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	)	

REPLY IN SUPPORT OF MOTION

FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Respondent Smith Farm Enterprises, L.L.C. ("Smith Farm") hereby replies to the Complainant's opposition to Smith Farm's motion for leave to file a supplemental brief. Complainant incorrectly asserts that: (1) the supplemental brief improperly introduces new testimony; and (2) that the issues discussed in the supplemental brief were not timely and/or were previously decided or waived. For the reasons that follow, the Environmental Appeals Board ("the Board" or "EAB") should allow the filing of the brief and affidavit and should find for Smith Farms in this case.

(1) The Supplemental Brief Merely Emphasizes an Issue That Was Previously Raised and Is Appropriate for Consideration by the Environmental Appeals Board.

Complainant complains that the issue of fair notice is not timely and/or was previously decided or waived. As set forth in the Supplemental Brief filed with Smith Farm's Motion, the facts dispositive of the issue of fair notice *have been raised*

consistently and 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 Complainant's Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act pp. 36-42.

It is fundamental that the government must give fair notice to private citizens of what is required to comply with the law. Especially in a case such as this, where the government is impinging on the fundamental Constitutional right to use one's property in a reasonable manner and seeking a monetary penalty, private citizens should be entitled to the benefit of a full examination of the question whether the government has disseminated confusing regulations and information or whether the government's regulatory interpretation was clear and reasonably ascertainable.

The Boyd family has already endured significant hardship as a result of having their family farm be the subject of an enforcement action spanning over eleven years. They have endured the tremendous emotional and financial burdens of defending this case and their property rights, despite having sought clarity from the permit issuing

authority, the U.S. Army Corps of Engineers ("the Corps"), *for the very purpose of ensuring full compliance with the law and avoiding any legal problems.* Even more egregious is the fact that EPA brought this enforcement action against the Boyd family farm months after the alleged violations, when EPA could easily have requested or ordered the project to stop shortly after it began, had it been clear that a violation was in fact occurring. We are left to wonder why EPA remained silent, allowing the timbering and ditching project to proceed, even though EPA was aware that the Boyds were relying upon their consultations with the Corps, the permitting agency. In the interest of justice, the Board should fully and fairly consider this issue and ensure that important fair notice and due process rights are given exhaustive attention.

This issue clearly has been raised throughout this case. During the course of these proceedings, on July 14, 2004, when this case came before the Board for oral argument, members of the Board rightly questioned whether the regulations were clear – in other words whether Smith Farm had fair notice. 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. *See Pennsylvania v. Lockheed Martin Corp.*, 684 F. Supp. 2d 564, 567 (M.D. Pa. 2010) (judicial notice may be taken of facts and background information appearing in the Federal Register as well as public records including those filed by public agencies).

Where, as here, the relevant facts were introduced in the record to substantiate lack of fair notice, the Board may consider the issue. The Board, indeed, has done so in previous cases. *See In Re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 10 E.A.D. 385 (EAB 2002) (interpreting Advanced's argument that permitting requirements were

"confusing" as presenting the issue of fair notice). In this case, it is even more compelling for the Board to find for Smith Farm, where the Federal Register is replete with EPA's admissions that the very regulations that Smith Farm is accused of violating were "confusing."

Complainant cites various cases for the proposition that a party cannot raise an issue on remand that could have been raised in the first proceeding. These cases are inapposite because: (1) the issue of fair notice (and proper jurisdictional determinations post-Rapanos) have been raised throughout this proceeding; and (2) the EAB is not in precisely the same position as a federal circuit Court of Appeals. The EAB is the final agency decision maker with regard to this matter. Before a final decision is made, all parties should be afforded a full and fair opportunity to present their views. *See In re E.I. Dupont De Nemours & Co.,* FIFRA Appeal No. 98-2 (EAB May 7, 2000). The applicable rules provide that parties may appeal both issues raised during the course of the proceeding and by the initial decision. Additionally, if an issue was raised during the proceedings, but was not specifically appealed, the EAB may determine that it should be argued. *See* 40 CFR 22.30 (c). In other words, the EAB may consider any issues that were raised during the course of the proceeding or by the initial decision(s).

(2) Complainant Will Not Be Prejudiced if the Supplemental Brief is Allowed.

Complainant asserted that it would be prejudiced in the event that the Board permitted the filing of the Supplemental Brief shortly before the oral argument scheduled for July 20, 2010, in this matter. The Board, however, did not permit the issues in the Supplemental Brief to be discussed during oral argument. Therefore, there was and is no prejudice to Complainant. Smith Farm does not have any objection to the Complainant's

filing a responsive brief on or before August 20, 2010. The Board can then determine whether further oral argument would be beneficial or the Board may rule upon this issue of fundamental fairness and due process based upon the briefs alone.

Additionally, Smith Farm notes that there is no surprise to Complainant with regard to the issue discussed in the Supplemental Brief. As noted above, this issue was raised in varying forms throughout the proceeding, and Smith Farm's counsel informed Complainant's counsel, in October 2009, that Smith Farm intended to present the issue.

(3) The Affidavit of John Paul Woodley, Jr. May Be Considered by the Environmental Appeals Board.

Smith Farm notes that the affidavit of John Paul Woodley directly addresses what the government should consider to meet its burden of proof in establishing that it has jurisdiction over a particular piece of private property. The application of EPA's own *Rapanos* guidance to the facts of this case is highly probative of the very inquiry for which this case was remanded by the EAB for further findings. As such, Mr. Woodley's testimony could not be more relevant to this case. Mr. Woodley and his counterpart at the EPA, Mr. Benjamin Grumbles, were tasked with the objective of preparing field guidance for agency personnel, in light of *Rapanos*. That guidance set forth the agencies' interpretation of the steps that should be followed to establish jurisdiction over any particular site. The agencies' own interpretation of how this should be done is highly probative in this case as is their views concerning how best to establish jurisdiction in the wake of the *Rapanos* decision.

Complainant asserts that notice of such testimony was required prior to the hearing in this matter. The *Rapanos* guidance, of which Mr. Woodley was the co-author, was not issued until June 2007. Because the remand hearing before Judge Moran was

concluded in May 2007, it was impossible for the Respondent to have introduced evidence relative to that guidance at the hearing on remand.

Given the protracted nature of this enforcement action, its deleterious effects on the Boyd family, the continually evolving nature of the law relevant to this enforcement action and the issuance of this guidance near the time of the 2007 remand hearing, the Respondent should be entitled to the benefit of the Board's consideration of this evidence. Considering the government's own guidance and one of the author's opinion that there is an utter failure to meet the burden of proof in this case is highly probative to the ends of justice, and it is within the Board's discretion to consider this as the Board takes the final agency action.. The Board can and should consider the application of that evidence to the present enforcement action. Any prejudice to Complainant (to the extent such prejudice exists), may be readily cured by allowing Complainant to depose Mr. Woodley for cross-examination purposes.

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

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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2010, the **Reply in Support Motion for Leave to File Supplemental Brief** was filed electronically with the EPA Environmental Appeals Board.

And one copy of the foregoing **Reply in Support of Motion for Leave to File Supplemental Brief** was sent this July 23, 2010 via email and Federal Express to the following:

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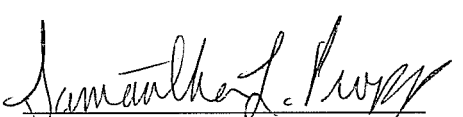

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