

**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 REMAND AND TO STAY FINAL ORDER**

As an alternative to its Motion and Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order (Docket #60 and 60.01), the Respondent, Smith Farm Enterprises, L.L.C. ("Respondent"), filed its Motion and Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order (Docket #60.02 and 60.03). It is the EPA’s position that Respondent’s Motion to Remand and Stay Final Order should be denied. The EPA contends that there is no need to remand the matter because, according to the EPA, Judge Moran did in fact incorporate Judge Charneski’s prior initial decision and Judge Charneski’s holdings as to Counts I and II of the Amended Complaint into his decision upon remand. The Respondent does not agree with this argument. In effect, the EPA’s argument opposing Respondent’s Motion for Remand and to Stay Final Order is the same as EPA’s arguments contained in pages 5 through 7 of the EPA’s Response to Respondent’s Motion for Partial Reconsideration and to Stay Final Order (Docket #73).

The Respondent simultaneously with the filing of this reply, filed its Reply to the EPA’s Response to Motion for Remand and to Stay Final Order wherein the Respondent addressed and refuted all of the EPA’s arguments concerning whether Judge Moran’s Initial Decision on

Remand contained a ruling on whether or not the Respondent violated § 301(a) of the Clean Water Act by failing to obtain a § 404 permit. In summary, the Respondent sets forth all of the reasons why Judge Moran's Initial Decision on Remand did not include any ruling on whether or not the Respondent violated § 301(a) of the Clean Water Act by failing to obtain a § 404 permit, why the Respondent's Other Issues were not before Judge Moran, why the Respondent did not need to again appeal the Other Issues and why Respondent did not abandon the Other Issues. Rather than repeating all of those arguments here, Respondent incorporates by reference all of its argument set forth in its Reply to EPA's Response to Respondent's Motion for Partial Reconsideration and to Stay Final Order. However, there are a few points the Respondent desires to make.

Respondent's Alternative Motion for Remand and to Stay Final Order states that remand should be made to Judge Moran, who had issued the Initial Decision on Remand. Respondent was not aware that Judge Moran is apparently no longer with the U.S. Environmental Protection Agency. Consequently, if the EAB decides that the matter should be remanded in accordance with the alternative request of Respondent, Respondent seeks remand to an Administrative Law Judge designated to preside over the remand.

Therefore, if the EAB does not grant the Respondent's Motion for Partial Reconsideration and also decides not to consider the Other Issues pursuant to 40 C.F.R. § 22.30(c), then in the alternative, Respondent requests that the EAB remand the matter to an Administrative Law Judge for the purpose of making a ruling on whether or not Respondent violated § 301(a) of the Clean Water Act by failing to obtain a § 404 permit.



**CERTIFICATE OF SERVICE**

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

**Via Electronic Filing:**

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

**Via Fax and Federal Express:**

Stefania D. Shamet, Esquire  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
Fax: (215) 814-2603

LaJuana S. Wilcher, Esquire  
English, Lucas, Priest & Owsley  
1101 College Street  
Post Office Box 770  
Bowling Green, KY 42102  
Fax: (270) 782-7782

**Via Federal Express:**

Ms. Lydia Guy, Regional Hearing Clerk  
U.S. Environmental Protection Agency  
Region III  
1650 Arch Street (3RC00)  
Philadelphia, PA 19103

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/s/ Hunter W. Sims, Jr.

Hunter W. Sims, Jr.