BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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 GRANTING MOTION TO RECONSIDER ORDER ELECTING TO EXERCISE SUA SPONTE REVIEW AND PENALTY ORDER, AND ORDER VACATING ORDER EXERCISING 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 found 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 assessed an administrative penalty of $75,000 for multiple violations of a National Pollutant Discharge Elimination System permit issued to ABL under Clean Water Act section 402, 33 U.S.C. § 1342.

On October 11, 2011, ABL filed with the U.S. Environmental Protection Agency,

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

Region 5 ("Region") Regional Hearing Clerk a motion to set aside the Default Order. However, the Environmental Appeals Board ("Board" or "EAB") did not receive notice that a motion to set aside had been filed, and on October 27, 2011, the Board elected to review the matter pursuant to its sua sponte authority under 40 C.F.R. § 22.30(b). The Board issued a final order in this matter, the Order Electing to Exercise Sua Sponte Review and Penalty Order ("Sua Sponte Review Order"). As a result of the Board's order, on November 2, 2011, ALJ Gunning dismissed ABL's motion to set aside due to lack of jurisdiction.

By motion filed with the EAB on November 9, 2011, ABL requested the Board reconsider the Sua Sponte Review Order, and/or stay the effective date of the order until a date subsequent to a ruling on ABL's Motion to Set Aside Default Order and Initial Decision ("Motion to Set Aside") by the ALJ. ABL further noted that the Region had filed a response to the Motion to Set Aside[2] and that ABL "remain[s] ready, willing and able to file [its] Reply upon order of the EAB." Motion to Reconsider at 2.

By filing dated November 16, 2011, the Region responded to ABL's motion to reconsider. In particular, the Region argued that ABL's motion was untimely because it was filed more than ten days after the Board served its Sua Sponte Review Order. Response to Motion to Reconsider at 2.

40 C.F.R. § 22.32 provides that a motion to reconsider a final order must be filed within

[2] The Board had also not received notice that the Region had filed a response.

ten days after service of the final order, and section 22.7 adds that "[w]here a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document." 40 C.F.R. § 22.7(c). In this case, the Default Order was served by first class U.S. mail. Accordingly, the filing deadline for a motion to reconsider the Default Order was no later than fifteen days after the October 27, 2011 service of the Sua Sponte Review Order, November 11, 2011, a federal holiday. "When a stated time expires on a Saturday, Sunday or Federal holiday, the stated time period shall be extended to include the next business day." *Id.* § 22.7(a). Thus, the deadline for filing a motion to reconsider the Sua Sponte Review Order was November 14, 2011, rendering ABL's November 9, 2011 motion to reconsider timely.

Motions for reconsideration of final orders, such as the Sua Sponte Review Order in this case, must "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R § 22.32. Reconsideration is generally reserved for cases in which the Board has made a demonstrable error, such as a mistake of law or fact. *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, at 2 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration); *see also in re Pepperell Assocs.*, CWA Appeal Nos. 99-1 & 99-2 (EAB June 28, 2000) (Order Denying Reconsideration) (denying reconsideration in a Clean Water Act penalty case based on respondent's failure to identify a demonstrable error of fact or law). Federal courts employ a similar standard. *See, e.g., Ahmed v. Ashcroft*, 388 F.3d 247, 249 (7th Cir. 2004) (noting that the rule governing motions for reconsideration, applies generally, and that "[t]o be within a mile of being granted, a motion for reconsideration has to give the tribunal

to which it is addressed a reason for changing its mind," such as "a change of law" or "perhaps an argument or aspect of the case [that] was overlooked") (quoting *In re Cerna*, 20 I&N Dec. 299, 402 n.2 (BIA 1991); *Publishers Res., Inc. v. Walker-Davis Publ'ns, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for Reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.") (quoting *Keene Corp. v. Int'l Fidelity Ins. Co.*, 561 F. Supp. 656, 665-66 (N.D. Ill. 1982), *aff'd*, 736 F.2d 388 (7th Cir. 1984)); *see also Arcega v. Mukasey*, 302 Fed. Appx. 182, 185 (4th Cir. 2008) (quoting *Ahmed v. Ashcroft* and upholding the Board of Immigration Appeals' denial of a motion for reconsideration because the petitioner failed to show how the Board erred as a matter of law or fact in reaching its decision).

