



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

By Electronic Mail and Facsimile

May 14, 2010

Lajuana S. Wilcher, Esq.
English, Lucas, Priest & Owsley
1101 College Street
Post Office Box 770
Bowling Green, Kentucky 42102



Re: Matter of Smith Farm Enterprises, LLC, CWA App. No. 08-02

Dear Ms. Wilcher:

This letter responds to your inquiry as to Complainants' position regarding your proposal to raise issues of fair notice and the Supreme Court's decision in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), to the Environmental Appeals Board.

With respect to fair notice, the precise scope and nature of your proposed fair notice argument also is unclear. Regardless, the Complainants reserve the right to object to Respondent raising this issue for the first time at this late stage. As you are aware, this case has a lengthy litigation history. The scope of the Board's remand was limited to the following: "to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question." The appropriate time for Respondent to raise the issue of fair notice passed long ago, Respondent has identified no new controlling or persuasive case law that appropriately should be brought to the Board's attention, and the issue is far outside the limited scope of remand.

With respect to *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009), we do not believe that decision is directly applicable. Nevertheless, we agree that this is a new decision and discusses issues that may be relevant. For that reason, we would not object to your bringing the case to the attention of the Board (and indeed, we may decide to do so ourselves). We do, however, reserve the right to respond to any filing by Respondent.

I trust this responds to your request. If you have any questions, please feel free to contact me at 215/814-2682.

Sincerely,

Stefania D. Shamet
Stefania D. Shamet
Senior Assistant Regional Counsel

cc: Hunter W. Sims, Jr.

