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

In the Matter of	:	
Smith Farm Enterprises, LLC	:	CWA App. No. 08-02
Respondent.	:	
Dkt. No. CWA-03-2001-0022	:	

RESPONSE TO MOTION FOR PARTIAL RECONSIDERATION AND TO STAY FINAL ORDER

Complainants, through counsel, hereby submit this response to Respondent's Motion for Partial Reconsideration and to Stay Final Order (# 60 & 60.01), in which Respondent urges the Board to reconsider its holding that Respondent had raised on appeal only the scope of Clean Water Act regulatory jurisdiction, and had abandoned other issues it had previously raised in CWA App. No. 05-05 (referenced in Respondent's Motion as the "Other Issues").[1,2] *Matter of Smith Farm Enterprises, LLC,* CWA App. No. 08-02, slip op. at 3, fn 3 (Sept. 30, 2010), 14 E.A.D. ___. The Motion should be denied because Respondent has identified no clear error by the Board. Much of the Motion is premised on Respondent's erroneous belief that the limited nature of the

[1] The Motion also seeks a stay of the effective date of the Decision and Final Order while the Board considers Respondent's appeal of the abandoned issues. Complainants recognize that the Board has issued an Order Staying Effective Date of Decision to allow time for the Board to decide this Motion and two other motions filed by Respondent. (#63). Since the Motion for Partial Consideration should be denied, the effective date of the Final Decision and Order should not be stayed past the date on which the Board decides the pending motions.

[2] Respondent simultaneously filed a Motion for Remand and to Stay Final Order (# 60.02 & 60.03). to which Complainants will respond separately.

remand and the Decision Upon Remand precluded Respondent from appealing any issue other than the scope of Clean Water Act regulatory authority[3]. Because Judge Moran, consistent with the Board's Remand Order, incorporated Judge Charneski's prior Initial Decision into his Decision Upon Remand (Decision Upon Remand at p. 2, fn. 3 & at pp. 57-58), however, Respondent plainly had an opportunity to appeal all issues in this matter. That Respondent did not do so is not the result of error by the Board or Judge Moran. To the extent Respondent urges the Board to use whatever authority it may have under 40 C.F.R. § 22.30(c) to disregard the well-established principle that issues not raised on appeal are deemed waived, Respondent has pointed to no plain error by Judge Moran or other manifest injustice that would justify such extraordinary action by the Board.

PROCEDURAL HISTORY

While the procedural history of his matter is by this time well-known, a short summary is repeated here. An initial hearing was conducted before Judge Charneski in June 2002. Because the court reporter failed to transcribe that hearing, another hearing was conducted in October 2003. Following the October 2003 hearing, Judge Charneski issued an Initial Decision on May 4, 2005, finding that Respondent had violated Section 301(a) and assessing a penalty of $94,000. Respondent appealed, and raised a number of issues on appeal, including that it was error for Judge Charneski to order a second hearing

[3] On October 26, 2010, Respondent filed a Motion for Leave to Correct certain statements made by Respondent in the Memoranda of Law supporting this Motion and the Motion to Remand referenced in footnote 2, *supra* (# 67 & 67.01). While Complainants will file separately a response to the Motion for Leave to Correct stating that Complainants do not object to the filing of the Motion, the Motion for Leave to Correct and its supporting memorandum mischaracterize certain aspects of the Decision Upon Remand and make arguments that go beyond correction. Those mischaracterizations and argument will be addressed herein and in Complainants' Response to the Motion for Remand and to Stay Final Order.

after the court reporter failed to transcribe the June 2002 hearing. (CWA 05-05, # 2). That appeal (CWA App. 05-05) was fully briefed and oral argument was conducted.

