

**BEFORE THE UNITED STATES ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
)	
Smith Farm Enterprises, L.L.C.,)	CWA Appeal No. 08-02
)	
Docket No. CWA-03-2001-0022)	
)	

**COMPLAINANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF**

Five working days prior to oral argument, and approximately a year after the final briefs were filed in this case, Respondent seeks leave to file a new 32-page brief, raising new arguments and submitting new evidence not before raised in this litigation.

Respondent request for leave to supplement is prejudicial to Complainants, too much, too late, and for the reasons set out below, should be denied. In the event the Board grants the Motion for Leave to File Supplemental Brief, Complainants request until August 20, 2010 to formulate a written response to this lengthy and very late submission.

ARGUMENT

Complainants respectfully urge the Board to deny Respondent's Motion for Leave to File Supplemental Brief filed by Respondent on July 13, 2010, and move to strike the simultaneously lodged Supplemental Brief. Respondent's filing prejudices Complainants because it (1) attempts to introduce without any justification new testimony from a witness not previously identified in these proceedings which testimony Complainant has had no opportunity to test through cross-examination; (2) raises new issues for the first time in this nine-year litigation without any justification as to why those issues were not

raised earlier; and (3) raises issues previously decided and/or waived and far outside the scope of this appeal as defined by the Board's Remand Order in CWA App. No. 05-05. Accordingly, the Motion for Leave to File Supplemental Brief should be denied and the Supplemental Brief and the attached affidavit of John Paul Woodley, Jr. should be stricken from the record.

A. At a minimum, the affidavit of John Paul Woodley, Jr. must be stricken

Complainants are prejudiced by Respondent's effort to introduce new testimony in the form of an affidavit of John Paul Woodley, Jr., a person who never appeared as a witness in these proceedings and was never identified in any prehearing exchange. Complainants' counsel has had no opportunity to test Mr. Woodley's testimony through cross-examination, and Respondent has identified no reason why Mr. Woodley could not have been called to testify during either the Initial Hearing before ALJ Charneski or the Remand Hearing before ALJ Moran. *Cf.* 40 C.F.R. 22.22(a) ("If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the information and provided the required information to all other parties as soon as it had control of the information or had good cause for not doing so").

The introduction of this untested testimony at this late date severely prejudices Complainants. The affidavit contains numerous errors of fact and law. It also attempts to usurp the role of this tribunal by (mis)applying facts (or at least Mr. Woodley's perception of facts) to (incorrectly stated) law. Respondent has offered no justification

for introduction of affidavit testimony from a previously unidentified witness without opportunity for cross-examination at this late stage. The affidavit should be stricken.

B. Respondent May Not Raise New Arguments at this Late Stage

For the first time at this late stage in the proceedings, Respondent seeks to argue that it should not be penalized because it lacked “fair notice” that the discharge of a layer several inches deep of wood chips in a jurisdictional wetland was regulated under the Clean Water Act. Respondent should not be allowed at the last minute, on the eve of oral argument, and without justification to interject new issues that Respondent had opportunity to introduce at an appropriate point in the litigation.

This matter has an extensive, nine-year history. The Administrative Complaint was filed in 2001. Following an October 2003 hearing, ALJ Charneski issued an Initial Decision on May 4, 2005, finding that Respondent had violated Section 301(a) and assessing a penalty of \$94,000. Respondent appealed. That appeal (CWA App. 05-05) was fully briefed and oral argument was conducted before this Board in July 2005. While CWA App. 05-05 was pending, the Supreme Court issued its decision in *Rapanos*. The Board issued a limited remand to the ALJ to take additional evidence, conduct further proceedings as necessary, rule on the CWA jurisdictional question in light of *Rapanos*, and issue a new Initial Decision. Remand Order (EAB Dkt. No. 05-05). A remand hearing was conducted before ALJ Moran in May 2007. ALJ Moran issued a Decision Upon Remand focusing on the CWA jurisdictional issue and adopting ALJ Charneski’s earlier Initial Decision in most respects on March 7, 2008 (re-issued June 27, 2008).

