

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

In the Matter of :

Smith Farm Enterprises, LLC :

CWA App. No. 08-02

Respondent. :

Dkt. No. CWA-03-2001-0022 :

RESPONSE TO MOTION FOR RECONSIDERATION OF SEPTEMBER 28, 2010
ORDER DENYING LEAVE TO SUPPLEMENT BRIEFING

Complainants, through counsel, hereby submit this response to Respondent's Motion for Reconsideration (# 59) in which Respondent urges the Board to reconsider its September 28, 2010 Order Denying Motion for Leave to Supplement Briefing (# 54) on the eve of oral argument in this matter.¹²

The Board repeatedly has stated that a motion for reconsideration should be limited to bringing to the Board's attention clearly erroneous factual or legal conclusions. A motion for reconsideration should not be regarded as an opportunity to re-argue the case more convincingly. *See, e.g., In re Pyramid Chemical Company*, RCRA-HQ-2003-0001 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration).

¹ 40 C.F.R. § 22.32 allows parties to seek reconsideration of a final order. The Board's September 28, 2010 Order Denying Motion for Leave to Supplement Briefing is not a final order as defined by 40 C.F.R. § 22.31. Nevertheless, the Board did issue its Final Decision and Order in this matter on September 30, 2010 (# 56), incorporating the September 28, 2010 Order at slip op. 3, fn 3.

² Complainants are aware that Respondent's counsel has filed a second Motion for Partial Reconsideration (# 60) and a Motion for Remand (# 60.02) on October 13, 2010. Complainants will file separately responses to those motions within the time allowed by 40 C.F.R. § 22.16.

Respondent's Motion for Reconsideration points to no legal or factual errors in the Board's September 28, 2010 Order, and for that reason Respondent's Motion for Reconsideration should be denied.

The Board's September 28, 2010 Order appropriately denied Respondent's Motion for Leave to File Supplemental Brief. Respondent's proffered supplemental brief argues that Respondent lacked fair notice that an unpermitted discharge of a layer of wood chips ½ - 5 inches thick as part of prepping the path for its vehicles to traverse in wetlands could be considered a violation of Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). The Board appropriately denied leave to file the supplemental brief as untimely for all the reasons stated in the Board's September 28, 2010 Order.

To the extent Respondent asserts that the brief is not untimely because the fair notice issue has always been part of the case, Respondents also argue that the supplemental brief is necessary to bring the issue to the Board's attention. Respondent should not be permitted to have it both ways. Moreover, Respondent's Motion for Reconsideration supplies no justification for Respondent's belated attempt to introduce yet another brief on the eve of oral argument. Even taking the health concerns of Ms. Wilcher and her husband into account, Respondent is represented by two law firms, and the Motion for Reconsideration provides no explanation why the other firm could not have written and filed a supplemental brief during Ms. Wilcher's or her husband's illness. Nor does the Motion for Reconsideration explain Respondent's 59-day delay in moving for leave to file following the last communication with Complainants' counsel.

Apart from the untimeliness and lack of merit of Respondent's fair notice argument,³ Respondent's proffered supplemental brief offers argument that is not relevant to the issue on appeal. Respondent's Appeal Brief (# 21) at page 4 articulated the sole issue raised in this appeal: "The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case when he found jurisdiction both under the Scalia Opinion Rapanos and under the Kennedy Opinion in Rapanos." As the Board noted in both its September 28, 2010 Order (#54) and in its Final Order (# 56), all other issues – including the question whether Respondent's activities constituted a violation of the Clean Water Act – have been waived.⁴ Accordingly, the fair notice argument in Respondent's proffered supplemental brief is not relevant to the issue on appeal.

³ As stated in Complainants' Opposition to Motion for Leave to File Supplemental Brief (Dkt.# 48), Respondent's proffered supplemental brief disregards the record and is rife with factual and legal mis-statements. For example, Respondent's proffered supplemental brief fails to acknowledge that the Corps had warned Respondent's consultant that discharge of excessive wood chips could be considered a discharge of fill material. *Matter of Smith Farm Enterprises, LLC*, Dkt. No. CWA-3-2001-0022 (Initial Decision by ALJ Charneski May 4, 2005) at page 35 (Citing Tr. IV-11 (Needham)). Moreover, Respondent asserts without support that Respondent only became aware of EPA's interest in its site after all of the discharges had occurred. That is simply not true. Respondent began work at the property during the winter of 1998-1999, but ceased operations without completing all work in February 1999 because the site became too wet to operate the equipment. CX 7. In July 1999, EPA contacted Respondent's counsel to arrange a site inspection. The site inspection was scheduled for early September 1999. Tr. I-108 (Lapp). On August 11, 1999, Respondent's contractors re-initiated work at the Site, which was completed later in August 1999. CX 7. In other words, Respondent re-initiated the work *after* EPA had contacted Respondent and scheduled a site inspection, but *before* the inspection had occurred, thus presenting EPA with a *fait accompli* upon its site inspection. The sudden rush to complete the work before rather than after EPA's inspection is not indicative of a Respondent caught unaware that EPA would have concerns. Respondent's proffered supplemental brief and the attached affidavit contain numerous other factual and legal mis-statements. Accordingly, in the event the Motion for Reconsideration is granted, Complainants respectfully request leave to file a responsive brief within an appropriate period of time.

⁴ The Board's Remand Order directed the ALJ to issue a "new initial decision" that "shall have the effect described in 40 C.F.R. 22.27 and that "either party may appeal from the new initial decision as prescribed in 40 C.F.R.22.30." ALJ Moran complied with the remand order, and issued a new decision on remand that addressed all issues by incorporating by reference ALJ Charneski's holdings and factual findings, including whether there was an unauthorized discharge requiring a Section 404 permit and penalty (Decision on Remand at p. 2, fn. 3 and at p. 58), as well as whether the wetlands at issue were within the CWA. Respondent, however, raised only the scope of geographic jurisdiction under the CWA on appeal. Appeal Brief (# 21) at 4.

With respect to the portion of the Board's September 28, 2010 that denied leave to file the Affidavit of J.P. Woodley, Respondent provides even less of a basis for reconsideration, points to no error in the Board's ruling, and merely states that the affidavit "adds additional information" regarding alleged inconsistency between the proof at the remand hearing and a guidance document that was issued *after* the record on remand had closed. As stated in Complainants' Opposition to Motion for Leave to File Supplemental Brief (#48), acceptance of the proffered affidavit of Mr. Woodley would severely prejudice Complainants. The affidavit contains numerous mis-statements of the record and the law, and Complainants have had no opportunity to test Mr. Woodley's testimony. Further, as the Board noted in its September 28, 2010 Order, Mr. Woodley does not speak for either EPA or the U.S. Army Corps of Engineers, and the affidavit represents merely his personal opinion, which has not been tested by Complainants and would not add anything to the record.

For all of the foregoing reasons, the Board correctly denied Respondent's Motion for Leave to Supplement Briefing, and the Motion for Reconsideration should be denied. In the unlikely event that the Board grants the Motion for Reconsideration, reopens its docket, and allows the Supplemental Brief, Complainants respectfully request an appropriate period of time in which to file a responsive brief.

Respectfully submitted,



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U.S. Environmental Protection Agency
Region III

Date: 10-14-10

CERTIFICATE OF SERVICE


I hereby certify that on this date I caused the foregoing Complainants' Response to Motion for Reconsideration of September 28, 2010 Order Denying Leave to Supplement Briefing in *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 to be served in the following manner:

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