BEFORE THE ENVIRONMENTAL APPEALS BOARD
United States Environmental Protection Agency
Washington, D.C.

In the Matter of	)	
	)	
Smith Farm Enterprises, L.L.C.,	)	CWA Appeal No.: 08-02
Docket No.: CWA-03-2001-0022	)	
Respondent.	)	

RESPONDENT'S REPLY TO EPA'S RESPONSE TO RESPONDENT'S MOTION FOR PARTIAL RECONSIDERATION AND TO STAY FINAL ORDER

Pursuant to 40 C.F.R. § 22.16(b), Respondent, Smith Farm Enterprises, L.L.C., respectfully submits its Reply to the EPA's Response to Respondent's Motion for Partial Reconsideration and to Stay Final Order. In making its reply, Smith Farm also relies on its Motion and Memorandum in Support of Motion for Partial Reconsideration and to Stay Final Order (Docket #60 and 60.01) and its Motion and Memorandum in Support of Alternative Motion to Remand (Docket #60.02 and 60.03).

A. The Board Erred By Considering Respondent's "Other Issues" To Be Abandoned.

The EPA's argument that the Board did not err by considering Respondent's "Other Issues" to be abandoned is not correct. EPA's principal argument in support of its position in this regard consists of a tortured and incorrect reading of two sentences from Judge Moran's Order appearing on page 59 of his Initial Decision on Remand. In making its argument, EPA sets forth what it refers to as the "single operative sentence" (which actually is two sentences) from page 59 of Judge Moran's Initial Decision Upon Remand. Page seven of EPA's response purports to quote the "operative sentence" 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.* [sic] 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.*

However, the quote contained in EPA's response is not correct because EPA inserted "[sic] in the quote between the first and second sentence while Judge Moran's Order does not contain the word "sic." In addition, the sentences as they are set out in the Order do not have the emphasis contained in the EPA's quote. A copy of page 59 of Judge Moran's Order is attached hereto, marked **Exhibit A** and incorporated by reference which shows that "[sic]" and the emphasis do not appear in the Order.

A plain reading of the first paragraph on page 59 of Judge Moran's Order is that the referenced paragraph contains two sentences. The first sentence reads " Judge Charneski's Initial Decision holding "that Smith Farm Enterprises, L.L.C., violated Section 301(a), 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*." This sentence ends with a period, which signifies the end of a sentence, and the second sentence begins with a capital letter to signify a new sentence ("It is further held that . . ."). In incorrectly arguing that the entirety of the language quoted by the EPA is only one sentence and not two sentences, when clearly the language contains two sentences, the EPA supports its argument by inserting the word [sic] and the emphasis by underlining, which do not appear in the Order, and then provides its own interpretation as to what it speculates Judge Moran was attempting to do. Complainants' insertion of [sic] in the response only illustrates that there are two sentences in the paragraph. In the first sentence, Judge Moran failed to make a holding. The first sentence of the Order plainly states as follows:

> Judge Charneski's Initial Decision holding "that Smith Farm Enterprises, L.L.C., violated § 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 § 404 of the Act. *33 U.S.C. § 1344.*

This separate sentence cannot be read as a ruling that the Respondent violated § 301(a) of the Clean Water Act by failing to obtain a § 404 permit because the sentence does not hold that or state that. In fact, the sentence does not contain any holding. Moreover, contrary to EPA's argument, nothing in this sentence incorporates Judge Charneski's initial decision into Judge Moran's Initial Decision on Remand. The language at the end of the second sentence which reads "is adopted for this Decision Upon Remand" only refers to the second sentence and not to the first sentence. "Basic to the operation of the judicial system is the principle that a Court speaks through its judgments and order." *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (4th Cir. 1984). Therefore, EPA is not permitted to argue a different interpretation of the first sentence of the Order than what is contained in the sentence's plain words.