While CWA App. 05-05 was pending, the Supreme Court issued its decision in *Rapanos v. United States*, 547 U.S. 715 (2006). The Board determined "that the facts required to decide this matter using the CWA jurisdictional tests set forth in *Rapanos* are either not present or not fully developed in the factual record before us." The Board remanded the matter to the Administrative Law Judge to take additional evidence, conduct further proceedings as necessary, and rule on the CWA jurisdictional question in light of *Rapanos*. Remand Order (EAB Dkt. No. 05-05). The Board did not retain jurisdiction over CWA Appeal No. 05-05, and instructed the Administrative Law Judge to issue a new Initial Decision, which would have the effect described in 40 C.F.R. § 22.27 and from which a new appeal could be taken.

A remand hearing was conducted before Judge Moran in May 2007. Judge Moran issued a Decision Upon Remand on March 7, 2008 (re-issued June 27, 2008). Judge Moran's Decision Upon Remand expressly incorporated by reference Judge Charneski's Initial Decision in two places.

In footnote 3 of the Decision Upon Remand, Judge Moran incorporated Judge Charneski's Initial Decision:

> The Court has selected from Judge Charneski's Initial Decision those findings of fact that it considers particularly pertinent to this Decision Upon Remand. However, unless otherwise noted, these selections should not be interpreted as a rejection of the many other findings of fact from that Initial Decision. The scope of the remand was limited to taking additional evidence as to CWA jurisdiction in light of *Rapanos* and thereafter to rule on the jurisdictional question. *Accordingly, subject to an express contradiction within this Decision Upon Remand, all of Judge Charneski's findings of fact remain intact. Subject to the foregoing, Judge Charneski's Initial Decision is incorporated by reference.*

March 7, 2008 Initial Decision Upon Remand at p. 2, fn 3 (emphasis added).

In the "Order" portion of the March 7, 2008 Decision Upon Remand (at p. 58) (emphasis added) , Judge Moran specifically incorporated Judge Charneski's Initial Decision, except that Judge Moran modified the penalty amount:

> *Judge Charneski's Initial Decision holding "that* Smith Farm Enterprises, L.L.C., violated Section 301(a) of the Clean Water Act, *33 U.S.C. § 1311*(a), as alleged in Count I, by discharging fill material into "waters of the United States," without having obtained a permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Act. *33 U.S.C. § 1344.* [sic] It is further held that respondent violated Section 301(a) of the Clean Water Act, as alleged in Count II, by discharging pollutants associated with storm water, without having obtained a National Pollutant Discharge Elimination permit pursuant to Section 402 of the Act. *33 U.S.C. § 1342*," *is adopted for this Decision Upon Remand.*
>
> The Court also adopts Judge Charneski's determination for the penalties assessed, less the $10,000.00 reduction. Thus, it adopts "[f]or the Section 301(a) violation involving the Section 404 permit, [by] Smith Farm Enterprises, L.L.C., [the assessment of] a civil penalty of $ 80,000, [and for] the Section 301(a) violation involving the Section 402 permit, [the] [R]espondent is assessed a civil penalty of $ 14,000. *33 U.S.C. § 1319*(g)." Accordingly, upon application of the reduction, Respondent is directed to pay a total civil penalty of $84,000.00 within 60 days of the date of this order.

The basis for Judge Moran's revision of the penalty was the failure of a court reporter to transcribe the June 2002 hearing before Judge Charneski that necessitated a second initial hearing:

> Accordingly, the Court reimposes the penalty imposed by Judge Charneski except that, in fairness, because it was the government's responsibility to provide a competent court reporter for these proceedings and because it failed to do so, causing the initial hearing before Judge Charneski to be repeated before him a second time, the penalty is reduced by $10,000.00. This reduction is appropriate upon consideration of the "other matters as justice may require" criterion. This amount is an approximation of the unfair cost imposed upon the Respondent by virtue of having to completely present its defense before Judge Charneski again, through no fault of its own. The Court is willing to allow a further reduction in the penalty, upon Respondent's Counsel documenting that the costs associated with the flawed first hearing were higher than $10,000.00.

March 7, 2008 Decision Upon Remand at pp. 57-58.

