other respects.

ABL shall pay a total civil penalty of \$75,000. Payment of the entire amount of the civil penalty shall be made within thirty (30) days of service of this Order Electing to Exercise Sua Sponte Review and Penalty Order,⁴ unless otherwise agreed to by the Region. Payment may be

⁴ Pursuant to 40 C.F.R. § 22.30(f), this constitutes the final order.

made by certified or cashier's check payable to the Treasurer, United States of America, and forwarded to:

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

A transmittal letter identifying the case name and the EPA docket number, plus ABL's name and address, must accompany payment. 40 C.F.R. § 22.31(c). ABL shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. See 31 U.S.C. § 3713; 40 C.F.R. § 22.31(c).

So ordered.

Dated: 10/27/11

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PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD⁵

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

⁵ The two-member panel deciding this matter consists of Environmental Appeals Judges Charles J. Sheehan and Anna L. Wolgast. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Electing to Review Sua Sponte and Penalty Order** in *In re Allen Barry & Tim Barry d/b/a Allen Barry Livestock*, CWA Appeal No. 11-07, were sent to the following persons in the manner indicated:

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Date: **OCT 27 2011**



Annette Duncan
Secretary