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
Respondent.	)	
Docket No.: CWA-03-2001-0022	)	

SUPPLEMENTAL BRIEF

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INTRODUCTION

Smith Farm Enterprises, L.L.C. ("Smith Farm") hereby submits this Supplemental Brief addressing important fair notice issues concerning the above-captioned matter. The record in this case supports a determination by the U.S. Environmental Protection Agency ("EPA") Environmental Appeals Board ("EAB" or "the "Board") that Smith Farm did not have fair notice that the federal government would consider Smith Farm's actions in 1998 and 1999 to be a violation of Sections 301, 404 or 402 of the Federal Water Pollution Control Act ("CWA" or "the Act") and regulations promulgated pursuant thereto. This enforcement action therefore violates fundamental fairness and due process of law. Accordingly, Smith Farm renews its request that this action be dismissed.

The elements necessary to demonstrate a lack of fair notice have been raised in varying forms throughout this proceeding. The Board may use judicial notice of Federal Register Notices and federal regulations to satisfy additional criteria, if necessary. For the Board's convenience, relevant portions of these documents are referred to and cited in this Supplemental Brief, as are previous EAB and federal court decisions.

In addition, Smith Farm refers the EAB to the Supreme Court's 2009 opinion in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), which held that EPA cannot proceed under both Section 404 and Section 402 of the CWA for the same alleged discharge. Finally, Smith Farm offers additional information for the EAB's consideration concerning the inconsistency of the EPA's most recent jurisdictional determination at the site with applicable EPA guidance.

FACTUAL AND REGULATORY BACKGROUND

The issue highlighted in this brief is a relatively narrow issue concerning fair notice. As the facts of this case have already been briefed extensively, Smith Farm adopts and incorporates herein the facts as stated in its previous filings. This brief focuses primarily on directing the Board's attention to Section 404's programmatic and regulatory background and references thereto, as well as cases addressing the fair notice issues raised in previous EAB or federal court decisions.

One cannot dispute that implementation of Section 404 of the CWA has been among the most challenging environmental laws that EPA has been charged with administering. The difficulties stem largely from Congressional action, or lack thereof. This includes the gaps left in the statute due to the failure to clearly define its jurisdictional limits, the words "dredged" or "fill," and the word "wetlands," the latter being finally added in 1977. In addition to leaving these important tasks to administrative agencies, Congress further complicated the new regulatory program in 1972 by authorizing joint administration of the Section 404 program by two different federal agencies, the EPA and the United States Army Corps of Engineers ("Corps") (collectively the "Agencies"), sometimes creating unique roles for EPA or the Corps, and sometimes creating overlapping responsibilities, with both Agencies to tackle one task.

Finally, and of particular relevance in the present case, Congress did not regulate draining of wetlands or other waters of the United States or the removal of vegetation in the CWA. Much of this case deals with if or how the CWA addresses those actions. Part of the motivation for the Agencies' regulatory decisions in the late 1980s and early 1990s was a growing concern that wetlands were being drained or cleared without regulation

under Section 404. While EPA was and is concerned that Section 404 does not regulate draining and ditching activities,[1] Congress has not actually given EPA nor the Corps that authority.[2] One might argue whether the CWA *should* grant such regulatory authority, but Section 404 does not, and did not, cover draining of wetlands or clearing of vegetation barring other, covered, regulatory actions, no matter how one might wish it did so. Quite simply, the EPA's desire to regulate such activities is what this case is really about.

For at least two decades EPA has sought to regulate draining of wetlands and the removal of vegetation to protect environmental resources by regulating activities often associated with it . . . attempting to regulate incidental fallback from mechanized landclearing operation, or working with the Corps to revise its regulatory definition of fill. Such regulatory efforts and the ensuing litigation and resulting judicial opinions created uncertainty and confusion that placed those in the regulated community in the unenviable position of needing to divine what EPA wanted, rather than being able to rely on a plain reading of the law, regulations and other publicly available documents in order to comply with the EPA's interpretation of the law.

Regardless of the EPA's motivation for its self-initiated regulatory revisions, however, litigation flourished in this environment, and the regulatory landscape shifted constantly as the result of judicial decisions, regulatory revisions and policy guidance that was rewritten by each new administration. No one questions the difficulties that regulators and the regulated community alike have faced in attempting to develop and

[1] EPA, in discussing this issue, recognizes that, with regard to ditching, draining and destruction of wetlands and stream channels, "[N]o regulatory action can fully close the Clean Water Act loophole that has led to this type of wetlands destruction. Congress will need to act and strengthen the Clean Water Act to close this loophole completely." *See,* http://www.epa.gov/owow/wetlands/dredgedmat/2001rule.html, accessed July 6, 2010. 5:44 PM CDT.

[2] Legislation has been introduced seeking to make that change in the law. *See, e.g.* H.R.350, the Wetlands Reform Act of 1993.

comply with the Section 404 program. Nonetheless, in our complex regulatory world, courts hold that the regulated community must be given fair warning or notice of the rules with which they are expected to comply. Government agencies must write and implement rules clearly and consistently in order to give the regulated community a fair sense of what is required.