While not a part of the argument section of the EPA's Response to Motion for Partial Reconsideration and to Stay Final Order, on page three of its brief where the EPA describes some of the procedural history, the EPA addresses footnote three on page two of Judge Moran's Initial Decision Upon Remand, which reads:

> 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 the 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 findings of fact remain intact. Subject to the foregoing, Judge Charneski's Initial Decision is incorporated by reference.*

March 7, 2008 Initial Decision Upon Remand at p.2, fn 3 (emphasis added).

However, this footnote is of no help to the EPA because it does not contain a decision or ruling about Respondent's "Other Issues." On page two of the Decision Upon Remand, Judge Moran begins his analysis by first noting "This Decision Upon Remand will first summarize salient points from the Initial Decision of Judge Charneski." *See Decision Upon Remand* at p. 2.

As Judge Moran goes on to note on page two of the Decision Upon Remand, "[T]he Court takes note of the findings of fact which are taken from Administrative Law Judge Charneski's Initial Decision dated May 5, 2005. These findings of fact were not offered by the testimony received during the proceedings upon remand.[3]"

Footnote 3 provided that "[T]he 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 the 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 findings of fact remain intact. Subject to the foregoing, Judge Charneski's Initial Decision is incorporated by reference." (emphasis added)

Clearly, by that language, Judge Moran is indicating that he is adopting Judge Charneski's findings of fact regarding jurisdiction to enable Judge Moran "to rule on the jurisdictional question" unless otherwise noted in his Decision Upon Remand, and that Judge Charneski's Initial Decision is incorporated by reference as to factual findings related to jurisdiction but not as to any other issues or rulings. This is made clear by Judge Moran when in

the same paragraph he clarifies his understanding that "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," and not to rule on all of the issues before Judge Charneski. This language is merely *dicta* and is not an order or ruling by Judge Moran that Judge Charneski's rulings on the issues other than jurisdiction are incorporated by reference or adopted by Judge Moran in his Initial Decision Upon Remand. Moreover, on page 21 of its Appeal Brief (footnote 5), the Respondent stated, "[R]espondent has previously made objections to the factual findings of Judge Charneski as not being supported by evidence, among other reasons. For purposes of raising objections to facts on the record, all briefs of the Respondent are incorporated by reference herein and all previous objections made to findings of fact are incorporated by reference into this brief on appeal." This was a direct response by the Respondent to Judge Moran's footnote three on page two of his Initial Decision Upon Remand referencing Judge Charneski's findings of fact remaining intact.

The Respondent was under the view that the only issue remanded, and the only issue for Judge Moran to rule upon, was jurisdiction, because of the language on pages 5 and 6 of the Remand Order ("Therefore the Board finds that it is appropriate to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question"). ("Accordingly, the 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, consistent with this Order and the Court's opinions in *Rapanos*. 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.[7]") Footnote seven provided "All documents filed in the current appeal to the Board will

be deemed a 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."

As argued by Respondent in its Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order (Docket #60.01) and in its Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order (Docket #60.03), this language plainly sets forth that the Remand is for a sole issue, i.e., jurisdiction. Footnote seven provides that the documents (i.e., pleadings, memoranda, etc.), filed in the current appeal (the first appeal), will be deemed a part of the record of any new appeal and that a new appeal may not raise any new issues except as they relate directly to the issue of jurisdiction, which clearly means that Respondent's Other Issues were not part of the remand and were already be a part of the record on any new appeal. Therefore, it would not be necessary to re-appeal those issues. Respondent relied and acted upon this language. The Notice of Appeal (Docket #1) reads "Respondent, Smith Farm Enterprises, L.L.C., through counsel, hereby appeals the Decision Upon Remand by the Honorable William B. Moran issued March 7, 2008, which was re-issued in connection with the supplemental decision issued June 27, 2008. Respondent does not appeal the substance of the supplemental decision issued June 27, 2008."

