

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

_____ :
In the Matter of :

Smith Farm Enterprises, LLC :

Respondent. :

Dkt. No. CWA-03-2001-0022 :
_____ :

CWA App. No. 08-02

MOTION FOR LEAVE TO FILE SUR-REPLY IN RESPONSE TO MOTION FOR
PARTIAL RECONSIDERATION

Complainants respectfully request leave to file a Sur-Reply to Respondent's Motion for Partial Reconsideration and to Stay Final Order (# 60 & 60.01). The Reply filed by Respondent (# 77) raises new arguments. Complainants believe that consideration of the attached, 2-1/2-page Sur-Reply may assist the Board by clarifying the issues. Counsel for Complainants has spoken with counsel for Respondent, who indicates that Respondent does not oppose this motion.

Respectfully submitted,



Stefania D. Shamet
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III

Date: 11-19-10

**BEFORE THE UNITED STATES ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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

**COMPLAINANTS' SUR-REPLY BRIEF IN RESPONSE TO RESPONDENT'S
MOTION FOR PARTIAL RECONSIDERATION**

Complainants respectfully submit this sur-reply brief in response to Respondent's Motion for Partial Reconsideration. In its Remand Order (# 27 in CWA Appeal No. 05-05), 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 v. United States*. The Board further 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.

Both Complainants and ALJ Moran interpreted the Board's Remand Order as requiring a new initial decision incorporating all prior issues that could then be appealed, and that Respondent would need to reserve any issues by reference to its briefs in CWA Appeal No. 05-05. Accordingly, ALJ Moran incorporated ALJ Charneski's holdings as to Counts I and II into his Decision Upon Remand, and Complainants in their Response Brief incorporated by reference their briefs in CWA Appeal No. 05-05.

Respondent in reliance on footnote 7 of the Board's Remand Order, apparently believed that its Appeal Brief in CWA Appeal No. 05-05 would automatically be

considered by the Board as part of this appeal and, based on that understanding, failed to preserve on this appeal the issues raised in CWA Appeal No. 05-05. Footnote 7 of the Remand Order states:

All documents filed in the current appeal to the Board will be deemed a part of the record of any new appeal. Consistent with the scope of this remand, a new appeal may not raise any new issues except as they relate directly to the issue of jurisdiction.

While Complainants, ALJ Moran and the Board interpreted the Board's Remand Order as requiring a wholly new initial decision and appeal raising all issues (albeit one that allowed for incorporation by reference of prior briefs), Complainants believe that Respondent's interpretation, while not correct, was not unreasonable.

Respondent in its Reply on the Motion for Partial Reconsideration for the first time brings to Complainants' and the Board's attention a Joint Status Report filed and signed by both parties in February 2009, which states:

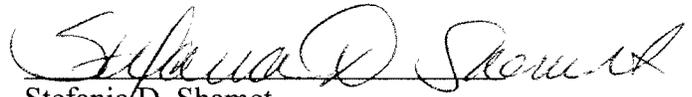
Unlike *Matter of Vico Construction Corporation, et al.*, (closed docket CWA App. No. 05-01; *see* 12 E.A.D. 298 (2005); active docket CWA App. No. 08-03), which involved similar activities at a different site, the Board had not issued a Final Decision and Order in closed docket CWA App. No. 05-05 prior to the October 6, 2006 remand. With one exception described below, the Parties believe that all issues that previously were before the Board as part of closed docket CWA App. No. 05-05 remain before the Board. In addition, Respondent appeals the Decision on Remand issued by ALJ Moran on March 7, 2008.

That Joint Status Report was filed in advance of the briefs in this matter, and at the time it was signed, Complainants had assumed that Respondent would preserve in its yet-to-be filed appeal brief all issues available to it based upon ALJ Moran's incorporation of ALJ Charneski's holdings. According to its Reply, Respondent apparently believed that this portion of the Joint Status Report was consistent with its interpretation of footnote 7 of the Remand Order, *i.e.*, that the issues raised in CWA

Appeal No. 05-05 would automatically be considered by the Board. Respondent's interpretation, while not correct, also was not unreasonable.

Accordingly, should the Board determine that it would be appropriate for the Board to consider and decide as part of this appeal the issues raised by Respondent in CWA Appeal No. 05-05, Complainants would not file any further motions objecting to such a determination by the Board. Complainants would reserve all arguments in its briefs regarding the substance of those issues.

Respectfully submitted,



Stefania D. Shamet
Senior Assistant Regional Counsel
Counsel for Complainants

Date: 11-19-10

CERTIFICATE OF SERVICE

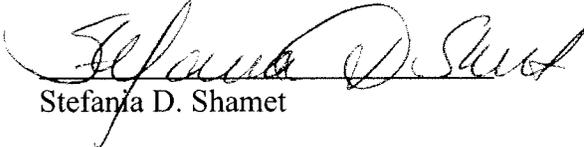
I hereby certify that on this date I caused the foregoing Complainants' Motion for Leave to File Sur-Reply in Response to Motion for Partial Reconsideration and attached Sur-Reply in *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 to be served in the following manner:

BY Electronic Mail and Overnight Delivery:

Hunter W. Sims
Kaufman & Canoles
150 West Main Street
Suite 2100
Norfolk, VA 23510

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

11-19-10
Date


Stefania D. Shamet