The regulatory backdrop in this case is an essential element in understanding the mindset of Smith Farm in 1998 and 1999, when the alleged violations occurred. Even though the Initial Decision did not find that Smith Farm discharged dredged material in violation of Section 301, the regulatory developments in the early 1990s concerning the discharge of dredged material are key to the Board's understanding of what Smith Farm or other members of the regulated community might have believed with regard to the regulatory requirements of the CWA relating to "ditching."

Prior to 1993, Corps regulations defining the "discharge of dredged material" provided that *de minimis* incidental soil movement occurring during normal dredging operations was not considered to be within this regulatory definition, and thus was not regulated under Section 404. In 1992, the Federal government settled a lawsuit involving the applicability of Section 404 of the CWA to mechanized landclearing, ditching and channelization in waters of the United States. The lawsuit, brought by environmental groups in North Carolina, argued that incidental fallback associated with such activities should constitute the discharge of dredged material, and should therefore be subject to regulation under Section 404 if those activities occurred in waters subject to the jurisdictional reach of the CWA. *North Carolina Wildlife Federation, et al. v. Tulloch,* Civil No. C90-713-CIV-5-BO (E.D.N.C. 1992). In accordance with the settlement

agreement, in 1992 the Agencies proposed a modification of the definition of "dredged material" in their regulations to provide that mechanized landclearing, ditching, channelization, and other excavation activities would constitute discharges of dredged material, and that, when performed in waters of the United States, such activities would be regulated when they had or would have the effect of destroying or degrading waters of the United States, including wetlands. *See*, 57 *Fed. Reg.* 26894 (June 16, 1992). This was a major change in the Corps' historical interpretation of which activities should be regulated under the CWA, as noted in the Federal Register notice: "…Corps guidance has not been entirely clear or uniform among all Corps district offices regarding which activities involving discharges of material excavated (*i.e.*, dredged) from the waters of the United States require authorization under section 404." *Id.* The Agencies continued to describe the problems that had arisen and the varying interpretations that had been applied by the agencies in the course of administering the Section 404 program, as follows:

> The Corps' current definition of "discharge of dredged material," at 33 CFR 323.2(d), provides that *de minimis* incidental soil movement occurring during normal dredging operations is not considered to be within this regulatory definition. This exclusion derives, in part, from a desire to avoid duplicative regulation of dredging itself in waters within the jurisdictional scope of the Rivers and Harbors Act. EPA's regulations contain a similar definition, with the same exclusion, at 40 CFR 232.2(e).
>
> Over the years, application of this "*de minimis*" language has become problematic, especially when applied to activities which did not involve dredging for the purposes of maintaining navigation in traditionally navigable waters. Because of the lack of guidance in the regulation, in some instances this language has been interpreted to exclude from regulation landclearing and drainage activities in wetlands where the actual quantity of excavated material discharged was relatively small, but where the discharge was part of an activity which could have significant environmental impacts on the waters of the United States, contrary to the intent of the Clean Water Act. While the Corps and EPA have attempted

> to address this problem through guidance memoranda, e.g., RGL 90-5, addressing which landclearing activities are subject to section 404 jurisdiction, the agencies believe that a regulatory change would lead to a better understanding of the scope of the term "discharge of dredged material" and would promote greater national consistency and more effective protection of the aquatic environment.

Id. at 26895.

Following a 60 day comment period, in which over 6,000 comments were submitted, the Agencies issued a final rule providing that "any addition or redeposition of dredged material associated with any activity, including mechanized landclearing, ditching, channelization and other excavation, that destroys or degrades waters of the United States requires a Section 404 permit." 58 *Fed. Reg*. 45008, 45009 (August 25, 1993).

The courts would not allow this expansion of authority to cover draining wetlands, even when the agencies sought to regulate them under the aegis of regulating the "discharge of dredged material." When the American Mining Congress, among others, challenged the 1993 regulatory decision, the U.S. District Court for the District of Columbia ruled that the regulation exceeded the Agencies' authority under the CWA because it impermissibly regulated "incidental fallback" of dredged material. *American Mining Congress v. United States Army Corps of Engineers,* 951 F. Supp. 267, 272-76 (D.D.C. 1997). The court concluded that incidental fallback is not subject to the CWA as an "addition" of pollutants, and declared the rule "invalid and set aside." *Id*. at 278. The court also enjoined the agencies from applying or enforcing the regulation. Id. The government appealed the court's ruling and the U.S. Court of Appeals for the District of Columbia Circuit affirmed the district court's decision. *National Mining Association v.*

United States Army Corps of Engineers, 145 F.3d 1339 (D.C. Cir. 1998).

The *National Mining Association* court described incidental fallback as "redeposit" of dredged material that "takes place in substantially the same spot as the initial removal." *National Mining Association*, 145 F.3d at 1401. The court further portrayed such fallback as "the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back," and concluded that because such fallback represents a net withdrawal, it cannot constitute a regulable "addition" of a pollutant. *Id*. at 1404.

