



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

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ENVIR. APPEALS BOARD

VIA FEDERAL EXPRESS

March 28, 2006

Ms. Eurika Durr
Environmental Appeals Board
Clerk of the Board
1341 G Street N.W.
Suite 600
Washington, DC 20005

Re: In the Matter of Smith Farm Enterprises, L.L.C.
CWA Appeal No. 05-05

Dear Ms. Durr:

Enclosed please find an original and six copies of Complainants' Motion to Strike Portions of Complainants' Appellate Briefs. Please date stamp one copy of the motion and return it me in the enclosed, self-addressed envelope.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Stefania D. Shamet / mtg".

Stefania D. Shamet
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III

cc: Beth V. McMahon, Attorney
Kaufman & Canoles



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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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ENVIR. APPEALS BOARD

In the Matter of)
Smith Farm Enterprises, L.L.C.,) CWA Appeal No. 05-05
Respondent.)
_____)

**COMPLAINANTS' MOTION TO STRIKE PORTIONS OF
COMPLAINANTS' APPELLATE BRIEFS**

Complainants, the Director of the Environmental Assessment and Innovation Division and the Director of the Water Protection Division, United States Environmental Protection Agency, Region III, through counsel, hereby move, pursuant to 40 C.F.R. § 22.16, to strike certain portions of Complainants' appellate briefs. Specifically, Complainants move to strike the portions of its briefs that cite Complainants' Exhibit ("CX") 69 because it has been brought to the attention of Complainants that CX 69 was not admitted as part of the hearing record. Counsel for Complainants left voice messages for counsel for Respondent on Friday, March 24, 2006 and Monday, March 27, 2006, but has been unable to contact counsel for Respondent. Accordingly, counsel for Complainants is unable to say whether Respondent opposes this motion.

By way of background, a hearing before Administrative Law Judge Charneski was originally conducted in June 2002. After the court reporter failed to transcribe the June 2002 hearing, ALJ Charneski ordered that a re-hearing be conducted. The second hearing was conducted before ALJ Charneski in October 2003. Judge Charneski ruled, with the agreement of the parties, that only the testimony and exhibits admitted as part of the October 2003 hearing would constitute the administrative record. In other words,

testimony and exhibits admitted as part of the June 2002 hearing would not be considered part of the record in this matter unless also admitted as part of the October 2003 hearing.

In May 2005, ALJ Charneski issued an initial decision. In his initial decision, ALJ Charneski found that Respondent had violated Section 301(a) of the Clean Water Act (“CWA”), 33 U.S.C. § 1311(a), by discharging pollutants, including fill material and storm water associated with construction activity, into waters of the United States without obtaining the requisite permits pursuant to Sections 404 and 402 of the CWA, *id.* §§ 1344 & 1342. The Environmental Appeals Board granted Respondent’s request for oral argument. Because oral argument in a similar case, *Matter of Vico Construction Corp., et al.*, CWA Appeal No. 05-01 was already scheduled for July 14, 2005, the EAB ordered the two matters consolidated solely for the purposes of oral argument. Complainants were directed to file their appellate brief as to liability on or before July 1, 2005, and to file their appellate brief as to matters other than liability on or before July 22, 2005.

In the appellate brief as to liability filed July 1, 2005, Complainants cited CX 69 in one sentence. In the brief as to matters other than liability, filed July 22, 2005, Complainants cited and quoted CX 69. While CX 69 was admitted as part of the June 2002 hearing, however, it was not admitted in connection with the October 2003 hearing. Accordingly, CX 69 is not properly part of the administrative record in this matter, and Complainants’ citation to CX 69 was in error.

Complainants, therefore, respectfully move to strike the sentence in their July 1, 2005 brief on pages 41 - 42 starting with the words “In its references to subsequent site visits by Mr. Martin ...” and ending with the citation to CX 69. Complainants also respectfully move to strike the portion of their July 22, 2005 brief citing to CX 69 on

page 19 starting with the words "I understand ..." and ending with the words "...other purpose."

Granting this motion to strike the above-referenced portions of Complainants' appellate briefs will not affect the Board's decision in this matter either as to liability or as to penalty. While the citations to CX 69 provided context for certain actions taken by Respondent and a representative of the U.S. Army Corps of Engineers, the absence of CX 69 from the record does not change the facts underlying the violations or analysis of the applicable statutory penalty factors.

Complainants and their counsel apologize to the Board for the inadvertent citation to CX 69.

Respectfully submitted,

Date: 3/28/06

Stefania D. Shamet /mtg
Stefania D. Shamet
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III

CERTIFICATE OF SERVICE

I hereby certify that on this date the original of Complainants' Motion to Strike Portions of Complainants' Appellate Briefs, In the Matter of Smith Farm Enterprises, L.L.C., CWA Appeal No. 05-05, was filed with the Clerk of the Board at the Environmental Appeals Board, in the manner described below. A copy was served to opposing counsel as described below.

BY FEDERAL EXPRESS:

Ms. Eurika Durr
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street N.W.
Suite 600
Washington, DC 20005

Beth V. McMahon
Kaufman & Canoles
150 West Main Street
Suite 2100
Norfolk, VA 23510

3/28/06
Date

Maria Goodine
Maria Goodine
Paralegal Specialist