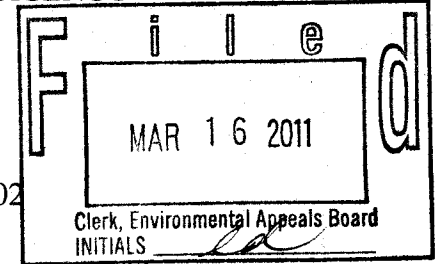


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Smith Farm Enterprises, LLC)

Docket No. CWA-03-2001-0022)
_____)

) CWA Appeal No. 08-02

ORDER GRANTING PARTIAL RECONSIDERATION

I. Introduction

On September 30, 2010, the Board issued a Final Decision and Order in the above-captioned matter (“the Board’s Final Decision”), in which it affirmed the March 7, 2008, Decision on Remand of Administrative Law Judge William B. Moran (“Remand Decision”). In footnote three of its decision, the Board noted that it considered abandoned all of the issues that Smith Farm had raised and briefed in its pre-remand appeal, but that Smith Farm did not re-raise in this appeal (“Other Issues”). *See* Board’s Final Decision and Order (Sept. 30, 2010) at note 3. As such, the Board did not consider or decide any of these Other Issues.

On October 13, 2010, Smith Farm timely filed a Motion for Partial Reconsideration of the Board’s Final Decision, citing as error the Board’s decision to consider Smith Farm’s “Other Issues” as abandoned, or waived. Simultaneously, Smith Farm sought to stay the effective date of the Board’s Final Decision, pending the Board’s ruling on Smith Farm’s Motion for Partial

Reconsideration.¹ The Board granted the stay motion on October 18, 2010, and stayed the effective date of the Board's Final Decision pending a decision on the Motion for Partial Reconsideration.

In its Motion for Partial Reconsideration, Smith Farm relied heavily on its assertion that it could not have raised the Other Issues in this appeal because ALJ Moran "made no mention" of the Other Issues in his Remand Decision. *See* Memo. in Support of Motion for Partial Reconsideration at 4, 5, 7, 9; *see also* Memorandum in Support of Alternative Motion to Remand at 1 (October 13, 2010) (seeking, as an alternative to its motion for reconsideration, a remand of the matter to ALJ Moran for additional rulings regarding the "Other Issues" so that Smith Farm could "retain its appeal rights"). That assertion is factually incorrect and, on October 26, 2010, Smith Farm filed a Motion for Leave to Correct its position that ALJ Moran had "made no mention" of the Other Issues.

On November 3, 2010, Complainant, EPA Region 3 ("the Region") filed responses to both Smith Farm's Motion for Partial Reconsideration and Smith Farm's Motion for Leave to Correct, opposing any reconsideration of the Board's Final Decision. Smith Farm filed replies to these responses on November 12, 2010. Among other things, Smith Farm cites the Joint Status

¹ As an alternative to its Motion for Partial Reconsideration, Smith Farm simultaneously filed an alternative Motion for Remand (and accompanying stay). *See* Motion for Remand and Memo. in Support of Alternative Motion to Remand and to Stay Final Order (Oct. 13, 2010). The Region responded to the alternative motion on November 3, 2010, and Smith Farm filed a reply on November 12, 2010. For the reasons articulated in this Order, the Board is granting Smith Farm's Motion for Partial Reconsideration. Thus, the Board does not consider or address Smith Farm's alternative Motion for Remand.

Report (filed in this appeal while the matter was stayed pending settlement negotiations) as evidence that it has “always believed” that the Other Issues remained pending before the Board. See Joint Status Report (Docket #12) (Feb. 5, 2010) (indicating, prior to filing the appeal brief in which all issues are required to be identified, both parties’ belief that “all issues that previously were before the Board as part of a closed docket CWA 05-05 remain before the Board”). Finally, on November 19, 2010, the Region sought leave to file a Sur-Reply, in which it states, essentially, that Smiths Farm’s position, in conjunction with the joint status report, “while not correct,” was also “not unreasonable,” and that the Region “would not file any further motions objecting to [the Board’s determination that it would be appropriate to consider and decide the Other Issues].” Complainant’s Sur-Reply Brief in Response to Respondent’s Motion for Partial Reconsideration at 3 (Nov. 19, 2010).

For the reasons articulated below, the Board is exercising its discretion to consider the Other Issues, notwithstanding the fact that Smith Farm waived them in this appeal and, thus, grants the partial motion for consideration.

