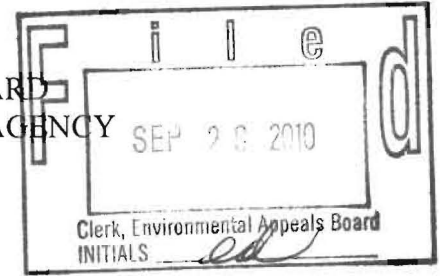


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
)

Smith Farm Enterprises, LLC)

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

CWA Appeal No. 08-02

ORDER DENYING MOTION FOR LEAVE TO SUPPLEMENT BRIEFING

On July 12, 2010, eight days prior to oral argument and more than a year after filing its initial brief in this appeal, Smith Farm Enterprises, LLC (“Smith Farm”) filed with the Board a Motion for Leave to File Supplemental Brief (the “Motion”). EPA Region 4 (the “Region”) opposed the motion, and Smith Farm filed a reply in support of its motion. Smith Farm also sought leave to discuss the contents of its motion at oral argument on July 20, 2010, which the Board denied. *See* Order Clarifying Scope of Oral Argument, Docket No. 49 (July 13, 2010). For the reasons articulated below, the Board denies Smith Farm’s Motion as untimely and will not consider the accompanying brief in deciding this appeal.

Smith Farm filed its principal brief in this appeal on April 17, 2009. The supplemental brief it seeks to have considered – more than fifteen months after its initial brief was filed – cites no new controlling case law and no new issues or arguments that could not have been submitted in its principal brief. Smith Farm has apparently intended to supplement its brief since at least October 29, 2009, when Smith Farm first contacted the Region regarding the proposed supplemental briefing. *See* Motion at 1. The Region apparently notified Smith Farm on or about

May 14, 2010, that it would oppose any such motion. Smith Farm does not explain, in either its Motion or its Reply, why it waited until one week prior to oral argument to file this motion and the accompanying brief.

It is axiomatic that an appellant's principal brief should contain all issues presented for review. *See* 40 C.F.R. § 22.30(a) (providing that an appeal brief "shall contain * * * a statement of the issues presented for review * * * [and] argument on the issues presented"); *In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989) (explaining that even if the rules did not require an appellant to submit a supporting brief with its appeal, general principles of administrative law and the Agency's practice in appeals dictate as much). In the permitting context, the Board frequently declines to review issues not raised in the initial petition for review. *See, e.g., In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 438 (EAB 2007) (rejecting as untimely certain issues raised for the first time in Petitioner's post-remand appeal because they could have been raised in the initial petition for review) (*citing In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (EAB 2000) (rejecting issues raised on appeal after remand that should have been raised in the initial appeal); *cf. In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (new issues raised in reply briefs are equivalent to late-filed appeals and must be denied as untimely). This principle applies equally in the enforcement context. Moreover, the Board has broad discretion to take all measures necessary for the fair, efficient and impartial adjudication of issues arising before it, including the denial of untimely submissions. 40 C.F.R. § 22.4(a)(2). In this case, the motion to supplement was filed significantly out of time and, as stated above, no explanation is provided by Smith Farm for its delay in raising the issues

and arguments the supplemental brief contains. For these reasons, alone, the motion is denied as untimely.

Even if the motion had been timely filed, and the Board has determined it was not, the issue Smith Farm now seeks to raise – concerning the doctrine of fair notice – was never raised in any of the proceedings in the nine-year history of this matter. Part 22 limits the “parties’ rights of appeal * * * to those issues raised during the course of the proceeding and by the initial decision.” 40 C.F.R. § 22.30(c). Although Smith Farm asserts that the “fair notice” issue it seeks to raise has “already been raised” but has “not been fully briefed,” *see* Motion at 1, Reply at 1, 3, the Board disagrees. The fact that certain elements of the fair notice doctrine are present in the record or that the “facts dispositive of the issue * * * have been raised” (Reply in Supp. of Motion for Leave to File Suppl. Br. at 1-2,3), cannot and does not substitute for timely and sufficiently raising the issue or making the relevant arguments below. *See, e.g., In Re C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 598 (EAB 1994) (explaining that Part 22 limits appeals to adverse rulings and orders of the presiding officer and that because the issue was not raised, the presiding officer could not rule on the issue and, thus, the issue cannot be appealed); *See also In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989) (explaining that objections to initial decisions must be sufficient enough to inform the agency of one’s position).

Furthermore, the Board disagrees that Board precedent cited by Smith Farm – namely, *In re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 10 E.A.D. 385 (EAB 2002) – supports the notion that the lack of fair notice is an issue that may be raised at any time. In that case the

Board interpreted an inartful penalty argument that was made on appeal as a fair notice argument; the Board did not address the issue sua sponte. (Even if it had, Smith Farm errs in assuming that an issue addressed by the Board sua sponte renders that issue one that can be raised at any time). In this case, Smith Farm made no argument prior to the supplemental brief that reasonably could be interpreted as a fair notice argument. Moreover, fair notice claims not timely raised may be considered waived. *See In re Ketchikan Pulp Co.*, 7 E.A.D. 605, 639-40 (EAB 2005).

Additionally, it is unclear whether Smith Farm's citation to *Coeur Alaska v. Southeast Alaska Conservation Council*, 129 S.Ct. 2458 (2009), was intended to relate to its belatedly-raised fair notice claim. If by referring the Board to this case Smith Farm was instead intending to raise a separate issue regarding Judge Moran's finding of liability, Smith Farm has provided no basis for the Board's belated consideration of that issue as well. Although it could have done so, Smith Farm failed to challenge liability in this appeal and chose instead to challenge only the Agency's jurisdictional determination. *See Respondent's Appeal Brief*, Docket No. 21 (Apr. 17, 2009). Thus, for the reasons stated above, the issue of liability is untimely and is not at issue in this appeal.

Finally, Smith Farm has provided no basis for the Board's consideration of the affidavit from John Paul Woodley, Jr. Mr. Woodley's testimony was not offered as evidence in the hearing below, the Army-EPA guidance on which he claims to have particular expertise speaks for itself, and to the extent that it does not, Mr. Woodley does not speak for either of the agencies

that authored the guidance document (i.e., the U.S. Army Corps of Engineers and the U.S. EPA). Furthermore, as Smith Farm points out, Reply at 5-6, the guidance was not in existence at the time of the remand hearing, and was not relied upon by the Agency in making its jurisdictional determination in this case. Nor was it cited by ALJ Moran as a basis for determining jurisdiction in this matter. Thus, Mr. Woodley's opinion regarding whether the Agency's jurisdictional determination is consistent with the guidance in this matter is as irrelevant as it is untimely.

Smith Farm's Supplemental Brief is simply too late to receive the Board's consideration. Accordingly, in the interest of finality, efficiency and the effective use of Board resources, the Board denies Smith Farm's Motion for Leave to File a Supplemental Brief.

So Ordered.

Dated: _____

September 29, 2010

ENVIRONMENTAL APPEALS BOARD

Anna L. Wolgast

Anna L. Wolgast
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Leave to Supplement Briefing 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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SEP 28 2010

Dated: _____



Annette Duncan