Respondent took up Judge Moran's invitation and filed an affidavit purporting to identify costs and expenses related to the earlier hearing before Judge Charneski as to which the court reporter failed to produce a transcript. The parties ultimately stipulated to a penalty reduction of $60,000 to account for Respondent's costs and expenses from the untranscribed hearing, and Respondent waived any appeals related to the court reporter's omission. Judge Moran re-issued his Decision Upon Remand on June 27, 2008 incorporating the revised penalty.

On appeal, the Board assigned a new docket number and did not reopen CWA Appeal No. 05-05. Respondent limited its statement of issues presented on appeal to: "[Whether t]he Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case when he found jurisdiction both under the Scalia opinion in Rapanos and under the Kennedy opinion in Rapanos." (#21 at p. 4).

THE BOARD DID NOT ERR BY CONSIDERING ISSUES NOT RAISED IN CWA APPEAL NO. 08-08 ABANDONED

The Board repeatedly has stated that a motion for reconsideration should be limited to bringing to the Board's attention clearly erroneous factual or legal conclusions by the Board. A motion for reconsideration should not be regarded as a second chance to argue the case. *See, e.g., In re Pyramid Chemical Company,* RCRA-HQ-2003-0001 (EAB Nov. 8, 2004) (Order Denying Motion for Reconsideration).

The Board did not err by considering issues not raised in CWA Appeal No. 08-08 abandoned. Respondent's argument in this regard is premised on Respondent's incorrect representation that the limited nature of the remand in CWA Appeal No. 05-05 combined with Judge Moran's Decision Upon Remand left Respondent no avenue to appeal issues other than the scope of Clean Water Act regulatory authority. While in its Motion for

Leave to Correct, Respondent acknowledges that Judge Moran adopted Judge Charneski's holding as to Count II (see # 67.01 at pp. 2-3), Respondent continues to maintain that Judge Moran did not adopt Judge Charneski's holding as to Count I. Respondent's premise is incorrect.

Respondent's various characterizations of the Decision Upon Remand as not addressing "Other Issues" decided by Judge Charneski (*see, e.g.,* Motion at p. 4 ("Since the remand was limited to CWA jurisdiction in light of *Rapanos,* the remand decision made no mention of the Other Issues"); Motion at p. 5 ("Judge Moran did not address or rule on any of the Other Issues in the Remand Decision"); Motion at p. 7 ("In no way did Judge Moran's decision on remand rule upon or mention in any way the Other Issues")) are incorrect.[4] The Decision Upon Remand adopts Judge Charneski's holding as to Counts I *and* II. It also addresses at least one of the "Other Issues" by reducing the penalty based upon the court reporter's failure to produce a transcript of the June 2002 hearing, an issue raised by Respondent in CWA Appeal No. 05-05.

Consistent with the Board's Remand Order, Judge Moran's Decision Upon Remand on its face adopts Judge Charneski's holding as to Count I. Respondent's assertion appears based on Respondent's misreading of the operative sentence in Judge Moran's decision. Specifically, Respondent appears to disregard the quotation marks in the operative sentence and thereby fails to recognize that Judge Moran incorporates by

[4] Similarly, Respondent's statement on page 5 of its Motion that "The EPA did not brief or address any of the Other Issues in the Second Appeal" also is incorrect. To the contrary, Complainants expressly addressed the "Other Issues" in Section II of their Response Brief, titled "Matters Other than Navigable Waters." Although Respondent had failed to raise the "Other Issues," Complainants, in an abundance of caution, expressly reserved all arguments made in their briefs filed in CWA Appeal No. 05-05, except that Complainants noted that Respondent had waived by stipulation one of the issues raised in that appeal. Complainants also directed the Board's attention to its subsequent decision in *Matter of Vico Construction Corp. and Amelia Venture Properties, LLC,* 12 E.A.D. 298 (EAB 2005) as pertinent to the "Other Issues." Complainants' Response Brief at pp. 2-4 (# 22).

quotation Judge Charneski's holdings under Counts I and II. The operative sentence from page 58 of Judge Moran's Decision Upon Remand is repeated below (emphasis added):

