

made by Respondent in the Memoranda of Law supporting the two motions (# 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 Partial Reconsideration and to Stay Final Order.

The Motion for Remand and to Stay Final Order should be denied because Judge Moran in fact did incorporate Judge Charneski's prior Initial Decision and Judge Charneski's holdings as to Counts I and II of the Amended Complaint into his Decision Upon Remand (Decision Upon Remand at p. 2, fn. 3 & at pp. 57-58). Accordingly, there is no need to remand this matter to the Office of Administrative Law Judges because the Decision Upon Remand did not deprive Respondent of an opportunity to appeal all issues decided by Judge Charneski.

PROCEDURAL HISTORY

While the procedural history of his matter is by this time well-known, a short summary bears repeating 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 after the court reporter failed to transcribe the June 2002 hearing. (CWA Appeal No. 05-

05, # 2) (“The Administrative Law Judge erred in Denying Respondent’s 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”). That appeal (CWA Appeal No. 05-05) was 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. The Board’s Remand Order indicated that the record developed for CWA Appeal No. 05-05 would be part of any new appeal.

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 expressly incorporated by reference Judge Charneski’s Initial Decision in two places.

On page 2, footnote 3 of the Decision Upon Remand (emphasis added), 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.

In the "Order" portion of the March 7, 2008 Decision Upon Remand (at p. 58) (emphasis added), Judge Moran adopted Judge Charneski's Initial Decision, and specifically quoted Judge Charneski's holdings under Counts I and II of the Amended Complaint, except that Judge Moran expressly did not adopt Judge Charneski's penalty and reduced 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 an 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 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 MOTION SHOULD BE DENIED

To the extent Respondent argues that remand is necessary to incorporate Judge Charneski’s Initial Decision into Judge Moran’s Decision Upon Remand in order to enable Respondent to appeal Judge Charneski’s rulings, Respondent is simply incorrect. Judge Moran’s Decision Upon Remand on its face incorporates Judge Charneski’s Initial Decision both on page 58 and in footnote 3 on page 2.

In its Motion for Leave to Correct, Respondent acknowledges that Judge Moran incorporated Judge Charneski’s holding as to Count II, but continues to assert that Judge

Charneski's holding as to Count I was not incorporated. 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 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, there is no need to remand the matter to the Office of Administrative Law Judges in order to incorporate Judge Charneski's holdings as to Counts I and II into Judge Moran's Decision Upon Remand. Judge Moran's Decision Upon Remand is consistent with the Board's Remand Order, adopted Judge Charneski's holdings under

both Count I and Coun II, and did not deprive Respondent of an opportunity to appeal all issues decided by Judge Charneski.

Respectfully submitted,



Stefania D. Shamet
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U.S. Environmental Protection Agency
Region III

Date: 11-3-10

CERTIFICATE OF SERVICE

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

BY Electronic Mail and Overnight Delivery:

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11-3-10
Date


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