II. *STANDARD FOR REVIEW OF MOTIONS FOR RECONSIDERATION*

Motions for reconsideration of final orders, such as the Final Decision and Order in this case, must “set forth the matters claimed to have been erroneously decided and the nature of the alleged errors.” See 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 CWA 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., 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. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [original] motion. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.") (citation omitted); *Ahmed v. Ashcroft*, 388 F.3d 247 (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 address a reason for changing its mind," such as "a change of law" or "perhaps an argument or aspect of the case [that] was overlooked"); *see also Arcega v. Mukasey*, 302 Fed. Appx. 182 (4th Cir. 2008) (quoting *Ahmed v. Ashcroft* and upholding the Board of Immigration Appeal's 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).

III. ISSUE FOR RECONSIDERATION

As explained above, the only issue for which Smith Farm seeks reconsideration is the Board's determination in footnote 3 of the Board's Final Decision that Smith Farm had abandoned the Other Issues raised in the initial appeal, prior to remand. To fully understand this issue, a brief synopsis of the procedural history of this case is warranted.

This matter involves Clean Water Act (CWA) violations relating to wetlands at Smith Farm that occurred in 1998, more than a decade ago. These violations resulted in two complete administrative hearings before Administrative Law Judge Carl C. Charneski; the second hearing was necessitated by the failure of the court reporter to produce a transcript of the first hearing. ALJ Charneski issued an Initial Decision in 2005 that Smith Farm appealed to the Board (CWA Appeal No. 05-05), raising six issues, one of which concerned the EPA's jurisdiction over the wetlands.² The matter was fully briefed, argued, and pending before the Board when the Supreme Court of the United States decided *Rapanos v. U.S.*, 547 U.S. 715 (2006), which resulted in a plurality decision articulating two new and distinct tests for determining CWA jurisdiction over wetlands. After a hearing, the Board determined that remand of this *matter* to an ALJ was appropriate, to take further evidence on the issue of jurisdiction, consistent with the Supreme Court's *Rapanos* decision. In the Remand Order, the Board stated:

² The six issues Smith Farm identified in its appeal from the Initial Decision were as follows: (1) the ALJ erred in concluding that Smith Farm "filled" the wetlands with woodchips and, in so doing, violated CWA section 404, when he found that Smith Farm's purpose in spreading the wood chips was only to dispose of waste; (2) the ALJ erred in concluding that fill was placed in wetlands based on the finding that "substantial" amounts of woodchips were present throughout the site; (3) the ALJ erred in finding CWA Section 402 liability because the violation was based on a point source (ditches) not identified in the Amended Complaint; (4) the ALJ erred in assessing a penalty just below the maximum that could be assessed based on a finding that the Respondent was highly negligent when the Respondent lacked culpability and the EPA failed to establish any resultant financial harm; (5) the ALJ erred in denying Respondent's motion to dismiss the case after the trial transcript from the first proceeding could not be produced because the EPA hired an incompetent court reporter; and (6) the ALJ erred in finding CWA jurisdiction (this final jurisdictional issue was identified only, and not briefed, to preserve the issue in anticipation of a possible intervening change in law). The latter two issues are not part of the "Other Issues" that Smith Farm seeks to have decided because the jurisdictional issue was the purpose of the remand and has been appealed and decided by the Board, and the issue related to the incompetent court reporter was resolved by stipulation. *See* Respondent's Reply to EPA's Response to Respondent's Motion for Partial Reconsideration and to Stay Final Order at 10 (Nov. 12, 2010).

[T]he Board hereby remands the above *matter* to the ALJ to take additional evidence, conduct further proceedings as necessary, and to rule on the CWA jurisdictional question * * *. The ALJ shall thereafter render a *new initial decision*, which shall have the effect described in 40 C.F.R. § 22.27. Either party may appeal from the new initial decision as prescribed in 40 C.F.R. § 22.30.^[fn7]

[FN7] All documents filed in the current appeal to the Board will be deemed part of the record of any new appeal. Consistent with the scope of this remand, a new appeal may not raise any *new* issues except as they relate directly to the issue of jurisdiction.

In re Smith Farm, CWA 05-05 at 5 & n.7 (Oct. 6, 2006) (Remand Order) (Emphases added).

