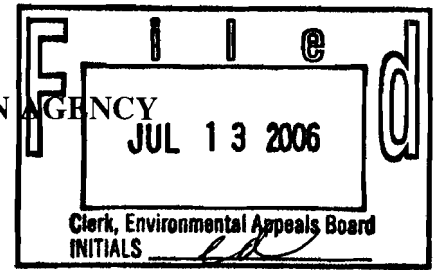


ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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In re: )  
)  
Smith Farm Enterprises, L.L.C. ) CWA Appeal No. 05-05  
)  
)  
Docket No. CWA-3-2001-0022 )  
\_\_\_\_\_)

**ORDER GRANTING EXTENSION OF TIME**

On May 5, 2005, Administrative Law Judge Carl C. Charneski (the “ALJ”) issued an Initial Decision finding Smith Farm Enterprises, L.L.C. (“Smith Farm”) liable for two violations of section 301(a) of the Clean Water Act (the “CWA”), 33 U.S.C. § 1311(a). Specifically, the ALJ found (1) that Smith Farm discharged fill material, in the form of wood chips, into wetlands that were waters of the United States, without a permit under CWA section 404, and (2) that Smith Farm discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System permit under CWA section 402.

On June 3, 2005, Smith Farm appealed the Initial Decision to the Environmental Appeals Board (the “Board”) and filed an appellate brief in support thereof. U.S. Environmental Protection Agency (“EPA”) Region 3 (the “Region”) filed an Appellate Brief As To Liability on

July 1, 2005, and the Board held oral argument on liability on July 14, 2005.<sup>1</sup> The Region filed an Appellate Brief As To Issues Other Than Liability on July 22, 2005.

With respect to the section 404 allegations, Smith Farm argued before the ALJ that EPA did not have jurisdiction over the wetlands on its property because the site “contains isolated wetlands not adjacent or with significant nexus to navigable waters or tributaries to navigable waters.” Init. Dec. at 22 (quoting Respondent’s Post-Trial Brief at 33-34). In doing so, Smith Farm relied heavily on *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”). Notwithstanding Smith Farm’s arguments, the ALJ found that the wetlands on the Smith Farm property were in fact jurisdictional wetlands, relying in part on *SWANCC*; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); and various other federal court and Board decisions. Among other matters, the ALJ stated that “[i]t is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm.” Initial Decision at 26. Concluding that a significant hydrological connection exists between the waters adjacent to the Smith Farm wetlands and navigable waters, the ALJ concluded that the Smith Farm wetlands are jurisdictional wetlands. *Id.* See also *id.* at 21-29.

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<sup>1</sup> Pursuant to the Board’s order of June 13, 2005, the July 14 oral argument included liability issues related to both this case and the case of *In re Vico Construction Corp.*, CWA Appeal No. 05-01, slip. op. (EAB Sept. 29, 2005), 12 E.A.D. \_\_\_\_.

On appeal, Smith Farm does not reiterate its arguments with respect to jurisdiction, but instead “incorporates by reference its post-trial briefs and expressly reserves the issue in the event any subsequent decisions alter the applicable legal landscape.” Respondent’s Appeal Brief at 41.

The Board was nearing issuance of its final decision in this matter when the U.S. Supreme Court issued *Rapanos v. United States*, Nos. 04-1034, 04-1384, 2006 WL 1667087 (U.S. June 19, 2006), 547 U.S. \_\_\_\_\_. *Rapanos* was consolidated with the Supreme Court’s grant of certiorari in *Carabell, supra*. 546 U.S. \_\_\_\_, 126 S.Ct. 415, 163 L.Ed.2d 316 (2005). In *Rapanos*, by a vote of 4-1-4, and a plurality, two concurring, and two dissenting opinions, the Court vacated and remanded the *Rapanos* and *Carabell* cases.

On June 28, 2006, the Board directed the Region and Smith Farm (the “Parties”) to submit a statement by July 13, 2006, explaining what, if any, next steps they believe the Board should take with respect to the jurisdictional issues in this matter, in light of *Rapanos* and Smith Farm’s procedural posture (“June 28 Order”). At the same time the Board notified the Parties that if they were interested in attempting to resolve their case through alternate dispute resolution with a member of the Board who is not a member of the panel for this case, they should file a joint motion with the Board in that regard by July 13, 2006. On June 30, 2006, in order to facilitate a prompt determination of next steps in this case, the Board directed the parties to appear for a status conference on July 19, 2009 (“June 30 Order”).

