

**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.	)	

**MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT'S**  
**MOTION FOR LEAVE TO CORRECT**

Respondent, Smith Farm Enterprises, L.L.C. (“Respondent”), through its counsel, has moved the Environmental Appeals Board for leave to correct its Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order filed on October 13, 2010 and also to correct its Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order filed on October 13, 2010.

In both its Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order and in its Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order, the Respondent took the position that Administrative Law Judge William B. Moran’s Decision Upon Remand made no mention of the issues previously decided by Administrative Law Judge Carl C. Charneski other than the jurisdictional issue which was the subject of the remand (“the Other Issues”). However, that position needs to be corrected as follows and Respondent offers this memorandum to make the correction.

After fifty-eight (58) pages of factual and legal analysis used to arrive at the decision that Clean Water Act jurisdiction existed for the Smith Farm site under the Supreme Court’s ruling in *Rapanos*, Administrative Law Judge Moran’s Order appears on page 59 of the Decision Upon Remand. The Order contains the following language:

Judge Charneski's Initial Decision holding "that Smith Farm Enterprise, 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. 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.

While the first sentence of the above-quoted paragraph references Judge Charneski's Initial Decision holding that the Respondent violated § 301(a) of the Clean Water Act by discharging fill material into waters of the United States without having obtained a § 404 permit from the U.S. Army Corps of Engineers, it does nothing more. The sentence does not state that Judge Charneski's Initial Decision on this point is adopted for the Decision Upon Remand, and there is no language in the Order on page 59 ruling that the Respondent violated § 301(a). Therefore, there was nothing the Respondent could appeal on this point regarding issues other than jurisdiction. Consequently, all of the Respondent's arguments and all of the relief sought in its two motions and memoranda filed on October 13, 2010 with respect to the Other Issues on this and all other points are still valid.

In the second sentence of the above-quoted paragraph, Judge Moran does make clear that Judge Charneski's Initial Decision regarding a violation of § 301 (a) of the Clean Water Act alleged in Count II by discharging pollutants associated with storm water without having obtained a § 402 permit is adopted for the Decision Upon Remand. Therefore, the Respondent's arguments contained in its Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order filed on October 13, 2010 and its Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order filed on October 13, 2010

based upon a premise that Judge Moran's Decision Upon Remand did not contain a ruling as to the portion of the Other Issues arising from the failure to obtain a § 402 permit are not correct and those particular arguments are withdrawn. However, Respondent's other arguments and the relief sought in its Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order and its Memorandum of Law in Support of Alternative Motion to Remand and to Stay Final Order, which are not based upon the incorrect premise that the Decision Upon Remand did not rule on the portion of the Other Issues related to the failure to obtain a § 402 permit, are not withdrawn and remain before the Environmental Appeals Board for consideration.

In addition, footnote 3 on page 2 of the Decision Upon Remand does not contain a decision or ruling which can be appealed. On page 2, of the Decision Upon Remand, Administrative Law Judge Moran begins his analysis by first noting, "[t]his 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 altered by the testimony received during the proceedings upon remand.<sup>3</sup>" 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 that Initial Decision. The scope of the remand was limited to taking additional evidence as to Clean Water Act 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 in tact. Subject to the foregoing, Judge Charneski's Initial Decision is incorporated by reference."

Clearly, by that language, Judge Moran is indicating that he is adopting Judge Charneski's findings of fact on the remand issue of jurisdiction unless noted otherwise in his Decision Upon Remand, and that Judge Charneski's Initial Decision is incorporated by reference as to factual findings but not as to rulings. This language is merely *dicta* and, as noted above, particularly with regard to the § 301(a) (violation regarding failure to get a § 404 permit), is not a part of Judge Moran's Order and/or ruling set forth on page 59 of the Decision Upon Remand. Moreover, on page 21 of its Appeal Brief (Footnote 5), the Respondent stated: "Respondent has previously made objections to the factual findings of Judge Charneski as not being supported by the 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 act are incorporated by reference into this brief on appeal." This was a direct response to Judge Moran's footnote three on page two referencing Judge Charneski's Findings of Fact remaining in tact.

For the above stated reasons, subject to the correction described herein, Respondent's Motion for Partial Reconsideration should be granted and the Environmental Appeals Board should consider Respondent's Other Issues or in the alternative, grant Respondent's Alternative Motion to Remand.

**October 26, 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 26th day of October 2010, the foregoing *Memorandum of Law in Support of Respondent's Motion for Leave to Correct* was furnished:

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/s/ Hunter W. Sims, Jr.  
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