It was also the EPA's position that Respondent's issues other than jurisdiction remained before the Board during the remand of the jurisdictional issue. In the Joint Status Report (Docket #12) prepared and filed by the EPA (the EPA attorney signed, with consent, Respondent's counsel's signature after Respondent's counsel had reviewed the draft of the Joint Status Report) provides on page three under the heading "Summary of Issues Remaining and Issues Resolved" the following:

> Unlike *Matter of Vico Construction Corporation, et al.* (closed docket CWA App. No. 05-01); *see 12 EAD* 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 (emphasis added).

A copy of the Joint Status Report is attached hereto, marked **Exhibit B**, and incorporated by reference herein.

The "exception" noted in the above quote was the reduction of the penalty based upon the EPA's failure to hire a competent court reporter to transcribe the first hearing before Judge Charneski, which caused the Respondent to have to endure another multi-day hearing. The Joint Status Report was filed in response to a part of the Board's Order Granting Third Extension of Time (Docket #10), which provided: "In addition, on or before Friday, February 6, 2009, the parties shall file a joint report regarding the status of this appeal, which shall include a detailed summary of the issues resolved, remaining issues and projected time necessary for any further settlement discussions."

Clearly, based upon the above-referenced Joint Status Report prepared and filed by the EPA, and consented to by Respondent, the EPA position was that Respondent's Other Issues had remained before the EAB, which is consistent with the position being taken here by the Respondent, and is also consistent with Judge Moran's position as noted above that the only issue before him on remand, and the only issue for him to decide, was the jurisdictional issue.

The EPA also states on page six in footnote four of its Response to Motion for Partial Reconsideration and to Stay Final Order (Docket # 73), "Although Respondent had failed to raise the 'Other Issues,' Complainants, in an abundance of caution, expressly reserved all arguments made in their briefs filed in CWA Appeal No. 05-05, except that Complainants noted

that Respondent had waived by stipulation one of the issues raised in that appeal." The EPA then cites to its response brief (Docket # 22) at pp. 2-4.

On page three of its response brief (Docket #22), the EPA first states, "[T]his brief focuses on the 'navigable waters' issue that was the subject of the Board's Remand Order and the May 2007 Remand Hearing. (Navigable waters issue is a part of the jurisdictional issue)." The EPA then went on to state, [W]ith respect to all other elements of the violation, Complainants incorporate by reference the briefs filed by Complainants in CWA Appeal 05-05 on July 1, 2005 and July 22, 2005, except as set forth herein." The EPA never stated that it was doing this in an abundance of caution. It is clear that the reason the EPA added this language is because it believed that, from the procedural history of this case, the Other Issues were not a part of the current appeal because they were already before the EAB awaiting decision after the Administrative Law Judge decided the remanded jurisdictional issue.

In summary, it is clear that Judge Moran's Initial Decision and Order did not incorporate by reference, or adopt, or provide any ruling with respect to the violation of § 301(a) of the Clean Water Act for failing to get a § 404 permit. In addition, as set forth in the Remand Order, and as recognized by the EPA in the Joint Status Report it prepared and filed in response to a request from the EAB regarding the status of the case, the "Other Issues" were not before Judge Moran for decision but remained before the EAB during the time the jurisdictional issue was remanded for decision. Consequently, the Respondent did not abandon its Other Issues, the Other Issues were never a part of the remand, but always remained with the EAB and there was no need to again appeal the Other Issues. Respondent has always believed this to be the case, Judge Moran believed this to be the case and the EPA believed this to be the case, at least as of the time it drafted and filed the Joint Status Report (Docket #12). The Respondent respectfully requests

that the EAB reconsider its ruling that the Respondent abandoned its Other Issues and then rule upon the Other Issues after considering the briefs filed at the oral argument before the EAB prior to the remand.

B. **The EPA's Position That There Is Nothing In The Record To Justify The EAB Considering The Other Issues Pursuant To 40 C.F.R. § 22.30(c) Is Wrong.**

The EPA's position that there is nothing in the record to support the EAB considering the Other Issues pursuant to 40 C.F.R. § 22.30(c) is simply wrong. There is abundant support in the record for the Environmental Appeals Board to consider and decide Respondent's Other Issues. For all of the reasons set forth in the Respondent's Motions and Memoranda filed on those points and, for the alternative reason that 40 C.F.R. § 22.30(c) gives the EAB the express authority to decide the Other Issues and, in light of the entire record in this case, it is simply the right thing to do.