It was at this point in time that Smith Farm sought to install ditches on the property in question in Virginia. Clearly, no law or regulation prohibited this action. Indeed, on May 10, 1999, the Agencies issued a final rule, without opportunity for notice and comment, modifying the agencies' definition of "discharge of dredged material" in response to the Court of Appeals' decision to affirm the district court's order invalidating the 1993 "Tulloch rule." (64 *Fed. Reg*. 25120, 25123) (the "1999 Rule"). The 1999 Rule made changes to attempt to conform the regulations to these decisions, and specifically excluded from the term "discharge of dredged material:"

> *(ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, and*
> *(iii) Incidental fallback. (*emphasis added).

Smith Farm cut and removed vegetation above the ground, without substantially disturbing the root system and without involving mechanized activities that redeposited excavated soil material. Any redeposit was simply incidental fallback.

Similarly, it was easy for confusion to arise in that time frame concerning the definition of "fill material" because the EPA's and Corps' definitions differed, with the Corps using a primary purpose-driven test and EPA using an effects test. Specifically, from 1977 until 2002, the Corps definition at 33 C.F.R. 323.2(e) stated that "[t]he term ''fill material'' means any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.'' 33 CFR 323.2(e). *See,* 65 *Fed. Reg*. 21292 (April 20, 2000) (emphasis added). The preamble for the proposed rule recognized repeatedly that the differences between the Corps and EPA rules created confusion, stating "[a]t present, the Army and EPA definitions of ''fill material'' differ from each other, and this has resulted in *regulatory uncertainty and confusion*." *Id.* at 21294 (emphasis added). It was the Agencies' hope, as expressed in the Federal Register, that the revised rule would be "less ambiguous" than the rules in effect in 1998 and 1999, and that even EPA's effects test needed clarification. They stated, "This approach, which focuses on whether the material would have the effect of replacing portions of waters of the U.S. with dry land, or of changing the bottom elevation of such waters, is less ambiguous and subjective than use of a ''primary purpose test.'' *Id*. at 21295.

Only in 2000 (perhaps coincidentally, a short time after EPA initiated enforcement actions against Smith Farm and others engaged in similar activities) did EPA and the Corps make a public statement with regard to their interpretation of when "wood chips" would be considered to be "fill" and subject to regulation under Section

404 in the preamble to the proposed rule. They stated:

> With respect to ‘‘wood chips,’’ when this material is scattered as a result of the normal use of wood cutting equipment such as chainsaws, bush hogs, and similar equipment, the wood chips would not have the effect of fill, and thus would not be covered by CWA section 404 under today's proposal. However, some operators of heavy mechanized equipment place or stockpile wood chips in wetlands to use as temporary road material, equipment pads, or surfacing to facilitate operation of equipment such as trucks, backhoes, and excavation equipment. In addition, in some cases the regular operation of chipping equipment can result in stockpiling or mounding of chips in waters of the U.S. In situations such as these, because of their quantity or distribution, the woodchips have the effect of fill and would be subject to regulation under CWA section 404.

Id. at 21295

It was not until 2002 that the Agencies promulgated a rule whereby a consistent approach was adopted. See 67 *Fed. Reg*. 31129 (May 9, 2002).The Agencies recognized that the differing definitions had created confusion, stating in the preamble to the rule:

- "These differing definitions of ‘‘fill material’’ have resulted in some confusion for some members of the regulated community which has not promoted effective implementation of the CWA." *Id*. at 31131.
- "In the preamble for the April 2000 proposal, the agencies discussed the need to address the confusion created by the agencies' differing definitions*." Id.*
- "We believe that a change in the regulatory language is justified and that by adopting the substance of EPA's longstanding definition, we are minimizing potential confusion and disruption to the program." *Id.* at 31132
- "Many of the comments also noted that the differences between the Corps' and EPA's rules have historically caused confusion for the regulated community." *Id.*
- "In addition, although similar ‘‘purpose’’ tests may be used under other statutes and even under the section 404 program, this does not negate the difficulties we have faced in

applying the primary purpose test, as well as some confusion that has resulted from the use of the subjective primary purpose test in the section 404 jurisdictional context." *Id.* at 31132-31133.

● The Agencies also noted that judicial decisions had further confused the issue, and that the purpose of the new clarification was to promote clearer understanding and application of the CWA regulatory programs. *Id.* at 31131.

In fact, on July 14, 2004, when this case came before this tribunal for oral argument, members of the EAB expressed their concerns about this precise issue . . . the lack of clarity of the regulations under which this enforcement action was brought. Judges Stein, Reich and Fulton each expressed such concerns. For example, Judges Fulton and Stein observed as follows:

JUDGE FULTON: And there is actually a letter in the record *from the Corps*—right?—that talks about wood chips… it says where the wood chips are widely dispersed over the surrounding area, this would not appear to constitute a discharge of dredged or fill material within the meaning of Section 404… So you would *disagree* with the legal proposition that's advanced here, that that would not constitute a fill.

MS. SHAMET: That's correct. Your Honor.

