

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

Respondent.

Docket No.: CWA-03-2001-0022

MOTION FOR RECONSIDERATION

Respondent Smith Farm Enterprises, L.L.C. (Smith Farm”) hereby requests the U.S. Environmental Protection Agency’s (EPA’s) Environmental Appeals Board (EAB) to reconsider its decision to deny Respondent’s Motion for Leave to File a Supplemental Brief, filed with the Board on July 8, 2010. A party dissatisfied with an EAB decision may file a motion for reconsideration with the EAB within 10 days of service of the order, in this case September 28, 2010. 40 C.F.R. § 22.32. The EAB will grant a motion for reconsideration to correct an obvious error or a mistake of law or fact, or to address additional information or new law. The EAB erroneously concluded that the issue of fair notice had not been raised in the case prior to July 8, 2010, and that as such, it was untimely. In addition, the Board expressed concerns over the timing of the filing and the undersigned seeks to provide additional information concerning the delay so that Smith Farm will not be prejudiced by the timing of the filing.

First, in this case, the issue of fair notice had been raised consistently throughout the proceedings, as a review of the record will indicate. Some of those references include Respondent's Appeal Brief pp.7-8 (asserting that "Tulloch ditching" was legal, that Smith Farm consulted with Corps, and the lack of notice by EPA or the Corps regarding an alleged violation); Respondent's Appeal Brief pp. 8-9, 36-38 (detailing Smith Farm's extensive efforts to consult with the Corps to clarify regulatory requirements under Section 404); Respondent's Appeal Brief p. 10 (describing Smith Farm's knowledge of the Corps approval for a substantially identical project nearby); Respondent's Appeal Brief p. 11 (Smith Farm's understanding of the regulations at the time of the alleged violation); Respondent's Appeal Brief p. 30 (noting differing definitions of "fill" under EPA and Corps regulations. *See also* Complainant's Post Hearing Reply Brief Pages 30-35 and Complainant's Appellate Brief as to Liability for Violation of Section 301 of the Clean Water Act pp. 36-42. Moreover, during the course of these proceedings, on July 14, 2004, when this case previously came before the Board for oral argument, members of the Board expressed their concerns (see transcript) related to whether the regulations were clear . . . in other words, whether Smith Farm had fair notice. Further, as discussed more fully in Respondent's Supplemental Brief, EPA's own regulations, which it is seeking to enforce in this case, were by EPA's own admission unclear and confusing.

The undersigned became involved in this matter in September 2009, almost a decade after this matter was initiated, and after several hearings, arguments, and voluminous pleadings had been filed. At that time, Smith Farm sought to retain counsel with particular familiarity with the EPA and the CWA, to help bring clarity to the complex and

convoluted interpretations of the CWA and the evolving issues under consideration in this protracted case. After a preliminary review of the case, it appeared that Smith Farm could not have reasonably had fair notice of a violation at the time of the activities that are the subject of this case. The inequities and the facts underlying this case had been fully developed throughout the proceedings and the unfairness, confusion and disparity among the various regulatory interpretations are clear in the record, even though the issue had not previously been labeled as “fair notice.” To fail to take into account the glaring inequities in this case, where all of the elements of a lack of fair notice have been raised throughout the proceedings, is a grave injustice.

Concluding that the issue may needed to be highlighted for the Board (as it is so basic to fundamental fairness and due process) the undersigned contacted counsel for the EPA on or about October 29th, 2009. The undersigned informed counsel that she had been retained in the case, and of the intention to supplement the Respondent’s Appeals Brief to assist the Board on the fair notice issue, and to address a recent decision by the U. S. Supreme Court. The undersigned inquired of the EPA’s position relative to the same per EAB rules, which require a movant to state whether opposing counsel agreed or objected to such a filing. EPA counsel replied that she did not believe EPA would agree, but EPA counsel agreed to check with her superiors to provide a final answer. EPA counsel never replied until May 2010, after the undersigned again contacted EPA counsel by phone to request a final answer. The request for leave to file the supplemental brief and the brief were prepared thereafter and filed in early July.

The EAB, in its order, notes that counsel for Smith Farm did not explain the reason for the delay in filing the brief. First, the issue already had been raised, simply not fully briefed, and it was believed that the brief would assist the Board in its decision. Second, EPA did not respond to the October 2009 request until May 2010. Third, the law in this area continues to evolve, further clarifying that Mr. Boyd of Smith Farm could not have had fair notice at the time the ditches were constructed on the property.

Fourth, due process lies at the heart of fair notice, a Constitutional issue that that Board had previously addressed specifically on its own and should be considered by the Board in the interest of fairness and justice. The D. C. Circuit, the 4th Circuit and numerous other courts have held that a party cannot be liable for civil penalties where EPA has failed to provide "fair notice" of its interpretation of the regulation allegedly violated. *See, e.g., General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216 (4th Cir. 1997). This Board should consider the information in the record and the law and determine that the Boyd family could not have reasonably known that their actions would be considered a violation by the federal government.

And finally, on a personal note, between late August 2009 and mid April 2010, the undersigned had shoulder surgery and her husband had two hip replacements, the recovery process taking a significant amount of time in each case. (Should the Board require more details the undersigned will be willing to provide them). Smith Farm made inquiries of the undersigned concerning the timing of the filing and in no way contributed

to the delay in the filing of the brief. Smith Farm should not be penalized because the motion for leave to file the brief was filed in early July, before oral argument, while the case clearly was still under consideration by the Board.

Finally, the affidavit of John P. Woodley adds additional information that demonstrates the inconsistencies of the interpretations by the regulatory agencies charged with administering the CWA, which further evinces that impossibility of being in compliance, as considered by EPA.

Respectfully submitted,

SMITH FARM ENTERPRISES

By: _____
LaJuana S. Wilcher

Date: October 7, 2010
LaJuana S. Wilcher
ENGLISH, LUCAS, PRIEST, & OWSLEY, LLP
1101 College Street, Post Office Box 770
Bowling Green, KY 42102
(270) 781-6500
(270) 782-7782 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2010, the **Motion for Reconsideration** was filed electronically with the EPA Appeal Board.

And one copy of the foregoing **Motion for Reconsideration** was sent this day via U.S. Mail to the following:

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Stefania Shamet, Esq.
Assistant Regional Counsel – Region 3
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103

Hunter Sims, Jr., Esq.
Christy L. Murphy, Esq.
Marine Liacouras Phillips, Esq.
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510

Gary Jones
Senior Counsel
U.S. EPA Office of Civil Enforcement/
OECA
Ariel Rios Building
1200 Pennsylvania Ave.NW
Mail code 2241-A
Washington, DC 20460

LaJuana S. Wilcher