The Other Issues which Respondent requests the EAB to decide, all of which are set forth in Respondent's Appeal Brief filed on June 3, 2005 (CWA 05-05, Docket #2) and addressed in the oral argument before the EAB prior to the remand, and on which the EAB was about to decide prior to the remand, are as follows:

A. The Administrative Law Judge erred in concluding that Respondent "filled" the wetlands with woodchips and thus violated § 404 of the Clean Water Act when he found that Respondent's purpose in spreading the wood chips was only to dispose of waste.

B. The Administrative Law Judge erred in concluding that fill was placed in wetlands based on the finding that "substantial" amounts of woodchips were present throughout the site when the Government samples were isolated and biased and when a more scientifically valid sampling technique revealed no more wood chips than would be expected in a timbered, natural forest.

C. The Administrative Law Judge erred in finding Clean Water Act Section 402 liability because he based the violation on a point source (ditches) not claimed in the Amended Complaint, which cites equipment as the only point source.

D. The Administrative Law Judge 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 environmental harm.

There were two other issues raised by the Respondent in its appeal prior to the remand. They were that the Administrative Law Judge 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 that the Administrative Law Judge erred in finding Clean Water Act jurisdiction.

On remand, the jurisdictional issue was heard before the Administrative Law Judge and decided and now has been decided by the EAB. The issue regarding Judge Charneski denying Respondent's Motion to Dismiss because the court reporter hired by the EPA could not produce a transcript has been resolved by stipulation. Judge Moran, *sua sponte*, considered the cost to Respondent associated with the failure of the court reporter to produce a transcript in connection with the June 2002 multi-day hearing as a "matter(s) as justice may require" in calculating the penalty. 33 U.S.C. § 1319(d). *See* May 14, 2008 Stipulation of the Parties Concerning Penalty at page two, paragraph 10(a). Therefore, Judge Moran's *sua sponte* consideration of a reduction in the penalty based upon the costs suffered by Respondent as a result of having to repeat the initial evidentiary hearing before Judge Charneski was decided as a "matter(s) as justice may require in calculating the penalty under 33 U.S.C. § 1319(d) and not as a result of this specific

remand by the EAB for the Administrative Law Judge to address the jurisdictional issue. The Respondent accepted this reduction of $60,000. However, as the Stipulation further provides, the Respondent continued to maintain its argument that the assessed penalty was too high on a finding that Respondent was highly negligent when Respondent lacked culpability and the EPA failed to establish any resultant environmental harm. None of these issues regarding the penalty were visited, and ruled upon, in any way by Judge Moran as they were not before Judge Moran and he did not rule upon them.

As stated in paragraph F of Smith Farm's Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final order (the "Memo") (Docket Entry #60.01), 40 C.F.R. § 22.30(c) states "[i]f the Environmental Appeals 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." (Emphasis added). Complainants, in its Response to Motion for Partial Reconsideration and to Stay Final Order (the "Response") argue that 40 C.F.R. § 22.30(c) does not give the EAB authority to address issues not appealed by the parties. Complainants further argue that, even if 40 C.F.R. § 22.30(c) does grant the Board authority to address issues not appealed by the parties; it may only do so if the failure to do so would result in manifest injustice. Complaints are incorrect on both arguments.