Respondent had ample opportunity to raise the issue of fair notice before ALJ Charneski in 2003 and before this Board in CWA App. No. 05-05. Respondent's Motion identifies no new controlling case law and provides no justification for Respondent's failure to raise the issue previously, let alone why Respondent waited until one week before oral argument. Indeed, all but one of the cases cited by Respondent were decided prior to the first appeal in CWA App. 05-05, and all but two were decided prior to the hearing before ALJ Charneski in 2003. Respondent's opportunity to introduce this issue passed long ago, and this issue has been waived.

The Motion itself offers further evidence of unnecessary delay by Respondent. As the Motion for Leave to File Supplemental Brief states, Respondent's counsel was contemplating raising the question of fair notice as early as October 29, 2009, when she inquired regarding Complainants' position. Counsel for Complainant at that time stated that Complainant was likely to oppose any such effort to introduce new issues outside the scope of the remand at this late date in the proceedings, and confirmed Complainants' opposition on May 14, 2010 (Attachment A to Motion for Leave to File Supplemental Brief). Respondent then waited an additional **fifty-eight days** following receipt of Complainants' May 14, 2010 letter to seek leave to file its Supplemental Brief only five working days prior to oral argument.

The principles and regulations governing the presentation of evidence and argument before the ALJ and the timing and scope of appeal serve an important role in bringing repose and certainty to the administrative process. Respondent offers no explanation that would justify its being allowed to raise new issues at this very late stage of the proceedings.

C. Respondent's Motion Should Be Denied Because the Issues Raised In the Supplemental Brief are Outside the Scope of the Appeal

The Motion also should be denied because the issues that Respondent seeks to raise are far outside the scope of the Board's limited remand in CWA App. No. 05-05, which defines the scope of this appeal. The scope of the Board's remand was limited to development of "additional" evidence necessary to the application of the CWA jurisdictional tests set forth in *Rapanos* that is "either not present or not fully developed in the factual record." Remand Order (Dkt. CWA App. 05-05). The Board's remand order specifically stated: "Consistent with the scope of this remand, a new appeal may not raise any new issues except as they relate directly to the issue of jurisdiction." Remand Order at 6, fn. 7 (EAB Dkt. CWA App. 05-05). The remand (and therefore this appeal) did not encompass the issue argued in the Supplemental Brief. It is well-established that a party "cannot use the accident of a remand to raise in a second [proceeding] an issue that he could just as well have raised in the first [proceeding]." *United States v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996). *See also United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002), *cert. denied*, 539 U.S. 961 (2003); *United States v. Morris*, 259 F.3d 894, 989 (7th Cir. 2001); *see also United States v. Bell*, 5 F.3d 64, 65 (4th Cir. 1993) (issues decided by a district court but foregone on appeal or otherwise waived are foreclosed on remand for further proceedings).

CONCLUSION

For the foregoing reasons, Complainants respectfully urge the Board to deny Respondent's Motion for Leave to File Supplemental Brief and to strike the Supplemental Brief and attached affidavit of John Paul Woodley, Jr.

In the event that the Board determines to grant Respondent's motion and accept the Supplemental Brief, Complainants request leave to file a responsive brief no later than August 20, 2010. Based on counsel's initial review, the Supplemental Brief introduces a school of red herrings and is rife with selective citation to the record and misapplication of the relevant statutes, regulations and cases. Accordingly, if the Board determines to accept the Supplemental Brief, Complainants believe that the Board would benefit from a responsive brief from Complainants that would serve to identify relevant portions of the record and statutory and regulatory provisions omitted from the Supplemental Brief and that would assure an appropriate record for any judicial appeal.

Respectfully submitted,



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Counsel for Complainants

Date: 7-14-10

CERTIFICATE OF SERVICE


I hereby certify that on this date I caused the foregoing Complainants' Opposition to Motion for Leave to File Supplemental Brief in *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 to be served in the following manner:

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