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 MOTION FOR PARTIAL RECONSIDERATION AND TO STAY FINAL ORDER

Respondent Smith Farm Enterprises, LLC (hereinafter the "Respondent"), through its counsel, seeks partial reconsideration of the Final Decision and Order (the "Final Order") entered by this Board on September 30, 2010. In support thereof the Respondent states:

I. EAB STANDARD FOR MOTIONS TO RECONSIDER.

This Motion for Partial Reconsideration (the "Motion for Partial Reconsideration") is a request that the Environmental Appeals Board ("EAB") correct a clearly erroneous legal and factual holding in the Final Order. It is not being filed to create an opportunity "to reargue the case in a more convincing fashion," but rather address a clear mistake it made *sua sponte* in the Final Order. *See In re: District of Columbia Water and Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10, 07-11, and 07-12, at 3 (EAB April 23, 2008)(Order Denying Motion for Reconsideration).

II. THE MOTION FOR PARTIAL RECONSIDERATION IS TIMELY FILED.

The Motion for Partial Reconsideration is filed in accordance with 40 C.F.R. § 22.32, which states that it must be filed "within 10 days after service of the final order." 40 C.F.R. § 22.6 states that copies of rulings, orders and decisions "shall be served personally, by first class

mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail)" upon all parties. In the certificate of service the EAB certified that it served the Respondent by facsimile and U.S. Mail on September 30, 2010. Although the Respondent never received the Final Order via facsimile, Section 40 of the Code of Federal Regulations does not recognize facsimile as a means of service of rulings, orders and decisions of the EAB. Therefore, the start date for clock on the ten days to file the Motion for Reconsideration is September 30, 2010, the day the Final Order was mailed by the EAB.

Pursuant to 40 C.F.R. § 22.7(c), "[w]here a document is served by first class mail or commercial delivery service, but not overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document." The Respondent was not served by overnight or same-day delivery, but was served by first class certified mail. Respondent's counsel, LaJuana Wilcher, received the Final Order by certified mail on October 6, 2010 and Hunter W. Sims, Jr. received the Final Order by certified mail on October 8, 2010.

The Respondent has ten (10) days from September 30, 2010 to file a motion for reconsideration, and the Respondent is entitled to a five-day extension for service by mail; therefore, the last day the Respondent can file a motion for reconsideration is October 15, 2010. As the Respondent is filing this Motion for Partial Reconsideration via electronic filing on October 13, 2010, it is timely filed. By way of illustration of this type of analysis *see In re: Tri-County Builders Supply*, CWA Appeal No. 03-04 (EAB July 26, 2004) (Order Denying Motion for Reconsideration).

III. PROCEDURAL HISTORY OF THE CASE.

The Environmental Protection Agency ("EPA") brought this enforcement action against the Respondent, the property owner and contractor, claiming that work performed at the property at issue ("Smith Farm" or the "Property") violated Sections 402 and 404 of the Clean Water Act ("CWA"). Respondent denied all liability and contested multiple issues, including but not limited to the EPA's jurisdiction over the Property and the EPA's asserted factual findings. The first trial of this matter took place over six days in 2003. However, the EPA-hired court reporter could not produce a transcript of the proceedings due to her extreme incompetence and Administrative Law Judge Carl C. Charneski ("Judge Charneski") ordered a full retrial of the matter. The retrial of this matter took place over six days in 2004. Judge Charneski issued his initial decision on May 5, 2005 (the "Initial Decision").

The Respondent appealed the Initial Decision (the "First Appeal") to the EAB. In the First Appeal, the Respondent identified six assignments of error, only one of which was the jurisdictional issue. The EAB was about to issue an opinion in the First Appeal on all of the issues (Remand Order issued October 6, 2006, p. 3) when the United States Supreme Court granted certiorari in *Rapanos v. United States*, 547 U.S. 715 (2006). The EAB stayed the First Appeal until the Supreme Court decided *Rapanos*. The EPA then made a motion to remand the matter to assess the impact, if any, of the *Rapanos* decision.

The EAB granted the EPA's motion to remand and issued a Remand Order on October 6, 2006 (the "Remand Order"). Both the EPA in its motion to remand and the EAB in the Remand Order limited the remand to the jurisdictional issue only. The Remand Order stated that it was appropriate "to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule <u>on the jurisdictional question</u>. Remand Order at 5

(emphasis added). At the time of the remand, the other five appealed issues before the EAB, as set forth in the briefs of the parties and the oral arguments (the "Other Issues"), remained pending in the First Appeal. The Remand Order further stated "[e]ither party may appeal from the new initial decision as prescribed in 40 C.F.R. § 22.30" (Remand Order at 6) and that "[a]ll documents filed in the current appeal [the First Appeal] to the Board will be deemed part of the record of any new appeal." Remand Order at 6, fn 7. To date, the Other Issues, despite the fact that they were made part of the record in the Second Appeal, have never been ruled on by the EAB.

