

**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
Docket No.: CWA-03-2001-0022	)	
Respondent.	)	

**MEMORANDUM OF LAW IN SUPPORT OF ALTERNATIVE  
MOTION TO REMAND AND TO STAY FINAL ORDER**

Respondent Smith Farm Enterprises, LLC (hereinafter the “Respondent”), through its counsel, in the alternative to its Motion and Memorandum of Law in Support of Motion for Partial Reconsideration and to Stay Final Order, moves the Environmental Appeals Board to remand this case to Administrative Law Judge William B. Moran (“Judge Moran”) for the limited purpose of having Judge Moran incorporate into his Initial Decision on Remand the prior rulings of Administrative Law Judge Carl C. Charneski (“Judge Charneski”). The purpose of the remand would be to afford to Respondent fundamental fairness so that it can retain its appeal rights regarding the issues previously appealed in addition to the jurisdictional issue. In making this motion, the Respondent is not agreeing with Judge Charneski’s rulings on the issues (“Other Issues”). In fact, it is the Respondent’s position that the rulings on the Other Issues are wrong and erroneous for all of the reasons set forth in Respondent’s appeal of Judge Charneski’s May 5, 2005 Initial Decision.

**I. PROCEDURAL HISTORY OF THE CASE.**

The Environmental Protection Agency (“EPA”) brought this enforcement action against the Respondent, the property owner and contractor, claiming that work performed at the property

at issue (“Smith Farm” or the “Property”) violated Sections 402 and 404 of the Clean Water Act (“CWA”). Respondent denied all liability and contested multiple issues, including but not limited to the EPA’s jurisdiction over the Property and the EPA’s asserted factual findings. The first trial of this matter took place over six days in 2003. However, the EPA-hired court reporter could not produce a transcript of the proceedings due to her extreme incompetence and Administrative Law Judge Carl C. Charneski (“Judge Charneski”) ordered a full retrial of the matter. The retrial of this matter took place over six days in 2004. Judge Charneski issued his initial decision on May 5, 2005 (the "Initial Decision").

The Respondent appealed the Initial Decision (the "First Appeal") to the EAB. In the First Appeal, the Respondent identified six assignments of error, only one of which was the jurisdictional issue. The EAB was about to issue an opinion in the First Appeal on all of the issues (Remand Order issued October 6, 2006, p. 3) when the United States Supreme Court granted certiorari in *Rapanos v. United States*, 547 U.S. 715 (2006). The EAB stayed the First Appeal until the Supreme Court decided *Rapanos*. The EPA then made a motion to remand the matter to assess the impact, if any, of the *Rapanos* decision.

The EAB granted the EPA's motion to remand and issued a Remand Order on October 6, 2006 (the "Remand Order"). Both the EPA in its motion to remand and the EAB in the Remand Order limited the remand to the jurisdictional issue only. The Remand Order stated that it was appropriate “to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question. Remand Order at 5 (emphasis added). At the time of the remand, the other five appealed issues before the EAB, as set forth in the briefs of the parties and the oral arguments [the “Other Issues”], remained pending in the First Appeal. The Remand Order further stated “[e]ither party may appeal from

the new initial decision as prescribed in 40 C.F.R. § 22.30” (Remand Order at 6) and that “[a]ll documents filed in the current appeal [the First Appeal] to the Board will be deemed part of the record of any new appeal.” Remand Order at 6, fn 7. To date, the Other Issues, despite the fact that they were made part of the record in the Second Appeal, have never been ruled on by the EAB.

Administrative Law Judge William B. Moran (“Judge Moran”) heard evidence in the remand on May 14, 15, 16, 17, 18, 21, 22, and 23, 2007 and issued his Decision on Remand on March 7, 2008. (“Remand Decision”). Since the remand was limited to CWA jurisdiction in light of *Rapanos*, the remand decision made no mention of the Other Issues. The Respondent appealed the Remand Decision (the “Second Appeal”). The EAB issued the Final Order in the Second Appeal on September 30, 2010. In the Final Order, the EAB held “Smith Farm raised only the jurisdictional question identified above, and did not raise any of the other issues it had previously raised in its appeal prior to remand.” Final Order at 3, fn 3. The EAB then quoted from the Remand Order. The EAB further held “[t]hus the Board considers all issues raised in the appeal prior to remand, but not raised in this appeal, to be abandoned.” Final Order at 3, fn 3. Respondent maintains that his ruling is erroneous and seeks reconsideration of this holding by the EAB as the EAB made a demonstrable error.