40 C.F.R. § 22.30(c) provides:

> Scope of appeal or review. The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals 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. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

There is no question but that the "Other Issues" have been raised during the course of these proceedings and by Judge Charneski's Initial Decision and Respondent's appeal of that Initial Decision. There is a difference of opinion concerning whether the Other Issues, which had been fully briefed and argued orally by the parties before the remand, were addressed in Judge Moran's Initial Decision on Remand. The Respondent contends that the most expedient course to take at this point to resolve the "abandonment" issue, and the course which would be fair to the Respondent given all of the circumstances of this case, would be for the EAB to consider and decide the Other Issues pursuant to 40 C.F.R. § 22.30(c) as an alternative to deciding the Other Issues pursuant to the other arguments set forth by Respondent. The justification for the EAB deciding the Other Issues includes the following:

A. This matter has been ongoing now for more than 12 years. On October 30, 1998, Bob and Jim Boyd, the owners of Smith Farm, met with U.S. Army Corps of Engineers representatives and discussed Smith Farms' plan to construct "Tulloch ditches" in the forested area of the Smith Farm tract. They were told that the ditching they described would a non-regulated activity pursuant to the Clean Water Act as long as certain construction methods were followed. After the meeting and prior to any work being done, the Boyds, through their environmental consultant, wrote a letter on November 6, 1998 to the Army Corps of Engineers setting forth the agreement reached in the meeting. The letter asked for the Army Corps of Engineers to contact the Boyds if there were any questions concerning the letter. The Boyds offered to meet with Army Corps of Engineers to review the site and to discuss specifics of the ditch excavation. *See* letter dated November 6, 1998 from Robert Needham to Nick Konchuba in the regulatory branch of the Army Corps of Engineers in Norfolk, Virginia. A copy of this

letter is attached to Respondent's Appeal Brief filed on June 3, 2005 marked Exhibit 14 (CWA 05-05, Docket #2).

B. On May 21, 2001, the EPA filed its Administrative Complaint. The first trial of this matter took place over six days in 2003 before Administrative Law Judge Charneski. The EPA hired a court reporter that could not produce a transcript of the proceedings due to her incompetence. Judge Charneski denied Respondent's motion to dismiss or, in the alternative, for its fees and costs expended in the first trial, and ordered a complete re-trial of the matter, which took place over six days in 2004. Judge Charneski issued his Initial Decision on May 5, 2005, which Respondent appealed to the EAB. The Other Issues were among those issues appealed. The case was stayed until after the United States Supreme Court decided *Rapanos v. United States*, 547 U.S. 715 (2006). Thereafter, the EPA requested the EAB to remand the case to an Administrative Law Judge for further hearings on the jurisdictional issues in light of *Rapanos.* The Respondent objected because it believed that there were sufficient facts already in the record on appeal to decide the jurisdictional issue in light of *Rapanos*. However, the EAB remanded the case for further proceedings on the jurisdictional issue in light of *Rapanos*.

C. The Remand Order provided that it was "appropriate to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question." *See* Remand Order, page five. (CWA 05-05, Docket #27) The Remand Order further provided "Accordingly, the 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, consistent with this Order and the Court's opinions in *Rapanos*. 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.[7]"

Footnote seven stated, "[A]ll documents filed in the current appeal to the Board will be deemed a part of the record on 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. The Respondent interpreted that language to mean that the only issue remanded to the ALJ for consideration was the jurisdictional issue and that Respondent's Other Issues remained before the EAB for decision after the ALJ ruled on the jurisdictional issues in light of *Rapanos*. The EPA thought the same thing. In an Order Granting Third Extension of Time entered by Environmental Appeals Judge Charles J. Sheehan on January 12, 2009 (Docket #10), the parties' joint motion for a third extension of time to file briefs was granted. Judge Sheehan also ordered, on page 2, "In addition, on or before Friday, February 6, 2009, the parties shall file a joint report regarding the status of this appeal, which shall include a detailed summary of the issues resolved, remaining issues, and projected time necessary for any further settlement discussions.[1]" In compliance with said order, the parties filed a Joint Status Report on February 6, 2009 (Docket #12), a copy of which is also attached to this memorandum marked **Exhibit B** and incorporated herein by reference, which was prepared and filed by the EPA. The EPA attorney also executed the Joint Status Report on behalf of Respondent's counsel acting with Respondent's counsel's authorization after Respondent's counsel had reviewed and approved the draft Joint Status Report prepared by the EPA. The Joint Status Report provided the following on page three in the section entitled "Summary of Issues Remaining and Issues Resolved" in direct response to Judge Sheehan's request that the parties provide a detailed summary of the remaining issues: "With one exception described below, the parties believe that all issues that previously were