Administrative Law Judge William B. Moran ("Judge Moran") heard evidence in the remand on May 14, 15, 16, 17, 18, 21, 22, and 23, 2007 and issued his Decision on Remand on March 7, 2008. (the "Remand Decision"). Since the remand was limited to CWA jurisdiction in light of *Rapanos*, the remand decision made no mention of the Other Issues. The Respondent appealed the Remand Decision (the "Second Appeal"). The EAB issued the Final Order in the Second Appeal on September 30, 2010. In the Final Order, the EAB held "Smith Farm raised only the jurisdictional question identified above, and did not raise any of the other issues it had previously raised in its appeal prior to remand." Final Order at 3, fn 3. The EAB then quoted from the Remand Order. The EAB further held "[t]hus the Board considers all issues raised in the appeal prior to remand, but not raised in this appeal, to be abandoned." Final Order at 3, fn 3. Respondent maintains that this ruling is erroneous and seeks reconsideration of this holding by the EAB as the EAB made a demonstrable error.

IV. ARGUMENT

A. The Only Issue Remanded to the ALJ was the Jurisdictional Issue.

It is clear from the face of the Remand Order that the only issue remanded to the ALJ was the jurisdictional issue. *See* Remand Order at 4. In the EPA's Statement to the EAB, "the Region recommended that the Board remand this matter to the ALJ for the limited purpose of re-opening the record to take additional evidence as to CWA jurisdiction in light of *Rapanos*" (emphasis added) Remand Order at 5. "Therefore, the Board finds it is appropriate to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question." (emphasis added) Remand Order at 5. Accordingly, the Board hereby remands the above matter to the ALJ to take additional evidence, conduct further proceedings as necessary, and to rule on the CWA jurisdictional question, consistent with this Order and the Court's opinion in *Rapanos*." (Emphasis added).

The Remand Order limited the ALJ and the parties to the CWA jurisdictional issue. The EPA did not brief or address any of the Other Issues in the Second Appeal. Judge Moran did not address or rule on any of the Other Issues in the Remand Decision. Consequently, the only issue remanded to the ALJ, which could be brought on appeal in the Second Appeal, was the jurisdictional issue. As a result, the Other Issues remained with the EAB during the remand and there was no need to re-appeal them. Moreover, since the Other Issues were not before the ALJ on remand and were not addressed in the Initial Decision on Remand, Respondent could not appeal them. 40 CFR 22.30(c), Scope of appeal or review, states in part "[t]he parties' rights of appeal shall be limited to those issues raised during the course of the proceedings and by the initial decision, and to issues concerning subject matter jurisdiction." This was also made clear in the Remand Order at 6, fn 7, "consistent with the scope of this remand, a new appeal may not

raise any new issue except as they relate directly to the issue of jurisdiction." By this language, Respondent could not file a "new appeal" from the Remand Decision on the Other Issues.

B. The Remand Order Remanded Only the Jurisdictional Issue to the ALJ and Deemed All Documents Filed in the First Appeal Part of the Record in the Second Appeal.

In the Remand Order, the EAB, pursuant to the above quoted language, remanded only the jurisdictional issue, gave both parties the right to appeal the new decision on remand, and deemed all documents filed in the First Appeal a part of the record in the Second Appeal. The Remand Order states "[a]ll documents filed in the current appeal to the Board will be deemed a part of the record of any new appeal. 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. Therefore, the EAB is clearly stating to the parties that the Other Issues, including the original notice of appeal to Judge Charneski's Initial Decision and the previously filed briefs and oral argument before the EAB, are already a part of the EAB record for consideration despite the remand so the parties may not raise any new issues other than jurisdiction on any appeal from the jurisdictional issue remanded.

Therefore, there was no need for the Respondent to file a notice of appeal on the Other Issues, brief the Other Issues, or orally argue the Other Issues in the Second Appeal as that was already done in the First Appeal and the Other Issues were already a part of the record in the Second Appeal. There was no requirement that the Respondent "raise any of the other issues it had previously raised in its appeal prior to remand as the EAB ruled in the Final Order," *see* Final Order at 3, fn 3, as the EAB's own Remand Order deemed all documents filed in the First Appeal a part of the record in the Second Appeal. *See* Remand Order at 6, fn 7. Therefore, the EAB's conclusion that the Respondent abandoned the Other Issues is clearly erroneous and

contrary to the law and facts of this case. The Other Issues are all still pending with the EAB in the First Appeal, are deemed a part of the record in the Second Appeal, and should be decided.

C. Since Judge Moran's Remand Order Only Addressed and Ruled on the Jurisdictional Issue, the Respondent Could Not Appeal the Other Issues.

