

**KAUFMAN & CANOLES**  
attorneys at law

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ENVIR. APPEALS BOARD

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June 11, 2009

KC No.: 0058296

**Via Federal Express**

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
Colorado Building  
1341 G Street, NW  
Suite 600  
Washington, DC 20005

Re: ***In the Matter of Smith Farm Enterprises, LLC***  
**CWA Appeal No.: 08-02; Docket No.: CWA-03-2001-0022**

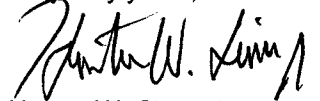
Dear Sir or Madam:

Enclosed are the original and five copies of the following, which I ask you to file on behalf of the Respondent in the captioned case:

- a. Motion for Permission to File a Reply Brief; and
- b. Motion Requesting Oral Argument.

Please call me if you have questions. Otherwise, thank you for your assistance in this regard.

Very truly yours,



Hunter W. Sims, Jr.

HWS/lsw

Enclosures

cc: Ms. Lydia Guy, Regional Hearing Clerk (*via* Federal Express)  
Stefania D. Shamet, Esquire (*via* fax and Federal Express)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD**  
United States Environmental Protection Agency  
Washington, D.C

2009 JUN 12 AM 11: 13

ENVIR. APPEALS BOARD

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

**MOTION FOR PERMISSION TO FILE A REPLY BRIEF**

NOW COMES Respondent, Smith Farm Enterprises, L.L.C. ("Respondent"), by counsel, and moves for permission to file a Reply Brief in response to the Complainants' Response Brief filed with this Board on or about June 4, 2009. In support of this motion, Respondent states:

1. Pursuant to 40 C.F.R. 22.30(a)(2), Respondent must obtain permission from this Board in order to file a brief in Reply to the Complainant's Response brief.
2. Upon receiving the Complainant's 48-page Response Brief, Respondent was able to determine that it is not only unresponsive to many of the arguments raised by the Respondent in the Appeal Brief, but raises additional issues and arguments which must be addressed by the Respondent.
3. A Reply Brief filed on behalf of the Respondent would assist this Board in its decision making in this appeal as this case is particularly difficult due to the procedural history of the case, the multiple hearings which have been held in this case and the current status of the law.

4. After two separate full hearings in this matter<sup>1</sup>, Administrative Law Judge Charneski issued his Initial Decision on May 5, 2005.

5. On June 3, 2005, the Respondent filed its appeal of Judge Charneski's initial decision to this Board.

6. Prior to this Board rendering its decision in the first appeal, the United States Supreme Court issued its opinion in Rapanos v. United States, 547 U.S. 715 (2006).

7. Subsequent to the issuance of the Rapanos decision, this Board remanded the jurisdictional issue back to the ALJ to take evidence as to CWA jurisdiction in light of Rapanos.

8. ALJ Moran took evidence on May 14, 15, 16, 17, 18, 21, 22, and 23, 2007 and issued his Decision on Remand on March 7, 2008, which was reissued on June 27, 2008.

9. This appeal is of ALJ Moran's Decision Upon Remand.

10. Due to the complexity of this case, the changes in law with the Rapanos decision, and other decisions of lower courts on the jurisdictional issue, and the number of trials, hearings, and facts which have been introduced over the course of litigation in this case, the Respondent respectfully requests permission to file a Reply to the Complainants' Response Brief.

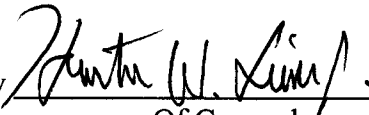
11. The Respondent has also filed a Notice Requesting Oral Argument, which the Respondent requests in addition to permission to file a reply brief.

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<sup>1</sup> The first full trial ended without a decision because the court reporter selected and hired by the EPA was incompetent and unable to produce a transcript of the hearing which lasted for six full days. Because of that, a second hearing also lasting six full days was held.

WHEREFORE, Respondent, Smith Farm Enterprises, LLC, respectfully requests permission to file a Reply Brief in response to the Complainant's Response Brief.

