



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MR. ALLEN BARRY,) DOCKET NO. CWA-05-2010-0008
MR. TIM BARRY)
d/b/a ALLEN BARRY LIVESTOCK,)
)
RESPONDENTS)

ORDER ON JOINT ANSWER TO ORDER TO SHOW CAUSE

As you previously have been notified, I have been designated by the November 5, 2010, Order of the Chief Administrative Law Judge to preside in the above captioned matter. This proceeding arises under the authority of Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), and is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

A Prehearing Order ("PHO") was issued on March 30, 2011, setting forth a schedule for the parties' information exchange ("PHE") with which the parties were instructed to comply strictly. Respondents' PHE was due on or before June 10, 2011. Respondents did not timely file their PHE in accordance with the PHO. On June 30, 2011, in response to inquiries from this office, the undersigned received a captioned letter ("Letter") from Respondent's current counsel-of-record, Mr. James E. Meason ("Attorney Meason"), stating that he had been called up for active duty in the U.S. Navy and was attending initial training out of state.

On July 6, 2011, citing the failure to comply with the March PHO, the undersigned ordered the Respondents to show cause why

they failed to meet the filing deadline set by the PHO.¹ Respondents were also reminded that any substitute counsel must file a Notice of Appearance with this Tribunal in the event that Attorney Meason was deployed.²

On July 19, 2011, the undersigned received Respondents' Joint Answer to Order to Show Cause ("Joint Answer" or "Jt. Ans."). In the Joint Answer, Attorney Meason states that he was placed on active military duty on June 17, 2011, with an "estimated detachment date [of] May 21, 2012." Jt. Ans. at 1. Counsel also asserts that "[t]he Servicemembers' Civil Relief Act (SCRA) (50 U.S.C. [sic] 501-596) protects soldiers, sailors, airmen, Marines, Coastguardsmen, and commissioned officers in the Public Health Service and National Oceanic and Atmospheric Administration, from civil proceedings while in active military service for up to a year after leaving active duty." Jt. Ans. at 1. Counsel goes on to argue that "Respondents' failure to meet

¹ This is not the first Order to Show Cause issued to Respondents in this matter. In an order entered November 30, 2010, the Respondents were requested to clarify whether a hearing before an Administrative Law Judge was requested, and the parties were directed to conduct a settlement conference. The undersigned issued an Order to Show Cause ("OTSC") to Respondents on January 31, 2011, when Respondents failed to file a clarification as directed and Complainant related that a settlement conference had not been held because counsel for Respondents had failed to respond to Complainant's telephone calls and correspondence. Respondents were advised that failure to comply could lead to a default order.

On February 22, 2011, the undersigned received a response to the January OTSC in which Attorney Meason states that he was "placed on alert status" with the Navy and "received involuntary mobilization to active duty orders on December 6, 2010." Defs. Resp. to OTSC at 1. Attorney Meason also stated that "Defendants were not in any way responsible for this case not moving forward" and requested "a new expedited status/settlement conference schedule." *Id.* That new expedited schedule (the PHO) is the subject of the most recent OTSC, issued July 6, 2011.

² On March 3, 2011, Attorney Meason spoke to the undersigned's staff attorney and confirmed at that time that new counsel would be substituted if Attorney Meason were deployed to Iraq.

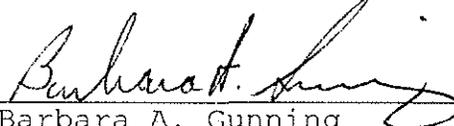
the filing deadline is at least in part related to Commander Meason's mobilization, and as such is protected by the SCRA, [therefore] this jurisdiction cannot proceed with a Rule to Show Cause [sic]. In fact, the Rule to Show Cause must be vacated." Jt. Ans. at 2.³

The undersigned maintains the utmost respect for the national service rendered by members of the Armed Forces and acknowledges the need for appropriate uses of the SCRA. However, Counsel for Respondents cites no authority for the proposition that the SCRA applies to proceedings where no party to the action is an active duty servicemember or an otherwise qualifying individual. Indeed, the SCRA on its face is generally intended to protect deployed servicemembers from the continuation of civil proceedings against them during their tour of duty. See, e.g., *McGhee v. Freund*, 2009 WL 2251289 (E.D. Wis. 2009). The Act makes no provision for servicemembers acting as attorneys or representatives in matters involving their clients. Rather, only servicemembers on active duty who are parties to a civil action are entitled to the stay of proceedings contemplated in the SCRA. See *Phillips v. Superior Court*, 2010 WL 2781549 (Cal. App. 4th Dist. 2010). By contrast, attorneys who are placed on active duty are traditionally bound by their state bar's ethical rules to prepare for incapacitation or absence, particularly if the servicemember-attorney is a solo practitioner. See, e.g., Rule 1.3 (Cmt. 5) ABA Model Rules of Professional Conduct (2004) (adopted by Illinois on January 1, 2010).

Regardless of the applicability of the SCRA, the relevant failure to comply with the PHO occurred on June 10, 2011, before the date Attorney Meason states that he was placed on active duty, and well before the anticipated detachment date of May 2012. Based on the record before me, I cannot conclude that pending training for subsequent deployment justifies a precedent failure to abide by an existing order of this tribunal. Nonetheless, in fairness to the Respondents, and in view of the fact that default is a harsh remedy, Respondents are granted three (3) weeks to comply with the requirements of the PHO. On or before August 12, 2011, Respondents shall file either their PHE or the signature page of a final CAFO containing Respondents'

³ The Joint Answer also states that Attorney Meason will depart for training in North Carolina on July 24, 2011, and that if no settlement has been reached by that time, Attorney David Smith will file an appearance in this matter. Jt. Ans. at 2.

signatures. The Respondents are again advised that any substitute counsel must file a Notice of Appearance with this Tribunal.


Barbara A. Gunning
Administrative Law Judge

Dated: July 21, 2011
Washington, D.C.

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

CORRECTED CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Joint Answer to Order to Show Cause**, dated July 21, 2011, was sent this day in the following manner to the addressees listed below.



Mary Angeles
Legal Staff Assistant

Original and One Copy by Facsimile and Pouch Mail to:

La Dawn Whitehead
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Fx: 312.886.0747

Copy by Facsimile and Pouch Mail to:

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**Dated: July 21, 2011
Washington, DC**