> *Judge Charneski's Initial Decision holding "that* Smith Farm Enterprises, L.L.C., violated Section 301(a) of the Clean Water Act, *33 U.S.C. § 1311*(a), as alleged in Count I, by discharging fill material into "waters of the United States," without having obtained a permit from the U.S. Army Corps of Engineers pursuant to Section 404 of the Act. *33 U.S.C. § 1344.* [sic] It is further held that respondent violated Section 301(a) of the Clean Water Act, as alleged in Count II, by discharging pollutants associated with storm water, without having obtained a National Pollutant Discharge Elimination permit pursuant to Section 402 of the Act. *33 U.S.C. § 1342*," *is adopted for this Decision Upon Remand.*

The single operative sentence states: "Judge Charneski's Initial Decision holding 'that …' is adopted for this Decision Upon Remand." ." The language within the quotation marks quotes Judge Charneski's holdings from his Initial Decision for both Counts I and II. Thus, Judge Moran adopted the "*holding 'that* Smith Farm Enterprises, L.L.C., violated Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), as alleged in Count I, by discharging fill material into 'waters of the United States,' without having obtained a permit from the U.S.Army Corps of Engineers pursuant to Section 404 of the Act. 33 U.S.C. 1344 …." , as well as Judge Charneski's holding under Count II.

Accordingly, Judge Moran's Decision Upon Remand is consistent with the Board's Remand Order, adopted Judge Charneski's holdings under both Counts I and II, and provided Respondent an opportunity to appeal all issues decided by Judge Charneski. Partial reconsideration should not be granted, therefore, because the Board did not err in applying the black letter law and deeming abandoned issues that could have been raised on appeal but were not.

RESPONDENT POINTS TO NOTHING THAT WOULD JUSTIFY ITS REQUEST THAT THE BOARD TAKE THE EXTRAORDINARY STEP OF ALLOWING RESPONDENT TO RESURRECT ISSUES THAT HAVE BEEN ABANDONED

While not entirely clear, Respondent also appears to argue that, notwithstanding whether Judge Moran adopted Judge Charneski's holdings in Count I and Count II, the Board should entertain Respondent's appeal brief in CWA Appeal No. 05-05 even though one of those issues was waived by stiputlation by Respondent, and four others were not raised in CWA Appeal No. 08-02. As authority for the Board to take this extraordinary step, Respondent appears to assume that the Board has equitable power to do so and also points to 40 C.F.R. § 22.30(c). Nothing in Respondent's various motions and memoranda, however, warrant use of whatever authority may be provided to the Board by 40 C.F.R. 22.30(c) to allow Respondent to resurrect issues appealed in CWA Appeal No. 05-05 but waived or not raised in Appeal No. 08-08.

To the extent Respondent asserts that Respondent did not re-raise issues appealed in No. 05-05 because Respondent believed that Judge Moran's Decision Upon Remand did not extend to issues beyond the scope of Clean Water Act regulatory authority, Respondent's assertion is inconsistent both with the Decision Upon Remand and with Respondent's own actions. On the *same page* in which he adopted Judge Charneski's holdings as to Counts I and II, Judge Moran declined to adopt the penalty imposed by Judge Charneski and reduced the penalty by $10,000 (ultimately $60,000 following a stipulation by the parties) for factors as justice may require. The factor on which Judge Moran based the penalty reduction was the court reporter's failure to transcribe the June 2002 hearing (a consideration unrelated to the scope of Clean Water Act regulatory

authority and one of the "Other Issues" raised by Respondent in CWA Appeal No. 05-05). Thus, on its face, the Decision Upon Remand entertained at least one issue beyond the scope of Clean Water Act regulatory authority and was thus consistent with the Board's Remand Order that a new initial decision be issued.

