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ENVIR. APPEALS BOARD

November 7, 2011

Clerk of the Environmental Appeals Board
Mail Code 1103B
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20460

ATTORNEYS AT LAW

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

815-490-4900
815-490-4901 (fax)
www.hinshawlaw.com

**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 a Motion to Reconsider Order Electing to Exercise Sua Sponte Review and Penalty Order to be filed with respect to the above matter. Once filed, please return a file-stamped copy 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

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IN THE MATTER OF:

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

RESPONDENTS.

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ENVIR. APPEALS BOARD

Docket No.: CWA-05-2010-0008

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

NOW COME the RESPONDENTS, by and through their attorney, MICHAEL F. IASPARRO of HINSHAW & CULBERTSON LLP, and for their Motion to Reconsider Order Electing to Exercise Sua Sponte Review and Penalty Order, state as follows:

1. On September 9, 2011, Administrative Law Judge Barbara A. Gunning ("ALJ") entered a Default Order and Initial Decision, pursuant to which a \$75,000 penalty was imposed against Respondents.

2. On or about October 6, 2011, Respondents filed a Motion to Set Aside Default Order and Initial Decision. Such Motion to Set Aside was filed within the statutory timeframe set forth under the Consolidated Rules of Practice. See 40 C.F.R. § 22.27(c)(3).

3. On or about October 25, 2011, Complainant filed a Response to Respondents' Motion to Set Aside Default Order and Initial Decision. Pursuant to 40 C.F.R. § 20.16, Respondents have ten (10) days from the date of filing of Complainant's Response to file a Reply.

4. However, on October 27, 2011, the Environmental Appeals Board ("EAB"), pursuant to a sua sponte review of the ALJ's Default Order and Initial Decision, filed an Order

Electing to Exercise Sua Sponte Review and Penalty Order, addressing an inconsistency in the determination of appropriate penalty caps and affirming the ALJ's Default Order and Initial Decision in all other respects. The EAB stated that such order constitutes a final order under the Consolidated Rules.

5. On November 2, 2011, pursuant to the EAB's Order Electing to Exercise Sua Sponte Review and Penalty Order, the ALJ issued an Order Dismissing Motion to Set Aside Default Order and Initial Decision due to lack of jurisdiction.

6. At the time the EAB entered its final order, Respondents' Motion to Set Aside Default Order and Initial Decision, timely filed under the Consolidated Rules, was pending before the ALJ.

7. Respondents request that the EAB reconsider the issuance of its final order and/or stay the effective date of said final order, on the basis that a Motion to Set Aside Default Order and Initial Decision was properly pending before the ALJ at the time the EAB filed the Order Electing to Exercise Sua Sponte Review and Penalty Order.


8. Under 40 C.F.R. § 20.16(b), Respondents have ten (10) days from the date of filing of Complainant's Response to their Motion to file a Reply. The ten (10) day period expires on the date even with the filing hereof. However, due to dismissal of the case for lack of jurisdiction, Respondents are unable to file such Reply within the mandated period. Respondents remain ready, willing and able to file their Reply upon order of the EAB.

For these reasons, Respondents request that the EAB reconsider the issuance of its Order Electing to Exercise Sua Sponte Review and Penalty Order and/or stay the effective date of such

Order until a date subsequent to the ALJ's ruling on Respondents' Motion to Set Aside Default Order and Initial Decision.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

By: 
Michael F. Iasparro

Michael F. Iasparro
Hinshaw & Culbertson LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
815-490-4900

AFFIDAVIT OF SERVICE

The undersigned certifies that on November 7, 2011, a copy of the attached *Motion to Reconsider Order Electing to Exercise Sua Sponte Review and Penalty Order* 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

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.



HINSHAW & CULBERTSON LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
(815) 490-4900
Fax: (815) 490-4901