## **II. ARGUMENT.**

As an alternative to granting the Respondent’s Motion for Partial Reconsideration and ruling that the Other Issues were appropriately before the EAB and should be decided, in order to ensure that the Respondent is afforded its appeal rights, and in the interest of fundamental fairness, the EAB should remand this case to Judge Moran for him to incorporate into his Initial

Decision on Remand the rulings of Judge Charneski on the Other Issues contained in Judge Charneski's Initial Decision dated May 5, 2005.

In its September 30, 2010 Final Decision and Order, the EAB ruled that the Respondent raised on appeal only the jurisdictional question, and did not raise any of the Other Issues it has previously raised in its appeal prior to remand. Thus, the EAB considered the Other Issues raised in the appeal prior to remand to be abandoned. As set forth more fully in Respondent's Motion and Memorandum for Partial Reconsideration filed simultaneously herewith, Respondent respectfully submits that this ruling is incorrect.

If it is the position of the EAB that the Other Issues were remanded to Judge Moran in the October 6, 2006 Remand Order (a position with which the Respondent does not agree because, in the Respondent's view, the Remand Order makes clear that the only issue remanded is jurisdiction and Judge Moran's rulings were limited to jurisdiction), it is clear from Judge Moran's Initial Decision on Remand that he made no rulings of any type concerning the Other Issues previously decided in Judge Charneski's Initial Decision previously appealed by the Respondent to the EAB and pending before the EAB and near to a final decision. (Remand Order at 7). Therefore, there was no way that the Respondent could re-appeal (assuming it had to), any of the Other Issues since they were not contained in Judge Moran's initial decision on remand. 40 CFR § 22.30(a) only allows an appeal of an adverse order or ruling and Judge Moran's Initial Decision on Remand did not contain any adverse order or ruling on the Other Issues. Moreover, again assuming without admitting that all issues (i.e., the Other Issues as well as the jurisdictional issue) were remanded in the remand order, there would be no way that Respondent could re-appeal Judge Charneski's May 5, 2005 Initial Decision on the Other Issues because the 30-day appeal time had lapsed approximately four years before. Consequently, the

result would be that there is no way that Respondent could appeal the Other Issues, assuming that it was necessary to re-appeal the Other Issues. To correct this harsh result, as an alternative to granting the Respondent's Motion for Partial Reconsideration, the EAB should, in the interests of fairness and affording Respondent its appeal rights, remand this matter to Judge Moran so that he can include in the Initial Decision on Remand a ruling that adopts Judge Charneski's rulings on the Other Issues. This would then allow Respondent to appeal the Other Issues. In requesting this remand, Respondent is not seeking to re-litigate in any way the Other Issues, but will rely on its previously filed briefs and its previous oral argument before the EAB on the Other Issues. In addition, Respondent continues to maintain, and does not waive, its position that Judge Charneski's rulings on the Other Issues were error.

In addition, the Respondent requests that the EAB stay its September 30, 2010 Final Decision and Order until it has ruled on Respondent's Motion for Partial Reconsideration, Respondent's Motion to Remand and all related rulings, and if the EAB does partially reconsider its Final Decision and Order and/or remands the case to Judge Moran, stay the Final Decision and Order pending a Final Decision and Order from the EAB on the Other Issues.

### **III. CONCLUSION.**

For the reasons set forth herein and in Respondent's Motion and Memorandum in Support of Partial Reconsideration filed simultaneously herewith, Respondent respectfully requests, without prejudice to Respondent's position that Judge Charneski erred in deciding the Other Issues, and that as an alternative to granting its Motion for Partial Reconsideration, the EAB remand this case to Judge Moran with a direction that he include in his Final Decision on Remand a decision incorporating Judge Charneski's rulings in his initial decision on the Other



**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of October 2010, the foregoing *Memorandum of Law in Support of Motion to Remand and to Stay Final Order* was furnished:

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