On remand, ALJ Moran was assigned to the matter, conducted a hearing, and issued a new initial decision – the Remand Decision. In the current matter, CWA Appeal No. 08-02, Smith Farm appeals the Remand Decision to the Board. It is undisputed that Smith Farm’s Appeal Brief in this second appeal raises only the jurisdictional issue. In the Board’s Final Decision, as explained above, the Board stated that it considered all of the other issues Smith Farm had previously raised in its appeal prior to the remand, but not re-raised in this appeal, to be abandoned. It is that determination that Smith Farm now seeks to have reconsidered. Smith Farm asserts that it did not intend to waive any of the previously raised issues and that they remained pending before the Board. Smith Farm asserts also that, even if the issues were unintentionally abandoned or waived by Smith Farm’s failure to re-appeal them, the Board can and should consider these issues pursuant to its authority under 40 C.F.R. § 22.30(c), which authorizes the Board to review issues not appealed by the parties. Thus, the questions the Board must resolve are:

Does Smith Farm meet its burden to show that the Board's determination that Smith Farm waived the "Other Issues" constituted demonstrable error?

And, if not, should the Board nevertheless, given the circumstances of this case, exercise its discretion and decide the Other Issues?

IV. ANALYSIS

A. *Smith Farm Fails to Establish Demonstrable Board Error*

It is black letter law that issues not raised on appeal are waived. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Las Vegas Professional Football Ltd. Partnership*, No. 10-414-cv, slip op. at (2d Cir. 2010) (unreported) ("It is black letter law that a motion for reconsideration may not be used to advance new * * * issues or arguments not previously presented to the Court;") (citation omitted); *see also, In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 438 (EAB 2007) (issues not raised in first petition for review were "effectively abandoned" and could not be raised in second petition); *In re Woodcrest Mtg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998) (holding that issues not raised below are not available on appeal); *In re Lyon Cnty. Landfill*, 10 E.A.D. 416, 431 (EAB 2002), *aff'd*, No. Civ-02-907, 2004 WL 1278523 (D. Minn. June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005) (noting that generally issues that are untimely presented are waived); *see also* 40 C.F.R. § 22.30(a)(1) (requiring contents of notices of appeal and brief to include a statement of the issues presented fore review).

Smith Farm does not contend the Other Issues were raised in this appeal. Rather, Smith Farm contends that: (1) the issues remained pending before the Board while only the jurisdictional determination was remanded; or (2) it could not have appealed (some of) the

issues, because they were not incorporated into ALJ Moran's decision. We address each of these in turn.

A quick review of the Board's Remand Order reveals that the entire *matter* was remanded to the ALJ, and no issues "remained pending" before the Board. In the Remand Order, after finding it appropriate to remand this "matter" to the ALJ, the Board instructed that, after hearing evidence on the jurisdictional question, the ALJ should "render a new initial decision," from which either party could appeal. *See* Remand Order at 5. As discussed below, ALJ Moran did, in fact, render a new initial decision and assessed a civil penalty for the violation. *See* Remand Decision at 59. Notwithstanding Smith Farm's mistaken perception that only the issue of jurisdiction was remanded or that the Board's Remand Order prohibited the Other Issues from being raised because they were not related to jurisdiction, the Board in no way limited Smith Farm's ability to raise *previously raised* issues. The only limitations on any such appeal were that "no *new* issues could be raised, except as they related directly to the issue of jurisdiction." *Id.* note 7. The entire matter was remanded, and the appeal (Appeal No. 05-05) was closed. Contrary to Smith Farm's assertion, no issues "remained pending" before the Board.

Smith Farm next asserts that it could not have raised the Other Issues in this appeal because ALJ Moran did not incorporate them into his Remand Decision. In support of this argument, Smith Farm's initial memorandum in support of reconsideration asserted that ALJ Moran "made no mention," of the Other Issues. Smith Farm retreated from that assertion, however, and acknowledges, at least in part, that ALJ Moran did incorporate these issues into his

decision. *See Memorandum of Law in Support of Respondent's Motion for Leave to Correct* (Oct. 26, 2010).

