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

ENVIRONMENTAL APPEALS BOARD

In re:	)	
Smith Farm Enterprises, LLC	)	CWA Appeal No. 08-02
Docket No. CWA-03-2001-0022	)	
	)	

**JOINT STATUS REPORT**

Pursuant to the Board's Order Granting Third Extension of Time dated January 12, 2009, the Parties hereby submit this Joint Status Report.

**Procedural History**

This matter first came before the Board following Respondent's appeal of an Initial Decision by Administrative Law Judge Charneski, dated May 4, 2005, assessing a penalty of \$ 94,000 for violations of Sections 301, 402, and 404 of the Clean Water Act, 33 U.S.C. §§ 1311, 1342 & 1344. CWA App. No. 05-05 (docket now closed). That appeal was fully briefed, and oral argument was conducted July 14, 2005. On June 19, 2006, while CWA Appeal No. 05-05 remained pending before the Board, the U.S. Supreme Court issued its decision in *Rapanos v. United States*, 547 U.S. 715 (2006). On October 6, 2006, the Board issued a Remand Order remanding this matter to the Office of Administrative Law Judges to conduct further proceedings and to rule on the question of Clean Water Act jurisdiction consistent with *Rapanos*. The Remand Order directed the Office of Administrative Law Judges to issue a new initial decision.

An additional hearing limited to the issue of Clean Water Act jurisdiction was conducted before Administrative Law Judge Moran in May 2007. ALJ Moran issued an Initial Decision on Remand on March 7, 2008 in which ALJ Moran adopted the findings of ALJ Charneski in his May 4, 2005 Initial Decision. In addition, ALJ Moran found that Clean Water Act jurisdiction extended to wetlands and other waterbodies on the Site under the standards described by the Supreme Court in *Rapanos*. ALJ Moran also reduced by \$10,000 the penalty assessed by ALJ Charneski to account for the fact that a court reporter had failed to transcribe the first hearing before ALJ Charneski, thus necessitating a second hearing and concomitant expenditure by Respondent. Following Respondent's motion to reopen the record to submit additional information regarding Respondent's costs associated with the untranscribed hearing, the parties stipulated to a further reduction of the penalty to \$34,000, and ALJ Moran issued a Supplement to Decision on Remand. This appeal (CWA App. No. 08-02) followed.

**Status of Settlement Negotiations and Projected Time Necessary for Any Further Negotiations**

As stated in the Parties' previous motions for extensions of time, the time period from ALJ Moran's Decision on Remand in March 2008 to the present has yielded the most serious and productive settlement negotiations in the lengthy history of this matter. The Parties and their counsel, along with representatives of the U.S. Army Corps of Engineers, met in Norfolk, Virginia for approximately six hours on January 30, 2009. Despite significant and good faith efforts by all, the Parties have been unable to reach an agreement in principle.

The previous extensions of the briefing schedule allowed the parties sufficient time to fully explore all issues for settlement. While the Parties intend to continue

negotiations, the Parties believe that further extensions of the briefing schedule will not facilitate their ability to reach an agreement in principle.

If an agreement in principle is reached, the Parties believe that the agreement in principle would include resolution of the status of the Site and injunctive relief, as well as penalty. Thus, if an agreement in principle is reached, the Parties anticipate that they would need an additional 90 days to reduce the agreement in principle to the appropriate writings, obtain approval from appropriate management within the federal government, and to comply with any applicable procedural requirements.

**Summary of Issues Remaining and Issues Resolved**

Unlike *Matter of Vico Construction Corporation, et al.*, (closed docket CWA App. No. 05-01; *see* 12 E.A.D. 298 (2005); active docket CWA App. No. 08-03), which involved similar activities at a different site, the Board had not issued a Final Decision and Order in closed docket CWA App. No. 05-05 prior to the October 6, 2006 remand. With one exception described below, the Parties believe that all issues that previously were before the Board as part of closed docket CWA App. No. 05-05 remain before the Board. In addition, Respondent appeals the Decision on Remand issued by ALJ Moran on March 7, 2008.

In connection with the Supplement to Decision Upon Remand issued by ALJ Moran, the Parties had filed a Stipulation of the Parties Concerning Penalty. In that document, the Parties stipulated as follows:

- (10) Based on the foregoing, the Parties hereby stipulate as follows:
  - (a) It is appropriate for the Presiding Officer to consider the costs associated with the failure of the court reporter to produce a transcript in connection with the June 2002 hearing as a "matter[] as justice may require" in calculating the penalty. 33 U.S.C. § 1319(d).

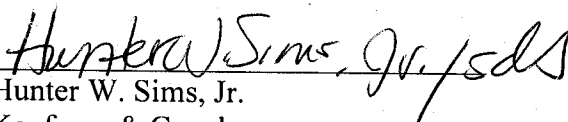
(b) The penalty may be mitigated by \$60,000 effective as of the date of the Initial Decision of Judge Charneski to account for the fees and costs incurred by Respondent in connection with the untranscribed June 2002 hearing as a "matter[]" as justice may require."

(c) By so stipulating, Respondent waives any appeal that would assert the court reporter's failure to produce a transcript of the June 2002 hearing and any appeal from ALJ Charneski's May 2, 2003 Order Denying Respondents' Motion to Dismiss with Prejudice, and Granting Complainants' Motion for a New Hearing. Respondent further waives any claim under the Equal Access to Justice Act for fees and costs associated or generated in connection with the untranscribed June 2002 hearing.

(d) By so stipulating, Complainants waive any appeal that would assert the Decision Upon Remand's consideration of the "as justice may require" factor was beyond the scope of the remand. Complainants further waive any appeal that would assert the Presiding Officer's consideration of the court reporter's failure to produce a transcript of the June 2002 hearing as a matter "as justice may require" pursuant to 33 U.S.C. 1319(d), provided the penalty reduction for this factor in the Final Decision by the Presiding Officer does not exceed the amount stipulated in Paragraph 10(b) above.


Accordingly, the issues waived by Respondent and Complainants in the foregoing stipulation have been resolved and are not before the Board. To the extent the issues described in stipulation 10(c) above were raised by Respondent in closed docket CWA App. No. 05-05, those issues have been resolved and no longer remain before the Board.

Respectfully submitted,

  
Hunter W. Sims, Jr.  
Kaufman & Canoles

Counsel for Respondent

Date: 2/5/09

  
Stefania Shamet  
Senior Assistant Regional Counsel

Counsel for Complainants

Date: 2/5/09

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Joint Status Report in the Matter of Smith Farm Enterprises, LLC, CWA Appeal No. 08-02 to be served in the following manner:

BY First Class Mail:

Hunter W. Sims  
Kaufman & Canoles  
P.O. Box 3037  
Norfolk, VA 23510


BY HAND DELIVERY (copy):

Lydia Guy, Regional Hearing Clerk  
EPA Region III (3RC00)  
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Original and Five Copies by Federal Express:

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
Colorado Building  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

2/5/09  
Date

  
Stefania D. Shamet