JUDGE FULTON: Has the EPA expressed itself on this point in a way that would allow the regulated community to understand why the Corps' interpretation is incorrect?

MS. SHAMET: The EPA and the Corps have *since* done so, Your Honor…

JUDGE STEIN: But it is in fact troubling, isn't it, that you have a consultant who has gone to the Corps for a consultation which, as Judge Fulton explained, was perhaps not as complete as it could have been, but there clearly was communication. And in the Smith Farm case there was further communication, so it's not like the Corps was unaware of generally what was happening…. I don't see in the record that immediately upon seeing the wood chips, it was clear to the Corps which side of the line things fell on…I see open questions,… it wasn't clear or didn't appear to be clear to the Corps that this clearly was… if wood chips were considered I guess some kind of disposal debris, they may have been regulated under 402 rather than under 404. But your position is that all of that should have no effect on what we do here.

Trans. of Proceedings before the EAB, pp. 40-41, 65 (July 14, 2004) (emphasis added).

In addition to trying to understand an ever-changing regulatory environment, the regulated community has been faced with evolving interpretations of Section 404 and 402 programs as determined by judicial intervention. The jurisdiction of the CWA has been a moving target as the result of decisions by the U.S. Supreme Court and various agency guidance documents attempting to clarify when discharges to intermittent or ephemeral waters, among others, should be regulated under the CWA. The shifting jurisdictional issues further compound the determination of whether a violation occurred in this case and whether Smith Farm could reasonably ascertain whether it could be considered to be in violation of the CWA. The jurisdictional issues have been addressed in previous filings by Smith Farm, and will not be repeated in detail here.

ISSUE

Whether Smith Farm had fair notice that the federal government would consider its actions in 1998 and 1999 to be a violation of Sections 301, 404 or 402 of the Clean Water Act and regulations promulgated pursuant thereto.

ARGUMENT

It is well established that it is contrary to the constitutional principle of due process for an agency to penalize a party for violating a regulation when that party has not received adequate notice of what the regulation requires. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (citing *Gates & Fox Co. v. Occupational Safety & Health Review Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986)). To determine if a party has received fair notice, courts examine the relevant facts of each case. *United States v. Bennett,* 984 F.2d 597, 605 (4th Cir. 1993). Specifically, courts "look at the facts as they

appear to the party entitled to the notice, not to the agency." *United States v. Hoechst Celanese Corp.,* 128 F.3d 216 (4th Cir. 1997).

Specifically recognizing the importance of fair notice in environmental enforcement cases, the Board has raised the fair notice issue *sua sponte* after noting that neither the Agency nor the regulated entity has specifically done so. *See, In Re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 10 E.A.D. 385 (EAB 2002). In that case, one of Advanced Electronics' arguments was that the language in the permit with which they were charged with violated was "confusing." The Board stated:

> We interpret Advanced's argument as presenting the issue of lack of fair notice. Before a party may be deprived of property, for example, by having a penalty imposed on it, it must receive fair notice of the conduct required or prohibited by the Agency. *See In re CWM Chem. Servs., Inc.*, 6 E.A.D. 1, 20 (EAB 1995)("where penalties are being sought, the principles of due process require that the language of the regulation itself * * * provide fair notice to the regulated entity of the conduct required or prohibited by the Agency."); *Gen. Elec. Co. v. EPA*, 53F.3d 1324, 1328 (D.C. Cir. 1995) ("[d]ue process requires that parties receive fair notice before being deprived of property."); *see also U.S. v. Chrysler Corp., 158F.3d 1350* (D.C. Cir. 1998) (the imposition of a fine deprives a party of property);*U.S. v. Hoechst Celanese Corp*., 128 F.3d 216, 224 (4th Cir. 1997) (because civil penalties are quasi-criminal in nature, parties subject to such administrative sanctions are entitled to notice similar to that required in the criminal context), (cert. denied, 524 U.S. 592 (1998)).

Id. Clearly the Board may consider fair notice at any time.

In this case, elements necessary to demonstrate a lack of fair notice have been raised in varying forms throughout this proceeding. *See, e.g.,* Respondent's Appeal Brief pp.7-8 (asserting that "Tulloch ditching" was legal, that Smith Farm consulted with Corps, and lack of notice by EPA or the Corps regarding an alleged violation); Respondent's Appeal Brief pp. 8-9, 36-38 (detailing Smith Farm's extensive efforts to consult with the Corps to clarify regulatory requirements under Section 404);

Respondent's Appeal Brief p. 10 (describing Smith Farm's knowledge of the Corps approval for a substantially identical project nearby); Respondent's Appeal Brief p. 11 (Smith Farm's understanding of the regulations at the time of the alleged violation); Respondent's Appeal Brief p. 30 (noting differing definitions of "fill" under EPA and Corps regulations. *See also* Complainant's Post Hearing Reply Brief Pages 30-35 and Complainants' Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act pp. 36-42. Indeed, as discussed above, the EAB discussed the issue during the 2004 oral argument. Other matters relevant to the Board's determination of this matter may be ascertained from judicial notice of Federal Register notices, case law, and other publicly available documents. They are summarized below.