before the Board as part of the closed docket CWA App. No. 05-05 remain before the Board (emphasis added). In addition, Respondent appeals the decision on remand issued by ALJ Moran on March 7, 2008. The 'one exception described below' had to do with the $60,000 deduction in the penalty ordered by Judge Moran for the fees and costs associated with the un-transcribed June 2002 hearing. Therefore, both the EPA and the Respondent thought that Respondent's Other Issues were still before the EAB to be decided and had not been part of the remand and therefore were not to be decided by Judge Moran. Judge Moran was of the same view. On page 2, footnote 3 of his Decision Upon Remand, Judge Moran states "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."

D. Before the remand, the Other Issues had been fully briefed to the EAB and the EAB heard oral argument on the issues. "The Board was nearing issuance of its final decision in this matter when the U.S. Supreme Court decided *Rapanos. . .*" *See* Remand Order entered October 6, 2006 at page three. Therefore, since the Other Issues have been fully briefed and argued by the parties, and the EAB was nearing issuance of its final decision with respect to those Other Issues, further briefing and argument on the Other Issues is not necessary. The EAB and the EPA are imminently familiar with the Other Issues and the EAB has all of the information before it and can easily decide the Other Issues under the authority of 40 C.F.R. § 22.30(c).

E. Administrative Law Judge William B. Moran heard evidence in the remand hearing for eight days in May 2007. Judge Moran issued his Initial Decision on Remand on March 7, 2008. In his Initial Decision on Remand, Judge Moran made no ruling with respect to

Judge Charneski's previous finding that Respondent had violated § 301(a) of the Clean Water Act by failing to obtain a § 404 permit.

F. The Respondent's Notice of Appeal clearly states that appeal is taken from Judge Moran's Initial Decision on Remand and the Supplemental Decision. The Respondent only briefed the jurisdictional issue because it in good faith believed, as did the EPA as it stated in the Joint Status Report that the Other Issues had not been remanded but remained for decision at the EAB. "All documents filed in the current appeal to the Board will be deemed a part of the record on any new appeal." Remand Order at page 6, footnote 7. The EAB then issued its Final Decision and Order, after which the Respondent filed the pending motions before the Court.

G. At no time did Respondent intend to abandon the Other Issues. It believed in good faith the Other Issues remained before the EAB and had not been remanded to Judge Moran for decision along with the remand on the jurisdictional issue in light of *Rapanos*.

In opposing Respondent's request that the Board decide the Other Issues pursuant to 40 C.F.R. § 22.30(c), the EPA makes arguments that, when applied to any request for an EAB decision under 40 C.F.R. § 22.30(c), would result in the EAB not exercising its authority to decide issues under that section. Obviously, the Board's authority under 40 C.F.R. § 22.30(c) would apply to some circumstance and, in light of all of the circumstances in the Smith Farm case, if ever there was a case where the Board should decide issues not appealed (assuming that the Board does not change its opinion on this issue after considering Respondent's motions and memoranda), then the Smith Farm case is that case. In addition to all of the circumstances listed above as grounds for the Board to exercise its authority, the fact that the Other Issues have already been briefed and argued, and the Board was "nearing issuance of its final decision in this matter when the U.S. Supreme Court decided *Rapanos v. United States* . . ." (Remand Order at p.

3), and the Board's Remand Order provided that all documents (which would include all briefs) in the appeal before the EAB at the time of the remand will be deemed a part of the record on any new appeal, weigh strongly in favor of the Board deciding the Other Issues under 40 C.F.R. § 22.30(c).

40 C.F.R. § 22.30(c) is clear on its face and specifically states that if the EAB determines issues that were raised, but not appealed, should be argued, then it may address the issues. Therefore, EPA's argument that the EAB shall not hear issues the parties did not appeal under the authority of 40 C.F.R. § 22.30(c) is in direct contradiction of the rule. The rule states clearly and unambiguously that the Board may determine to hear "issues raised, but not appealed by the parties."

