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 DENYING MOTION TO SET ASIDE DEFAULT ORDER AND INITIAL DECISION

Respondents Mr. Allen Barry and Mr. Tim Barry, d/b/a Allen Barry Livestock (collectively "Respondents") move to set aside the Default Order and Initial Decision issued on September 9, 2011. The undersigned finds that Respondents have failed to show that there is good cause to set aside the entry of default, and their motion is denied.

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" or "Rules"), 40 C.F.R. §§ 22.1 through 22.32.

The United States Environmental Protection Agency ("EPA" or "Complainant") initiated this proceeding by filing an Administrative Complaint ("Complaint") against Respondents with the Regional Hearing Clerk on March 17, 2010. The Complaint alleges multiple violations of Respondents' National Pollutant Discharge Elimination System ("NPDES") permit issued under Section 402 of the CWA, 33 U.S.C. § 1342, and proposes a civil administrative penalty of $75,000.00. Respondents were served with the Complaint on August 14, 2010.

On September 9, 2011, I issued a Default Order and Initial Decision. *Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock*, EPA Docket No. CWA-05-2010-0008, 2011 EPA ALJ LEXIS 17 (ALJ, Sept. 9, 2011) (hereinafter "Default Order"). Both

Respondents were found to be in default because each Respondent had "failed to submit a prehearing exchange or statement" in lieu of a prehearing exchange, "a motion to enlarge the applicable deadlines, or a signed consent agreement and final order, as required by multiple Orders of this Tribunal." Default Order at 1. The Default Order discussed the procedural history of this matter and the reasons for finding Respondents to be in default. Default Order at 1-6. That discussion is incorporated herein by reference.

On October 11, 2011, Respondents filed an Entry of Appearance of new counsel, together with a "Motion to Set Aside Default Order and Initial Decision" ("Motion").[1] Complainant filed and served a Response to the Motion ("Response") on October 25, 2011. On October 27, 2011, the Environmental Appeals Board ("EAB") issued an "Order Electing to Exercise Sua Sponte Review and Penalty Order," ("Final Order") pursuant to 40 C.F.R. § 22.30(b). *Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock*, CWA Appeal No. 11-07, slip op. (EAB, Oct. 27, 2011). In its Final Order, the EAB upheld the determination that Respondents were in default, and clarified that the penalty in this matter should have been calculated in accordance with 40 C.F.R. Part 19, as amended by the 2008 Civil Monetary Penalty Inflation Adjustment Rule, 73 Fed. Reg. 75,340 (Dec. 11, 2008). *Id.* at 1, 3. As a result of the EAB's order, on November 2, 2011, the undersigned dismissed Respondents' Motion due to lack of jurisdiction.

On November 9, 2011, Respondents requested that the EAB reconsider its Final Order so that they could obtain a ruling on their pending Motion. On December 5, 2011, the EAB issued an order granting Respondents' request ("Reconsideration Order"). *Mr. Allen Barry, Mr. Tim Barry d/b/a Allen Barry Livestock*, CWA Appeal No. 11-07, 2011 EPA App. LEXIS 40 (EAB, Dec. 5, 2011) (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 its Reconsideration Order, the EAB stated that it had not received notice that Respondents had filed their Motion, or that Complainant had filed its Response. *Id.* at 2, 4-5. The EAB

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[1] The "Affidavit of Service" attached to the Motion indicates that Respondents only served the Motion on counsel for Complainant, and did not serve the Motion on either the Regional Hearing Clerk or the Office of Administrative Law Judges ("OALJ"). The OALJ did not receive a copy of the Motion until October 24, 2011.

vacated both its Final Order of October 27, 2011, and this Tribunal's order dismissing Respondents' Motion due to lack of jurisdiction, dated November 2, 2011. *Id.* at 5-6. The EAB then reinstated these proceedings, and directed that this Tribunal should take further action as necessary and appropriate.[2] *Id.* at 6.

"A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing." 40 C.F.R. § 22.17(a). When a default occurs, the Presiding Officer "shall issue a default order against the defaulting party . . . unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c). Following entry of default, the Presiding Officer may set the default aside upon a showing of good cause. 40 C.F.R. § 22.17(c); *see* 40 C.F.R. § 22.27(c)(3). "Thus, the issue of 'good cause' informs both the inquiry whether a default order should be entered in the first place and, whether once entered, a default order should be set aside." *JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005).