**SMITH FARM ENTERPRISES, L.L.C.**

By  \_\_\_\_\_  
Of Counsel

Hunter W. Sims, Jr., Esquire  
Marina Liacouras Philips, Esquire  
Christy L. Murphy, Esquire  
Kaufman & Canoles, P.C.  
150 West Main Street, Suite 2100  
Norfolk, VA 23510  
Phone: 757-624-3000  
Fax: 757-624-3169

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of June 2009, the foregoing *Motion for Permission to File a Reply Brief* was furnished:

**Via Federal Express (the original and five copies):**

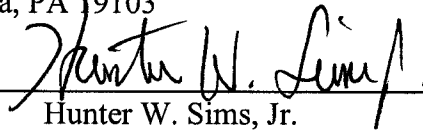
U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, D.C. 20005

**Via Fax and Federal Express:**

Stefania D. Shamet, Esquire  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029  
Fax: (215) 814-2603

**Via Federal Express:**

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

  
\_\_\_\_\_  
Hunter W. Sims, Jr.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD**  
United States Environmental Protection Agency  
Washington, D.C

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

**MOTION REQUESTING ORAL ARGUMENT**

NOW COMES Respondent, Smith Farm Enterprises, L.L.C. ("Respondent"), by counsel, and moves this Board to hear oral argument in this matter. In support of this motion, Respondent states:

1. Pursuant to 40 C.F.R. 22.30(d), this Board has the discretion to order oral argument on any issues in this proceeding.
2. After two separate full hearings in this matter<sup>1</sup>, Administrative Law Judge Charneski issued his Initial Decision on May 5, 2005.
3. On June 3, 2005, the Respondent filed its appeal of Judge Charneski's Initial Decision to this Board.
4. This Board held oral argument on that appeal on July 14, 2005.
5. Prior to this Board rendering its decision in the first appeal, the United States Supreme Court issued its opinion in Rapanos v. United States, 547 U.S. 715 (2006).
6. Subsequent to the issuance of the Rapanos decision, this Board remanded the jurisdictional issue back to the ALJ to take evidence as to CWA jurisdiction in light of Rapanos.

---

<sup>1</sup> The first full trial ended without a decision because the court reporter selected and hired by the EPA was incompetent and unable to produce a transcript of the hearing which lasted for six full days. Because of that, a second hearing also lasting six full days was held.

7. ALJ Moran took evidence on May 14, 15, 16, 17, 18, 21, 22, and 23, 2007 and issued his Decision on Remand on March 7, 2008, which was reissued on June 27, 2008.

8. This appeal is of ALJ Moran's Decision Upon Remand.

9. Due to the complexity of this case, the changes in law with the Rapanos decision, the various differing opinions of the Supreme Court Justices in Rapanos, the other decisions of lower courts on the jurisdictional issue after Rapanos, and the number of trials, hearings, and facts which have been introduced over the course of litigation in this case, the Respondent respectfully requests that this Board, like during the first appeal, permit the parties to present oral argument on this appeal.

10. The Respondent has also filed a Motion for Permission to File a Reply Brief in addition to this Motion Requesting Oral Argument.

WHEREFORE, Respondent, Smith Farm Enterprises, LLC, respectfully requests that this Board order oral argument in this proceeding pursuant to its discretion in 40 C.F.R. 22.30(d).

**SMITH FARM ENTERPRISES, L.L.C.**

By Hunter W. Sims, Jr.  
Of Counsel

Hunter W. Sims, Jr., Esquire  
Marina Liacouras Philips, Esquire  
Christy L. Murphy, Esquire  
Kaufman & Canoles, P.C.  
150 West Main Street, Suite 2100  
Norfolk, VA 23510  
Phone: 757-624-3000  
Fax: 757-624-3169

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of June 2009, the foregoing *Motion Requesting Oral Argument* was furnished:

**Via Federal Express (the original and five copies):**

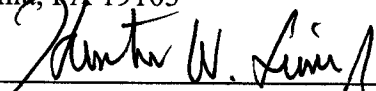
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