Complainants cite to *In re: Las Delicias Community*, SDWA Appeal No. 08-07 (Aug. 17, 2009) and *In the Matter of Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4 (February 24, 1993) for Complainants' argument that in "interpreting the *Consolidated Rules of Practice Governing the Assessment of Civil Penalties* (40 C.F.R. Part 22), the Board may, in its discretion, look for guidance to the applicable federal rules of procedure and federal court decisions interpreting those rules." *See Complainants' Response to Motion for Reconsideration,* page 10 (Docket Entry No. 73) Both of these cases are distinguishable from the Smith Farm case. In *Las Delicias*, the EAB looked to the Federal Rules of Civil Procedure, not to interpret a clear rule under the Consolidated Rules of Practice ("CROP") but only to asses whether an entity was an unincorporated association for purposes of determining whether service was accomplished under the rules. In *Las Delicias*, the EAB made an assessment on service pursuant to 40 C.F.R. § 22.5, however, its reference to the Federal Rules of Civil Procedure was not to influence the EAB's

interpretation of its rule, but to help classify an unincorporated association since the CROP did not include a definition of an incorporated association.

Similarly, in *Wego*, the EAB interpreted its own clear and unambiguous rule pertaining to interlocutory appeals and found its holding to be consistent with the Federal Rules of Appellate Procedure and supporting case law on the same issue. It did not, however, use the Federal Rules of Appellate Procedure to expand the CROP rule beyond what it stated on its face, which is what the Complainants ask the EAB to do here.

Nothing in 40 C.F.R. § 22.30(c) requires a showing of manifest injustice in order for the EAB to consider issues raised, but not appealed by the parties. 40 C.F.R. § 22.30(c) gives the EAB the authority and ability to consider the issues not appealed in its discretion. There is no requirement that failure to address the issues must result in manifest injustice. Had the EAB desired to include a requirement that failure to consider the issues not appealed would result in manifest injustice, the EAB certainly could have included that requirement in 40 C.F.R. § 22.30(c); however, it did not. Consequently, the EAB's ability to consider issues raised, but not appealed, is governed by 40 C.F.R. § 22.30(c) as written, which allows for EAB consideration of the issues raised, but not appealed without a showing of manifest injustice.

As the EAB received full briefing and heard oral argument on the Other Issues, was ready to rule on the Other Issues prior to the remand on the jurisdictional issue alone, and considering the twelve-year history of this case, this is precisely the type of case where the EAB should make a determination on issues raised in the First Appeal under the authority of 40 C.F.R. § 22.30(c). This is especially true considering everything needed is already before the EAB in the First Appeal including the record and briefs on the Other Issues, all of which were "deemed part of the record of any new appeal." Remand Order at 6, fn 7. Moreover, while the EAB does not have to

find manifest injustice before it can decide the Other issues pursuant 40 C.F.R. § 22.30(c), it truly would result in manifest injustice if the EAB declined to decide the Other Issues given the totality of all of the circumstances of this case over more than twelve years.

The Respondent respectfully requests that the EAB consider all of the above points, as well as all of the other points raised in Respondent's Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order (Docket #60.01), Respondent's Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order (Docket #60.03) and Respondent's Memorandum of Law in Support of Respondent's Motion for Leave to Correct (Docket #62.01) and, as an alternative, to Respondent's request that the EAB reconsider its holding that the that Respondent abandoned its Other Issues, exercise its power pursuant to 40 C.F.R. § 22.30(c) and decide Respondent's Other Issues.

November 12, 2010 **SMITH FARM ENTERPRISES, L.L.C.**

By /s/ Hunter W. Sims, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of November 2010, the foregoing ***Respondent's Reply to EPA's Response to Respondent's Motion for Partial Reconsideration and to Stay Final Order*** was furnished:

***Via* Electronic Filing:**

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Clerk of the Board, Environmental Appeals Board
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