Setting aside an entry of default "is essentially a form of equitable relief," and the undersigned must consider the "totality of the circumstances" when determining if there is good cause to do so. *Rybond, Inc.*, 6 E.A.D. 614, 624 (EAB 1996) (quoting *Midwest Bank & Trust Co., Inc.*, 3 E.A.D. 696, 699 (CJO 1991)) (quotation marks omitted); *see JHNY, Inc.*, 12 E.A.D. at 384. Factors traditionally considered under the "totality of the circumstances" include whether a procedural requirement was violated, whether the "violation is proper grounds for a default order, and whether there is a valid excuse or justification for not complying with the procedural requirement." *JHNY, Inc.*, 12 E.A.D. at 384. The undersigned may also consider "whether the

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[2] Where a nonmoving party files a response to a motion, the moving party has ten days from the date the response is served in which to file a reply to that response. 40 C.F.R. § 22.16(b). Five days are added to this time period when the response "is served by first class mail or commercial delivery service, but not by overnight or same-day delivery . . . ." 40 C.F.R. § 22.7(c). Fifty-six days have passed since Complainant mailed its Response to Respondents by certified mail, and fifteen days have passed since the EAB served its Reconsideration Order. To date, Respondents have not filed a reply to Complainant's Response. Any future reply would be deemed untimely.

defaulting party would likely succeed on the substantive merits if a hearing were held." *JHNY, Inc.*, 12 E.A.D. at 384. The burden is on the defaulting party "to demonstrate that there is more than the mere possibility of a defense, but rather a 'strong probability' that litigating the defense will produce a favorable outcome." *Pyramid Chem. Co.*, 11 E.A.D. 657, 662 (EAB 2004). This inquiry includes an examination of "whether the penalty assessed in the default order is a reasonable one." *JHNY, Inc.*, 12 E.A.D. at 384.

In their Motion, Respondents argue that there are several grounds for setting aside the Default Order. Almost none of these grounds are new, and most either were addressed in the Default Order, or could have been raised much earlier in this proceeding. Respondents first argue that they have now retained counsel "with relevant experience to litigate this matter in a timely fashion." Motion ¶ 4. Second, Respondents argue that their prior attorney's military duties "should not be held against Respondents." Motion ¶ 5. Third, Respondents claim that they "have meritorious arguments in mitigation of the penalty imposed . . . ." Respondents claim that the they have complied with EPA's suggested remedial measures. Motion ¶ 6. Respondents also claim "they derived little or no economic benefit from the alleged violations and that the gravity of the violations does not warrant" the penalty imposed. Motion ¶ 4. Finally, Respondents claim they can successfully argue that they will be unable to pay the penalty. Motion ¶¶ 4, 7-8.

To support their claim that they are unable to pay, Respondents state that "Respondent Allen Barry pledged his undivided half interest of the only remaining property dually owned by Respondents . . . to help secure his son's loans," but that the property was sold in February of 2010 to pay Respondent Tim Barry's debts. Motion ¶ 8(a). Respondents state that Respondent Tim Barry, a.k.a. Barry Livestock, filed for bankruptcy in January 11, 2011, during these proceedings, and that his bankruptcy was discharged on April 19, 2011.[3] Motion ¶ 8(b). Lastly, Respondents state that their business has "suffered substantial losses in recent years," and state that "[s]chedules showing the same will be made available for the Tribunal's in camera inspection upon request." Motion ¶ 8(c).

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[3] In the Motion, Respondents state that a docket sheet from Respondent Tim Barry's bankruptcy case is attached to the Motion as Exhibit A. Motion ¶ 8(b). No exhibits are attached to the copy of the Motion provided to the OALJ.

Complainant argues in its Response that Respondents have failed to show good cause under the totality of the circumstances for setting aside the Default Order. First, Complainant argues that the military obligations of Respondents' prior counsel are not the sort of circumstances that may excuse Respondents' noncompliance with the procedural requirements of this proceeding. Response at 5 (citing *B&L Plating*, 11 E.A.D. 183, 191 n.15 (EAB 2003)). Complainant argues that "[i]t is undisputed that Respondents received copies of the orders in this case," and as such they bear "responsibility to recognize the failure of counsel . . . and to take appropriate timely action." Response at 5. Second, Complainant states that Respondents' new counsel is in fact "the third attorney in a series that began work for Respondents on this case over four years ago." Response at 6. Complainant argues that "[n]o one in this successive and sometimes overlapping line of lawyers has been able to obtain any cooperation from Respondents," and that Respondents' new counsel has not provided any reason to believe that he will be more successful than his predecessors. Response at 6.