In *In Re Coast Wood Preserving, Inc.,* 11 E.A.D. 59, 81 (EAB 2003), the Board noted that it had considered a variety of challenges to the EPA's enforcement of regulations based on claims that the regulated community lacked fair notice of the conduct that was the basis of an enforcement action. *Id.* (*citing In re Tenn. Valley Auth.* ("TVA"), 9 E.A.D. 357, 411-16 (EAB 2000), *appeal dismissed, Tenn. Valley Auth. v. Whitman*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied,* 541 U.S. 1030 (2004)); *In re V-1 Oil Co.*, 8 E.A.D. 729, 751-52 (EAB 2000); *In re B.J. Carney Indus.*, 7 E.A.D. 171, 195-96 (EAB 1997), appeal dismissed, 192 F.3d 917 (1999), vacated as moot, 200 F.3d 1222 (9th Cir. 2000).

A starting point for addressing whether a party has received fair notice is whose point of view should be considered . . . that of the agency, or that of the regulated community? Courts look at the facts as they appear to the party entitled to the notice, not to the agency. *See Hoechst*, 128 F.3d at 226 (holding that corporation could not be held

liable for a penalty assessed against it because it reasonably believed it was exempted from the requirements of national standards controlling benzene emissions); *see also In re Tenn. Valley Auth.,* 9 E.A.D. 357, 412 (EAB 2000) (explaining that although fair notice does not require that a regulation be altogether free from ambiguity, it does require that if the regulation is susceptible to more than one possible interpretation, the interpretation advanced by the regulator should be ascertainable to the regulated community).

In the case before the EAB, Smith Farm could not reasonably ascertain, at the time of the activities complained of, that EPA would consider Smith Farm's conduct to be in violation of the CWA. Smith Farm made good faith efforts to ascertain and comply with the law. Notably, in an abundance of caution and in an effort to avoid precisely the kind of financial and emotional nightmare that the Boyd family has found itself embroiled for over a decade, Smith Farm hired consultants to advise it whether and how one might undertake these actions on the farm in accordance with the law. Smith Farm sought the advice of qualified consultants, including a retired career employee from the Corps, whose job had been regulatory enforcement and who should have been in an excellent position to provide advice regarding the Corps' interpretation of Section 404 regulations. Indeed, had Smith Farm wanted to evade the law, there would have been no need to hire consultants and meet with the Corps at all. Smith Farm could have simply gone ahead with the work, and perhaps no one ever would have known. But that was not Smith Farm's intent. Nor do Smith Farm's actions suggest that it did anything to "evade" the law, as alleged by EPA. For some reason, EPA in this case considers efforts to comply with the law as an attempt to evade the law, which has no basis in fact.

Several specific factors are ordinarily involved in determining whether fair notice requirements have been met. They are discussed in turn below.

<u>The Text of the Regulation</u>

During the course of this litigation, the regulations defining "discharge of dredged material" have changed. The regulations defining "fill" have changed. The federal government's definition of jurisdictional waters of the United States has changed. These changes have occurred either because the courts have disagreed with an agency interpretation of the reach of Section 404 of the CWA, because the agencies themselves have sought to "clarify" the regulations, or because the agencies have sought to eliminate the "confusion" experienced by the regulatory community in attempting to comply.

In late 1998 and in 1999, the regulated community was operating under the D.C. Circuit's decision in *National Mining Association*, *infra*, to uphold the District Court's determination that incidental fallback is not subject to the CWA as an "addition" of a pollutant, and declaring the 1993 rule purporting to regulate incidental fallback associated with mechanized landclearing and ditching as "invalid and set aside." Clearly, one undertaking Smith Farms' activities at that time could reasonably expect that the placement of soil on uplands when removed using buckets and trucks that virtually eliminated incidental fallback would not be a violation. According to the courts, when material is removed from the waters of the United States and a small portion of it happens to fall back, there is a net withdrawal, and this could not constitute a regulable "addition" of a pollutant, even if the activity occurred in a jurisdictional water of the U.S.

Indeed, the May 1999 rule appears to clarify that the activities being undertaken at Smith Farm did not constitute the discharge of dredged material. That regulation

excluded *activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, and incidental fallback.* (emphasis added). This is exactly the activity undertaken at Smith Farm.

Moreover, in 1998, the Corps definition of fill material, to include the primary purpose test, provided that "[t]he term ''fill material'' means any material used *for the primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of a water body. The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.'' 33 CFR 323.2(e). 65 *Fed. Reg*. 21292 (April 20, 2000) (emphasis added. In this case, the Kershaw machine's primary purpose was simply and exclusively to clear a path through a dense wooded area. Grasses, shrubs, branches, trees, saplings and other vegetation that stood in the way of the path were cut and chopped into mulch. The mulch was the by-product of this clearing of vegetation and was randomly dispersed as the obvious and practical result of the operation of the Kershaw machine. Indeed, the deepest area of mulch was around the base of a stump, obviously not a prime roadway, regardless of EPA's efforts to try to force this activity into the Corps' definition of fill. The wood chips were not mounded, raked or stockpiled for use elsewhere. Based upon a plain reading of the regulations, one could not have reasonably ascertained that EPA would contend that this activity should be regulated as the discharge of dredged or fill material.