Specifically, ALJ Moran stated the following in his Remand Decision:

The Court has selected from Judge Charneski's Initial Decision those findings of fact that it considers particularly pertinent to this Decision Upon Remand. However, unless otherwise noted, these selections should not be interpreted as a rejection of the many other findings of fact from that Initial Decision. The scope of the remand was limited to taking additional evidence as to CWA jurisdiction in light of *Rapanos* and thereafter to rule on the jurisdictional question. Accordingly, subject to an express contradiction within this Decision Upon Remand, *all of Judge Charneski's finding of fact remain in tact*. Subject to the foregoing, *Judge Charneski's Initial Decision is incorporated by reference.*"

Decision on Remand at 2 n.3 (emphasis added). ALJ Moran also concluded his Remand Decision by "adopt[ing]" "Judge Charneski's Initial Decision holding" with respect to the two violations alleged. Remand Decision at 59. To illustrate what was being adopted, ALJ Moran unfortunately quoted two sentences from the Initial Decision into one sentence of his own as follows:

Judge Charneski's Initial Decision holding "that Smith Farm Enterprises, L.L.C. violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), as alleged in Count I, by discharging fill material into 'waters of the United States,' without having obtained a permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Act. 33 U.S.C. § 1344. It is further held that respondent violated Section 301(a) of the Clean Water Act, as alleged in Count II by discharging pollutants associated with storm water, without having obtained a National Pollutant Discharge Elimination permit pursuant to Section 402 of the Act. 33 U.S.C. § 1342," *is adopted for this Decision Upon Remand.*

Remand Decision at 59 (emphasis added). Notwithstanding his drafting error, ALJ Moran's intent and holdings were nonetheless clear: ALJ Moran's decision incorporated ALJ Charneski's holdings with respect to both of the violations alleged. Immediately following this language, ALJ Moran goes on to "adopt[] Judge Charneki's determination for the *penalties* assessed," minus \$10,000, which ALJ Moran reduced based on the court reporter mishap from the initial hearing before ALJ Charneski.³ See Remand Decision at 59 (emphasis added). ALJ Moran obviously assumed he had incorporated both liability holdings, otherwise, he would have had no basis for adopting, and then reducing, the penalties for both violations.

Nevertheless, Smith Farm argues that "a plain reading" of the above-quoted paragraph demonstrates that ALJ Moran did not incorporate ALJ Charneski's holding with respect to the 404 violation because the first sentence is incomplete and "does not contain any holding." Although Smith Farm does not clearly acknowledge it, it apparently concedes that ALJ Moran adopted ALJ Charneski's holding with respect to the 402 violation. Smith Farm does not articulate in its Motion to Correct whether it, thus, agrees that it abandoned all issues related to the 402 violation in this appeal. Smith Farm also does not explain why it did not challenge the penalty ALJ Moran imposed with respect to the 404 violation if Smith Farm believed, as it now

³ ALJ Moran indicated he would be willing to further reduce the penalty if Smith Farm provided documentation that the costs incurred as a result of the flawed hearing exceeded \$10,000. Remand Decision at 58. In a subsequent Supplement to the Decision Upon Remand, ALJ Moran further reduced the penalty, pursuant to the parties' stipulation, after reopening the record to allow more evidence related to the actual costs associated with the flawed first hearing. In the penalty-related stipulation, the parties waived the right to appeal certain issues related to the penalty determination and the court reporter's failure to produce a transcript [from the initial hearing]." Stipulation at 2-3.

argues, that ALJ Moran did not incorporate a finding of liability with respect to the 404 violation. Regardless, the Board does not find Smith Farm's tortured reading of ALJ Moran's paragraph to be reasonable, let alone persuasive.

The requirement that parties identify all issues on appeal is well-grounded. Appellate adjudicatory bodies can not presume to know which issues a party may wish to appeal. Parties may have strategic, financial, settlement, or other reasons for not raising an issue on appeal that they may previously have raised. For example, in this case, the parties settled by stipulation all issues associated with the court reporter's failure to produce a transcript of the June 2002 hearing. *In re Smith Farm Enterprises, LLC*, Dkt. No. 03-2001-0022 (May 14, 2008) (Stipulation of the Parties Concerning Penalty (May 14, 2008)). It is only logical that Smith Farm be obligated to identify specifically for the Board, in this appeal, which of its prior issues have been resolved by stipulation and to identify which issues remain to be decided. Requiring appellants to identify the issues presented for review is essential to the orderly adjudication of matters before the Board.⁴

In sum, Smith Farm has not met its burden to establish that the Board committed demonstrable error of either fact or law. ALJ Moran's Remand Decision incorporated the liability findings and holdings of ALJ Charneski with respect to both the 402 and the 404