Third, Complainant contends that Respondents have not offered any new arguments to either excuse their previous noncompliance, or demonstrate a viable defense to the claim. Response at 6. Finally, Complainant notes that Respondents have not offered any "substantiation for any new facts that are tantamount to good cause." Response at 6. Complainant argues that most of the alleged facts recounted in Respondents' Motion are simply "conclusory remarks" that allude to evidence Respondents should have produced months ago in response to EPA's Administrative Order and several orders of this Tribunal. Response at 7. Complainant states that Respondents did not include any documents or other evidence with their Motion, including the bankruptcy docket sheet referred to as "Attachment A" in paragraph 8(b) of the Motion.[4] Response at 7. Complainant argues that Respondents' failure to provide the evidence alluded to in the Motion, or to cite any legal authority in the Motion, violates 40 C.F.R. § 20.16(a), which requires that all written motions "[b]e accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon." Motion at 7 (quoting

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[4] Complainant also notes that Respondent Tim Barry allegedly filed for bankruptcy on January 11, 2011, approximately ten months after the Complaint was filed in this matter on March 17, 2010. Response at 7. Complainant describes Respondents' failure to serve Complainant or the undersigned with proper notice of the pending bankruptcy as "surreptitious[]." Response at 7.

40 C.F.R. § 20.16(b)(4)).

Respondents do not dispute that they violated the procedural requirements of this proceeding. As recounted in the Default Order, Respondents failed to file a statement clarifying whether they were requesting a hearing or engage in good-faith settlement discussions within the time provided by this Tribunal's order of November 30, 2010. Respondents failed to provide the prehearing exchange of information required by 40 C.F.R. § 22.19(a) within the time allotted by this Tribunal's Prehearing Order, dated March 30, 2011. The deadline for filing the prehearing information exchange was extended by order dated July 21, 2011, and Respondents again failed to file the prehearing information exchange in a timely fashion. Respondents have never filed a proper or timely motion requesting that a deadline be extended. Respondents still have not filed any documents that could satisfy the prehearing information exchange requirements of 40 C.F.R. § 22.19(a) or this Tribunal's Prehearing Order.

These procedural violations are proper grounds for default. Section 22.17(a) of the Rules of Practice expressly states that "[a] party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing." 40 C.F.R. § 22.17(a); *see B&L Plating*, 11 E.A.D. at 192 (default appropriate consequence for failure to make prehearing exchange as directed by the ALJ's order).

In the Default Order, the undersigned found that the record disclosed no valid excuse for Respondents' noncompliance with the procedural requirements of this proceeding. Default Order at 5-6. Respondents have not attempted to articulate any new excuse for their procedural violations. Notably, Respondents have still not attempted to comply with the prehearing information exchange requirements, despite the alleged availability of documentary evidence that would support their defense. The undersigned concludes that there is no valid excuse for Respondents' past and continuing procedural violations. *See Pyramid Chem. Co.*, 11 E.A.D. at 661 ("[A] significant factor is . . . whether the purported defaulting party has any valid excuse for the procedural violation.").

The undersigned also concludes that Respondents have not demonstrated a "strong probability" that a hearing would yield an outcome in their favor. *Id.* at 662. Although Respondents state in their Motion that "[t]he only issue remaining . . . is the amount of any penalty to be imposed against Respondents," they

have not expressly conceded liability. Motion ¶ 6. I note, however, that Respondents have not proffered any arguments or materials with their Motion to support their denial of liability.

Respondents do claim that they would be able to succeed in reducing the penalty, in large part through a claim of inability to pay. Motion at ¶¶ 4, 7-8. While Respondents have retained new counsel, they have offered little else to support their claim. The "[e]xamples of facts" offered in support of their defense are conclusory assertions. Motion ¶ 8. Respondents claim they have actual evidence to prove these alleged facts, but they have not produced any documents, affidavits, or other items of evidence that, if admitted and credited, might warrant a favorable outcome. Furthermore, as noted by Complainant, such evidence should have been produced months ago as ordered by this Tribunal.

Given Respondents' continuing failure to produce any evidence or other material that could satisfy the prehearing information exchange requirements, the undersigned finds that Respondents have not demonstrated that they "would likely succeed on the substantive merits if a hearing were held." *JHNY, Inc.*, 12 E.A.D. at 384. For the same reason, the undersigned cannot say that the penalty assessed in the Default Order was not reasonable. *See* Default Order at 7-8.

ORDER

After considering the totality of the circumstances presented, Respondents' Motion does not appear to break from the pattern of delay noted in the Default Order. *See* Default Order at 6. I find that Respondents have not shown good cause as to why the Default Order should be set aside. Accordingly, Respondents' Motion to Set Aside Default Order and Initial Decision is **Denied**.

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Barbara A. Gunning
Administrative Law Judge

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