Toward that end, EPA's reliance on the preamble to its 2000 proposed revised

regulation concerning the definition of fill is misplaced. EPA cites to the preamble of the proposed rule that was published in 2000, *after* all ditching activity at the Smith Farm site had ceased. Complainants' Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act; Complainant's Post-Hearing Reply Brief page 37. Fair notice arguably may be provided in preambles, but only if they are published <u>before</u> the alleged violations occurred.

<u>The Regulations as a Whole</u>

In prior cases considering issues relating to fair notice, the Board has stated that after examining the language of the regulation on its face, it is appropriate to consider whether an agency's "'interpretation embodied in the rule or statement was reasonable in light of the * * * overall structure of the regulatory scheme."' *In re Howmet, RCRA (3008) Appeal 05-04* (EAB May 24, 2007) (*citing Tenn. Valley Auth.*, 9 E.A.D. at 412 (quoting *In re CWM Servs., Inc.*, 6 E.A.D. 1, 18 n.28 (EAB 1995))).

The total lack of consistency of agency statements and regulatory positions with respect to the relevant definitions in this matter, described more fully above, made it difficult for the regulated community to ascertain the overall structure of the legitimate regulatory scheme. This is due in part to the disagreements between EPA and the Corps on numerous regulatory issues throughout the history of this program. In addition, the program direction and regulatory interpretations have drifted to and fro based upon each new administration's goals and objectives. Varying judicial interpretations and guidance documents have added additional layers of inconsistencies. Clearly the Agencies have no authority to regulate draining wetlands or other waters of the U.S. It is inappropriate for EPA to employ the CWA in an effort to regulate through the back door what it cannot

regulate through the front, especially without giving clear and fair notice to Smith Farm concerning what was or was not required to comply with EPA's interpretations. This case represents the worst of EPA's good efforts to protect valuable aquatic resource, and has had an unnecessarily onerous effect on the owners of the Smith Farm and the Boyd family. Given the precautions taken by Smith Farm in the exercise of due diligence in an effort to comply with the law, this case is fundamentally unfair.

This is a case that involves the removal of trees in a silvicutural operation and the additional removal of vegetative material so that Smith Farm could dig ditches to drain private property, all done in compliance with the law as it stood at the time. While the Agencies may not like Congress's or the court's decisions concerning these matters, the Agencies' interpretations of the regulations in effect in 1998 and 1999 simply did not prohibit the conduct that is the subject of this action. Indeed, they allowed it.

Looking at the regulations as a whole, we see that in the late 1980s and early l990s EPA considered how to control unregulated clearing and draining of wetlands. EPA tried to regulate incidental fallback as a surrogate, and, as discussed previously, that effort failed as it was beyond the Agencies' authority under Section 404. After that decision, the Agencies attempted to protect aquatic resources by reinterpreting the definition of fill. In view of the regulations in effect at the time, then-recent court cases, and the fact that legislation had previously been introduced in Congress to address draining of wetland, it was reasonable for Smith Farm (or others in similar situations) to expect that its activities were not then regulated under the CWA.

Regulatory History and Agency Interpretive Guidance

A party may claim that it was denied fair notice because of internal agency confusion regarding the correct interpretation of a regulation. *See In re Friedman*, 11 E.A.D. 302,320 (EA 2004) (citing *Gen. Elec.*, 53 F.3d at 1332 (explaining that confusion among agency offices may result in a party not receiving adequate notice)). Differing interpretations within an agency indicate that one cannot reasonably ascertain what the agency intended. In this case, confusion clearly occurred within the Corps, and apparent confusion and disagreement occurred between the two federal agencies charged with administering Section 404; the principal should apply.

In this case, the Corps found no violations when it inspected the site on multiple occasions. The Corps' Mr. Martin did, however, raise several questions, but did so only internally, not with Smith Farm. His questions arose out of ambiguities within the regulations; he could not be certain whether generating wood chips as a by-product of clearing paths for equipment to access the woods or rutting in the soil by equipment was to be considered a violation. See October 6, 2003 Trans., Vol. I, p 271; Vol. II, pp 9-16. In an effort to clarify the inherent uncertainties of the regulations, following Mr. Martin's initial site visit to the Smith Farm on January 6th, 1999, Mr. Martin, on January 14, 1999, forwarded a package to his superiors at the Army Corps containing a detailed description of the work underway at the site, along with photograph depicting the work Pending a response to Mr. Martin's inquiry, an intra- agency conference call took place on March 23rd, 1999 in which the specter of whether the existence of wood chips might rise to the level of a violation was a topic of discussion. On April 21st, 1999, a response to Mr. Martin's inquiry was issued by his superior, John Studt, by correspondence in which Mr. Studt opined that the Corps does not regulate wood chips and that wood chips are not

dredged materials. Mr. Studt further opined that wood chips may be regulated under Section 402, but offered no further guidance which Mr. Martin found useful. Mr. Studt concluded that "the onsite regulators must use their common sense combined with their best professional judgment" in determining what needs to be regulated. Subsequent thereto Mr. Martin never issued a notice of violation regarding the Smith Farm site involving either of the concerns he had raised to his superiors.