On July 7, 2006, the Region filed a Motion for Extension of Time Regarding the Board's Orders Dated June 28, 2006, and June 30, 2006 ("Motion for Extension"). In the Motion for Extension, the Region requested a 62-day extension of time "to determine the meaning of the fractured opinions of the Supreme Court" in *Rapanos* and "what impact the decision might have on this matter." Motion for Extension at 3. The Region explained that EPA's Offices of General Counsel, Water, and Enforcement and Compliance Assurance currently are considering the implications of *Rapanos* for this and other pending CWA cases. The Region also explained that EPA currently is conferring with the U.S. Department of Justice, the U.S. Army Corps of Engineers, and other federal agencies to ensure that the federal government is presenting a consistent position in its CWA cases. According to the Region, EPA, the Corps of Engineers, and the Department of Justice, as a matter of policy, are seeking similar extensions before various tribunals to allow adequate consideration of the impact of *Rapanos*. The Region argues that "the Board would benefit from the government's careful consideration of the impact of *Rapanos* and *Carabell* on this and the range of pending CWA cases." Motion for Extension at 3.

On July 12, 2006, Smith Farm filed an Opposition to Complainant's Motion for Extension of Time Regarding the Board's Orders Dated June 28, 2006, and June 30, 2006, and Statement in Response to Board's Order Dated June 28, 2006 ("Opposition and Statement"). In its Opposition and Statement, Smith Farm first responds to the Board's June 28 Order and advises that, in its view, the jurisdictional issue in this matter is now ripe for decision based on the Supreme Court's opinion in *Rapanos*. According to Smith Farm, the factual considerations potentially relevant under *Rapanos* were developed fully during the trial before the ALJ and in

the Initial Decision. Accordingly, Smith Farm maintains that there is no need to remand the matter to the ALJ or for further supplementation of the record. Smith Farm requests that the Board apply *Rapanos* to the facts already established in the case, and asks the Board to establish a briefing schedule to address the jurisdictional issues in light of *Rapanos*. Smith Farm also opposes the Region's Motion for Extension. According to Smith Farm, the 62-day extension requested by the Region would impose greater costs on Smith Farm and might confer an unfair tactical advantage upon the Region.

Given the fractured opinions of the Court in *Rapanos* and Region's representation that the government is seeking similar extensions from other tribunals in order to develop a consistent and well-considered position in its CWA cases, the Board believes that a 62-day extension is appropriate. The Board does not believe that such an extension causes an unreasonable delay in the resolution of this case, and Smith Farm has not demonstrated how such an extension would prejudice its position. Therefore, the Board hereby grants the Region's Motion for Extension. The Region shall respond to the Board's June 28 Order no later than September 12, 2006. The Parties also shall appear for a status conference, as described in the June 30 Order, on September 19, 2006, at 11:00 a.m., in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Ave., N.W., Washington, D.C. Counsel for either of the Parties who wish to participate in the status conference via the EPA video-conferencing equipment shall contact the Clerk of the Board, at (202) 233-0122, no later than September 5, 2006, to make arrangements for the use of such equipment.

This order does not foreclose a subsequent decision by the Board to proceed procedurally as Smith Farm suggests. In determining next steps, the Board will consider both Smith Farm's position, as described in its Opposition and Statement, and the Region's position, as set forth in its statement due by September 12, 2006, as described above. We note that, with respect to alternative dispute resolution, Smith Farm states in its Opposition and Statement that "mediation does not appear likely to be fruitful at this point if [the Region] has not yet determined its position as to what impact *Rapanos* will have on this case. \* \* \* Once [the Region] determines its position, [Smith Farm] is willing to consider mediation, which at that point could be conducted more meaningfully." Opposition and Statement at 3. The possibility of alternative dispute resolution as suggested by the Board in its June 28 Order is one of the issues that the Parties should be prepared to discuss with the Board at the September 19, 2006, status conference.

So ordered.

Dated: July ~~13~~, 2006

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein

Kathie A. Stein

Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing ORDER GRANTING EXTENSION OF TIME in the matter of Smith Farm Enterprises, L.L.C., CWA Appeal No. 05-05, were sent to the following persons in the manner indicated.

By First Class, U.S. Mail and facsimile:

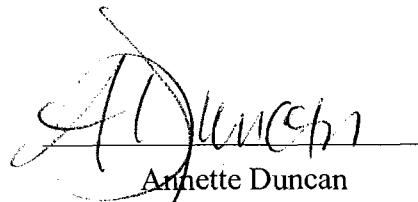
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Dated:

**JUL 13 2006**

  
Annette Duncan  
Secretary