That Respondent understood the Decision Upon Remand as serving as a new initial decision and incorporating issues other than the scope of Clean Water Act regulatory authority is evident from Respondent's actions. The Decision Upon Remand initially reduced the penalty by $10,000, and invited Respondent to file evidence that the penalty reduction should be greater. Respondent accepted Judge Moran's invitation and filed an affidavit purporting to demonstrate costs and expenses related to the court reporter's omission greater than the $10,000 penalty reduction assessed by Judge Moran. Ultimately, the parties stipulated to a $60,000 penalty reduction and Judge Moran re-issued his Decision Upon Remand to reflect the stipulated penalty reduction. In addition, in that stipulation Respondent waived any appeal related to the court reporter's failure to produce a transcript. *Matter of Smith Farm Enterprises, LLC,* Dkt. No. CWA-03-2001-0022, Stipulation of the Parties Concerning Penalty (May 14, 2008). Had Judge Moran reduced the penalty by less than the stipulated $60,000 amount, Respondent certainly would have felt within its rights to appeal the amount of the penalty reduction, even though that issue was unrelated to the scope of Clean Water Act regulatory authority.

To the extent Respondent urges reconsideration because the Board did not bring the question of abandonment to Respondent's attention prior to its Final Decision (#60.01 at p. 9), the Board was reasonable in assuming that Respondent, who is represented by competent counsel, knew what it was doing. It was not incumbent upon the Board to

read Respondent's appeal brief and then "check in" with Respondent to ensure that Respondent's framing of the Issue for Appeal meant what it said. The fact that Respondent apparently did not recognize its omission until the Board issued its opinion is not the result of Board error.

Respondent's argument that, even if Judge Moran adopted Judge Charneski's holdings as to Count I and Count II and even if Respondent failed to raise issues on appeal, the Board exercise authority under 40 C.F.R. 22.30(c) to resurrect the waived Other Issues because Respondent intended to appeal them also should fail.

Respondent's argument raises an *a priori* question as to the Board's authority under Section 22.30(c). In interpreting the *Consolidated Rules of Practice Governing the Assessment of Civil Penalties* (40 C.F.R. Part 22), the Board may, in its discretion, look for guidance to the applicable federal rules of procedure and federal court decisions interpreting those rules. *See, e.g., In re Las Delicias,* SDWA App. No. 08-07, slip op. at 11, n.13 (EAB Aug. 17, 2009), 14 E.A.D. __; *Matter of Wego Chemical & Mineral Corp.,* 4 E.A.D. 513, 530 n. 16 (EAB 1993).

It is black letter law that issues not briefed on appeal are considered abandoned or waived. 40 C.F.R. 22.30(c) provides the Board with discretion to determine that an issue raised but not appealed should be argued. Similarly, Rule 2 of the Federal Rules of Appellate Procedure provides appeals courts with discretion to overlook the failure to brief an issue on appeal if manifest justice would result. *See, e.g., United States v. Joyner,* 313 F.3d 40, 44 (2d Cir. 2002), *cert denied sub nom Atkinson v. United States,* 540 U.S. 1127 (2004). "Manifest injustice" in this context, is equated with the plain

error standard of review. *United States v. Draper,* 553 F.3d 174, 179, n. 2 (2d Cir. 2009); *United States v. Quintana,* 300 F.3d 1227, 1232 (11th Cir. 2002).[5]

For error to be plain, there must be a clear and obvious departure from current law that seriously affects the fairness, integrity, or public reputation of the proceedings. *Draper,* 553 F.3d at 179. The first step in plain error review is that error, meaning deviation from a legal rule, has occurred. *Id.* at 180. The second step is determining whether the error was "plain," meaning it was so clear and obvious that the trial judge was derelict even if Respondent had not pointed out the error. *Id.* at 180-81.

While Respondent argues that it would be unjust for the Board not to consider issues raised in CWA Appeal No. 05-05, that does not amount to manifest injustice. The type of "injustice" urged by Respondent occurs whenever a litigant fails to comply with procedural rules governing preservation of issues on appeal.[6] If Respondent's position were carried to its logical end, the exception would quickly overtake the rule.