Further, Region III of the EPA first became specifically aware of the work underway at the Smith Farm site in February 1999. EPA likewise failed to notify the Smith Farm of any concerns or violations. Had anyone been clear concerning the alleged violations, the Agencies could have protected aquatic resources simply by issuing a cease and desist order, or simply by asking Smith Farm to cease operations until the Agencies figured it out. By failing to act, the Agencies allowed the construction of the ditches later complained of to proceed to completion.

How the Agencies Have Interpreted This Issue to Date

Historically, as discussed previously, the Corps interpreted the discharge of fill material to be the deposit of material that had as its primary purpose changing wetland to uplands. Specifically, excluded material (such as wood chips) generally would not be regulated unless the materials were being placed in waters of the U.S. in a manner consistent with traditional uses of fill material to create a structure or infrastructure, or a road, among other things. The Corps did not historically regulate wood chips, which perhaps explains the lack of action by the Corps against Smith Farm.

Duty to Inquire

Courts have held that even if a regulation is confusing, ambiguous, or subject to more than one interpretation, one may have a duty to inquire about the meaning of the regulation at issue. *See, e.g., Friedman*, 11 E.A.D. at 320; *Tenn. Valley Auth.*, 9 E.A.D. at 415; *Tex. E. Prods. Pipeline Co. v. Occupational Safety & Health Rev. Comm'n*, 827 F.2d 46, 50 (7th Cir. 1987).

In this case, the regulations are *not* reasonably subject to more than one interpretation. EPA's interpretations are patently *unreasonable.* Nonetheless, Smith Farm clearly met its duty to inquire, and relied upon its ongoing interactions with the Corps to believe all was well. Smith Farm or their consultants met with the permitting authority (the Corps) before beginning work, wrote to the Corps asking whether the Corps had any concerns with the project, and asked the Corps to come out for site visits to inspect the work being done, *specifically for the purpose of advising the Smith Farm if the work in progress presented any problems to ensure that the Smith Farm would not run afoul of any regulatory violations.* Smith Farm did everything and more than one could have been expected to do to assure regulatory compliance. When the Smith Farm, inquired of the Corps whether a permit was needed for its activities, it was advised that no permit was required. In spite of numerous visits to the site, the Corps still never indicated that Smith Farm needed a permit for the actions that it was undertaking. The fact that the Smith Farm had every reason to believe that it could rely upon the actions of the government in response to its inquiries is abundantly clear from the testimony of Steve Martin of the Corps and of Robert Needham, Smith Farm's environmental consultant, as follows:

MS. SHAMET:

Q. Mr. Martin, was your visit on January 6th, 1999 your only visit to the site?

A. No. I visited the site on a number of occasions after January 6th.

CROSS EXAMINATION

BY MR. SIMS:

Q. Mr. Martin…you were specifically in charge of this particular project, Smith Farm; is that right?

A. It was assigned to me, yes, sir.

Q. What were your duties in that regard?

A. Per the request in Mr. Needham's letter, to meet with him on site and to discuss the ditching operation, provide my indication of any permits that might be required.

Q. And violations of the Clean Water Act?

A. Yes, sir…

Q. And on all of these occasions we've just recounted that you were on the site, you never cited Smith Farm for any violations, did you?

A. No, sir.

Q. And you didn't see any violation, did you?

A. Not to the best of my knowledge…

Q. … you didn't cite Smith Farm for any violation for fill because of wood chips, did you?

A. No, sir.

DIRECT EXAMINATION OF ROBERT NEEDHAM

Q. At the end of Mr. Martin's visit, did he issue or did the Corps issue any citations?

A. No, sir.

Q. Was a cease and desist order issued?

A. No, sir.

Q. Were you advised to stop work? Were the Boyds advised to stop work?

A. No, sir.

Q. Did Mr. Martin come back several other times to the site?

A. Yes.

Q. All right. At any time up until May of 2000, did anybody – after all the work had long been done, had anybody from the Corps or the EPA issued a cease and desist, stop work order, citation, anything like that?

A. No.

Transcript of Proceedings, Volume I page 248, Volume II, pages 63, 64, and 68, 73, Volume V, page 213, October 2003.

What is clear from the record is that the Corps itself was having difficulty making a determination *whether* the actions at Smith Farm would require a permit. Unbeknownst to the Smith Farm, deliberations were taking place within the Corps and between the Corps and the EPA about various regulatory interpretations, with EPA finally developing an approach to attempt to stop ditching in the area. No mention of these behind the scenes exchanges was made to the Smith Farm's owners nor to its representatives to alert them to the fact that there might be a problem. No one disclosed the uncertainties to Smith Farm.