⁴ The Board notes that Smith Farm a sophisticated litigant well-aware of its obligation to preserve issues it does not wish to waive. *See* Smith Farm's Appeal Brief, CWA Appeal No. 05-05 (2003) (identifying on appeal, but not arguing, the jurisdictional issue argued before the ALJ to "expressly reserve[] the issue in the event any subsequent decisions alter the applicable legal landscape").

violations. ALJ Moran also imposed a penalty for those violations. As provided in the Board's Remand Order, ALJ Moran's decision, including the findings and conclusions of ALJ Charneski, became a new initial decision appealable to the Board. In challenging only the jurisdictional determination in this appeal, Smith Farm failed to re-raise any issues remaining from the prior appeal, though it most certainly could have. As such, the Board did not err in considering all Other Issues not raised as abandoned, or waived.

B. Based on the Unique Facts of this Case, the Board Will Exercise its Discretion and Consider the Issues that Were Waived

Notwithstanding Smith Farm's failure to re-raise the Other Issues, Smith Farm asserts alternatively that the Board should exercise its authority to decide the Other Issues under 40 C.F.R. § 22.30(c). That section provides in pertinent part that "[i]f the [Board] determines that issues raised, but not appealed by the parties should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument." Because "[these] issues were extensively briefed and orally argued before remand," Smith Farm argues, "it should not be difficult for the Board to decide the Other Issues in fairness to the parties under the circumstances of this case." Memo. in Support of Motion for Reconsideration at 10.

The Board has, in rare circumstances, exercised the discretion to decide issues not properly raised. *See, e.g., Lyon Cnty. Landfill*, 10 E.A.D. at 431 (addressing an argument even though it was not timely raised because it was relevant to the Board's consideration of other issues). The Board further notes that its *sua sponte* authority and *de novo* review authority under

Part 22 provide the Board with the discretion to review issues that are not properly raised by the parties, although it has rarely done so. *See* 40 C.F.R. § 22.30 (b), (c) & (f).

In this case, the issues Smith Farm seeks to have decided were fully briefed and pending prior to the remand. The remand occurred as the result of an intervening Supreme Court decision, over which Smith Farm had no control. The focus of the remand hearing and the remand decision was solely jurisdiction. The parties did not re-brief or re-argue any of the Other Issues on remand. Although ALJ Moran clearly reopened the issue surrounding the court reporter mishap and reduced the penalty imposed accordingly, signaling that his decision encompassed more than jurisdiction, it appears that Smith Farm may have been confused about what it was required to do to preserve or re-raise the remaining Other Issues. *See* Joint Status Report (Docket #12) (Feb. 5, 2010) (indicating, *prior to filing the appeal brief in which all issues are required to be identified*, both parties' belief that "all issues that previously were before the Board as part of a closed docket CWA 05-05 remain before the Board"); Smith Farm Appeal Br. at 4 (identifying the jurisdictional determination as the only issue on appeal); Motion for Partial Reconsideration at 9 (Oct. 13, 2010) (stating that Smith Farm never intended to waive the Board's consideration of the Other Issues); Complainant's Sur-Reply Brief in Response to Respondent's Motion for Partial Reconsideration at 3 (Nov. 19, 2010) (stating that Smith's Farm's position, in conjunction with the joint status report, "while not correct," was also "not unreasonable").

Therefore, upon reconsideration and based on the unique history of this case, the Board concludes that it is appropriate to exercise its discretion to decide the Other Issues that remain, notwithstanding their waiver by Smith Farm. The Board chooses to exercise its discretion in consideration of the unique procedural circumstances of this case, including the fact that these issues were previously briefed, argued, and pending before the Board, and would undoubtedly have been decided but for the intervening Supreme Court decision.

V. ORDER

Based on the foregoing, the Motion for Partial Reconsideration is GRANTED. The Board will vacate the Final Decision and Order issued on September 30, 2010, and will issue a new Final Decision and Order which decides not only the jurisdictional issue, but all other viable issues previously raised, briefed, and argued.

So ordered.

Dated: March 16, 2011

ENVIRONMENTAL APPEALS BOARD⁵

By: Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

⁵ The three-member panel deciding this matter includes Environmental Appeals Judges Anna L. Wolgast, Kathie A. Stein, and Charles J. Sheehan. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting Partial Reconsideration in the matter of Smith Farm Enterprises, LLC, CWA Appeal No. 08-02, were sent to the following persons in the manner indicated.

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MAR 16 2011


Annette Duncan