In this case, the Board had not received notice that the motion to set aside the Default Order was filed, as it should have,[3] and the Board consequently issued an order that constituted a final order while the Motion to Set Aside was pending before the ALJ. Under the Part 22 rules that govern this proceeding, "[t]he final decision of the 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 [] or * * * [t]he Environmental Appeals Board elects to review the initial decision on its own initiative. 40 C.F.R. § 22.27(c). Although Part 22 is silent as to the consequences of both a party moving to set aside such a default order and the Board electing to review the initial decision sua sponte

[3] Regional Hearing Clerks are reminded to immediately notify the Board of any motions filed after the initial decision has been issued – such as a motion to set aside a default order that constitutes an initial decision or a motion to reopen a hearing – that may bear on the Board's jurisdiction or the timing relative to the Board's decision to review an initial decision on a sua sponte basis.

within the forty-five day period, the rules grant the Board the discretion to resolve such procedural gaps. 40 C.F.R. § 22.1(c); *see also id.* § 22.4(a)(2).

Section 22.28(b), which provides that the filing of a motion to reopen a hearing expressly stays the deadlines for appeal or Board review of the initial decision on a sua sponte basis, is instructive in determining the procedural effect of the filing of a motion to set aside a default order that constitutes an initial decision. As with the filing of a motion to set aside a default order, an appeal of the initial decision, or the Board's election to review an initial decision sua sponte, the filing of a motion to reopen a hearing prevents an initial decision from automatically becoming a final order after forty-five days. 40 C.F.R. § 22.27(c). Although section 22.27(c) does not specify the effect a filed motion to set aside a default order has on the appeal or sua sponte review deadlines, the Board believes that it is similar to the effect of a filed motion to reopen a hearing in section 22.28(b): stayed deadlines for appeal or for Board election to review the initial decision. Accordingly, the Board construes section 22.27(c) to mean that a timely-filed motion to set aside a default order that constitutes an initial decision results in the matter remaining within the Presiding Officer's, here the ALJ's, purview while the motion to set aside is pending.

In this case, unbeknown to the Board, at the time it issued the Sua Sponte Review Order, jurisdiction still rested with the ALJ. Under these circumstances, the Board grants ABL's motion to reconsider. Additionally, the Board vacates its Order Electing to Exercise Sua Sponte Review and Penalty Order. Finally, the Board observes that the ALJ's Order Dismissing Motion to Set

Aside Default Order and Initial Decision is based on the now vacated Order Electing to Exercise Sua Sponte Review and Penalty Order. In light of the instant Board order, proceedings before the ALJ are reinstated, and the ALJ should take such further action as she deems necessary and appropriate.

So ordered.

Dated: 12/5/11

ENVIRONMENTAL APPEALS BOARD[4]

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

[4] 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 Granting Motion to Reconsider Order Electing to Exercise Sua Sponte Review and Penalty Order, and Order Vacating Order Exercising Sua Sponte Review 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:

By Facsimile & First Class U.S. Mail:

Michael F. Iasparro
Hinshaw & Culbertson, LLP
100 Park Avenue
P.O. Box 1389
Rockford, IL 61105-1389
facsimile: 815 490-4901

By Facsimile & EPA Pouch Mail:

Luis Oviedo
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Boulevard, C-14J
Chicago, IL 60604-3590
facsimile: 312-886-7160

La Dawn White
Regional Hearing Clerk
U.S. EPA Region 5
77 West Jackson Boulevard, E-19J
Chicago, IL 60604-3590
facsimile: 312-886-0747

By Facsimile & EPA Interoffice Mail:
Judge Barbara A. Gunning
Office of Administrative Law Judges
U.S. EPA
1200 Pennsylvania Avenue, MC 1900L
Washington, DC 20460
facsimile: 202-565-0044

Date: DEC - 5 2011

Annette Duncan
Secretary