EPA's only explanation about how Smith Farm could possibly have come to believe there might be a violation was one comment by the Corps representative Steve Martin, that "The project was more than what he expected." From that singular comment Smith Farm could not glean that it would become the subject of a decade long EPA enforcement action. Indeed, the Corps *never* said that a permit was needed, *never* said that there was a problem, *never* issued a cease and desist order, and *never* issued a notice

of violation. Nor did EPA, even though it was aware of the activities on the farm within 3 months of the initiation of work. It appears that EPA and the Corps had a different perspective on this case. The Corps apparently did not believe that an activity such as that undertaken by Smith Farm was a violation of the law at the time it was occurring, and took no action.

For EPA's part during the critical period, Jeffrey Lapp of Region III of the EPA admitted that EPA first became aware of the activities at the Smith Farm in February 1999, yet EPA took no action regarding the activities later complained of until June, when Smith Farm was first alerted to EPA's interest in the Smith Farm's activity. *See* Hearing Transcript, October 6, 2003, Vol. 1 pp 161-171. By that time the construction of the ditches in question was already complete. It was not until a year later, in May 2000, that EPA acted, with the issuance of the present enforcement action. When asked why the EPA took so long to act, Mr. Lapp stated that, "It takes time to have discussions internally… briefings throughout the agency, discussions between the two programs, those sorts of things." Clearly, EPA could have issued a cease and desist order in February 1999, before the work was completed, had it believed there was a clear violation and that it had the clear authority to proceed.

In 1998 and early 1999 Smith Farm could not have reasonably ascertained that EPA would contend that it needed a Section 404 permit to engage in the land clearing and ditching operation. No ordinary person exercising common sense would have believed that a permit was needed, based on the facts of this case, including Smith Farm's inquiries concerning these issues to the permitting authority. As such, Smith Farm did not have fair notice that EPA would consider it in violation of the law.

Another indicator of the lack of clarity concerning whether a violation occurred appears from the pleadings themselves. EPA clearly could not decide whether to allege that the activities of ditching and draining, timbering and mulching on Smith Farm should be considered to be the discharge of dredged material or the discharge of fill material and regulated under Section 404, or whether it should be considered to be the discharge of a pollutant and regulated under Section 402 of the CWA. If EPA could not decide what sections of the CWA and what regulations Smith Farm allegedly violated, it obviously would have been exponentially more difficult for Smith Farm to have known. EPA cannot regulate a discharge under both Section 402 and Section 404, as determined in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009). EPA should have determined which violations it believed were occurring and then worked with Smith Farm to resolve these concerns. EPA cannot regulate under Section 402 of the CWA discharges that are subject to Corps permitting under Section 404, and it should not try to do so.

Moreover, in this case, EPA has applied its own jurisdictional determination guidance inconsistently, further complicating an already convoluted case and raising even more questions about the fairness of this matter. *See* Affidavit of John Paul Woodley, former Assistant Secretary of the Army for Civil Works, attached as Exhibit "A". In his affidavit, Mr. Woodley describes the jurisdictional determination guidance which he co-authored with his counterpart at the EPA and which guidance was issued jointly by EPA and the Corps following the Supreme Court's decision concerning the jurisdictional reach of the CWA's term "navigable waters of the United States" in *Rapanos v. United States,* 126 S. Ct. 2208 (2006). Granted, such guidance was issued after the time of the hearing upon remand in this case; this guidance, however, sets forth the Agencies' own expectations in terms of the proof required to establish CWA jurisdiction. Under its own standards, specifically for the reasons

set forth in the Respondent's Remand Briefs, as supported by Mr. Woodley's affidavit, EPA did not establish that the land in question was subject to the jurisdiction of the CWA as established by *Rapanos.*

CONCLUSION

In the case before the Board, Smith Farm was operating in a constantly shifting regulatory environment created by a lack of Congressional clarity, constant regulatory changes, and conflicting regulations prescribed by EPA and the Corps. This clearly created confusion, as EPA has repeatedly publicly admitted, concerning the issues that are at the core of this case. Specifically, these include what activities would be considered a regulated discharge of dredged or fill material and what areas were jurisdictional under the CWA. Nonetheless, Smith Farm asserts that its actions were not in violation of the CWA and its regulations. Should EPA argue otherwise, Smith Farm asserts that it did not and could not have received fair notice, reasonably ascertainable. The Agencies' regulatory action in 2002 to reconcile their regulations means, in essence, that this issue should not arise in the future for members of the regulated community. Nonetheless, at the time of the alleged violation, there was not clarity and Smith Farm could not, in spite of its best efforts, ascertain that the actions undertaken on the farm would have been considered a violation federal law. Therefore, this matter should be dismissed, with prejudice, thus bringing to an end this unfortunate enforcement action.

Respectfully submitted,
SMITH FARM ENTERPRISES, L.L.C.

By:_ _s/LaJuana Wilcher_____________
LaJuana S. Wilcher

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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, **Supplemental Brief** was filed electronically with the EPA Appeal Board.

And one copy of the foregoing **Supplemental Brief** was sent this day via email and Federal Express to the following:

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