Respondent points to no clear error committed by Judge Charneski that would amount to manifest injustice if left unappealed. In its Appeal Brief in CWA Appeal No. 05-05 (CWA Appeal No. 05-05 Filing #2, pp. 1-2), Respondent raised six issues for appeal:

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[5] Respondent's argues on pages 8-9 of its Motion that the Board should exercise its discretion and consider the "Other Issues" because Respondent did not "intend" to abandon them. While Respondent refers generally to "other cases which address abandonment," Respondent does not cite any cases. It appears that Respondent confuses the line of cases addressing a criminal defendant's unintended abandonment of important constitutional rights with a civil litigant's failure to raise an issue on appeal.

[6] To the extent Respondent argues that it was mislead by footnote 7 of the Remand Order, Respondent's purported confusion does not rise to manifest injustice. First, both Judge Moran and Complainants clearly understood the import of the Remand Order was a new initial decision and a wholly new appeal that would incorporate all issues. Second, Respondent as discussed above, Respondent clearly understood the Decision Upon Remand as extending beyond issues of scope of Clean Water Act regulatory authority when it urged Judge Moran to increase his penalty reduction based upon factors unrelated to Clean Water Act regulatory authority.

A. The Administrative Law Judge erred in concluding that Respondent "filled" the wetlands with wood chips and thus violated Section 404 of the Clean Water Act when he found that Respondent's purpose in disposing the wood chips was only to dispose of waste.

B. The Administrative Law Judge erred in concluding that fill was placed in wetlands based on a finding that "substantial" amounts of wood chips were present throughout the site when the Government samples were isolated and biased and when a more scientifically valid sampling technique revealed no more wood chips than would be expected in a timbered natural forest.

C. The Administrative Law Judge erred in finding Clean Water Act Section 402 liability because he based the violation on a point source (ditches) not claimed in the Amended Complaint, which cites equipment as the only point source.

D. The Administrative Law Judge erred in assessing a penalty just below the maximum that could be assessed based on a finding that Respondents were highly negligent when the Respondents lack culpability and the EPA failed to establish any resultant environmental harm.

E. The Administrative Law Judge erred in denying Respondents' motion to dismiss the case after the trial transcript from the first proceeding could not be produced because the EPA hired an incompetent court reporter.

F. The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case.

Of the six issues raised by Respondent in CWA Appeal No. 05-05, issue "F" was resolved by the Board in its Final Decision and Order in CWA Appeal No. 08-02. Issue "E" was waived by Respondent when it stipulated to a $60,000 penalty reduction to account for the court reporter's failure and as part of that stipulation waived any appeal that would assert the court reporter's failure to produce a transcript of the June 2002 hearing. *Matter of Smith Farm Enterprises, LLC,* Dkt. No. CWA-03-2001-0022, Stipulation of the Parties Concerning Penalty (May 14, 2008).

This leaves issues "A" through "D" as the subject of the Motion for Partial Reconsideration. While Respondent apparently disagrees with Judge Charneski's

holdings on these issues, Respondent's disagreement with Judge Charneski's interpretation of law or findings of fact by itself does not rise to the level of manifest injustice or plain error. Respondent points to no plain error regarding any of the four remaining appeal issues from CWA Appeal No. 05-05. Indeed, while not decided by the Board as part of this litigation, the Board affirmed similar holdings by Judge Charneski in a similar fact pattern in *Matter of Vico Construction Corp. and Amelia Venture Properties, LLC,* 12 E.A.D. 298 (EAB 2005).

In sum, the Motion for Partial Reconsideration and to Stay Final Order should be denied because Judge Moran incorporated Judge Charneski's Initial Decision into his Decision Upon Remand, Judge Moran's incorporation by reference was consistent with the Board's Remand Order, and did not deprive Respondent of an opportunity to appeal issues decided by Judge Charneski. Respondent's failure to raise the "Other Issues" on appeal is the result of Respondent's error; not the Board's or Judge Moran's. Respondent has pointed to no plain error or manifest injustice that would warrant a departure from the general rule that issues not raised on appeal are considered abandoned and will not be addressed.

Respectfully submitted,

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Date: 11-3-10

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Response to Motion for Partial Reconsideration and to Stay Final Order in *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 to be served in the following manner:

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