As noted above, Judge Moran's Decision on Remand only dealt with the issue of CWA jurisdiction. In no way did Judge Moran's decision on remand rule upon or mention in any way the Other Issues. Consequently, the Respondent had no way of appealing the Other Issues by appealing the initial decision on remand. The only other initial decision which would be subject to appeal would be Judge Charneski's initial decision rendered on May 5, 2005, which did address the initial issues. The Respondent timely appealed that decision in 2005. However, more than four years later, the Respondent was not able to re-appeal Judge Charneski's initial decision because the 30-day period had long passed. Consequently, even if Respondent was required to re-appeal the Other Issues, which were not dealt with in the Remand Order or in Judge Moran's initial decision on remand, there was no way Respondent could re-appeal the Other Issues since the Other Issues were not in any way addressed in Judge Moran's Remand Decision. Moreover, the time to appeal, or re-appeal, Judge Charneski's initial decision had passed approximately four years prior.

Another way to look at the problems developing from the EAB's position that the Respondent should have re-appealed the Other Issues, is to assume, *arguendo*, that Judge Moran had ruled in favor of the Respondent that there was no CWA jurisdiction. Naturally, the EPA would appeal that decision. At that point, pursuant to the EAB's position, the Respondent would be required to appeal the Remand Decision, which was in its favor, in order to preserve before the EAB the already perfected appeal on the Other Issues. Logic would dictate that an appeal of the Other Issues in this circumstance would not be possible or would not make any sense at all.

The practical effect of this is that, assuming *arguendo* the EAB is correct that it was necessary for the Respondent to re-appeal the other issues, there was no way the Respondent could do that. The effect of this "Catch 22" would be to deny Respondent its appeal rights and to deny Respondent fundamental fairness.

Fortunately, there is a simple answer to the potential of the "Catch 22" scenario set forth above and that is that the Other Issues did not need to be re-appealed because they were not remanded to Judge Moran, but remained at the EAB for consideration after Judge Moran's initial decision on remand and also because, by the language of footnote 7 on page 6 of the Remand Order, the Other Issues were deemed to be a part of the record of any new appeal.

Moreover, the Respondent did not abandon the Other Issues and for these reasons as well as the others stated elsewhere herein, the Respondent did not abandon its Other Issues and the EAB's holding in this regard is clearly erroneous.

D. The Respondent Did Not Intend to Abandon the Other Issues.

Even if the Other Issues were before Judge Moran on remand, which they were not, the Respondent did not abandon the Other Issues in the Second Appeal. In line with other cases which address abandonment, the Respondent would need to have the intent to abandon the Other Issues. Black's Law Dictionary defines abandonment as "the relinquishing of a right or interest with the intention of never claiming it. 7th ed., p. 1 (1999) (emphasis added). Nothing from any of the proceedings evidences any intent on behalf of the Respondent to abandon the Other Issues.

A party cannot abandon a right it does not know it has. The record and documents in this matter show that the Respondent could only know that the Other Issues were being handled by the EAB in the First Appeal and were deemed a part of the record in the Second Appeal. Nothing evidences any knowledge on behalf of the Respondent that the Other Issues were

involved in the remand. In fact, nothing evidences anyone's knowledge that the Other Issues were involved in the remand as neither the EPA nor Judge Moran addressed any of the Other Issues on remand.

Further, the Respondent did not abandon the Other Issues as it briefed and argued the Other Issues before the EAB in the First Appeal. The notice of appeal, briefs of the parties, and oral argument in the First Appeal were all made a part of the record in the Second Appeal by the Remand Order. The Respondent is still waiting on a decision from the First Appeal on the Other Issues. As the Respondent did not intend to abandon the Other Issues, the EAB committed clear error in holding that the Respondent did abandon the Other Issues.

E. The Issue of Respondent's Alleged Abandonment of its Other Issues was Raised for the First Time *Sua Sponte* by the EAB After All Briefs and Oral Argument.

A further reason the EAB should grant Respondent's Motion for Partial Reconsideration is because the parties have not had an opportunity to brief the issue of abandonment since it was raised for the first time by the EAB in its Final Order.

F. The EAB Should Decide the Other Issues Pursuant to 40 CFR § 22.30(c).

In addition, assuming *arguendo* that Respondent was required to re-appeal its Other Issues, on the extensive record in this case, the EAB should decide the Other Issues pursuant to its authority to do so under 40 CFR § 22.30(c), which provides in pertinent part, "[i]f the Environmental Appeals Board determines that issues raised, but not appealed by the parties should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument." Here, the Other Issues were extensively briefed and orally argued before the remand to determine jurisdiction in light of *Rapanos*. Therefore, it

should not be difficult for the Board to decide the Other Issues in fairness to the parties under the circumstances of this case.

V. CONCLUSION.

When the EAB held that the Respondent abandoned the Other Issues it was clearly erroneous for all of the reasons herein stated. The Respondent respectfully requests that the EAB partially reconsider the Final Order with respect to abandonment of the Other Issues, stay the final order pending a decision on the Motion for Partial Reconsideration, and, if the EAB does partially reconsider the Final Order in accordance with this Memorandum of Law, stay the final order pending a final decision and order on the Other Issues.

October 13, 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 13th day of October 2010, the foregoing ***Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order*** was furnished:

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