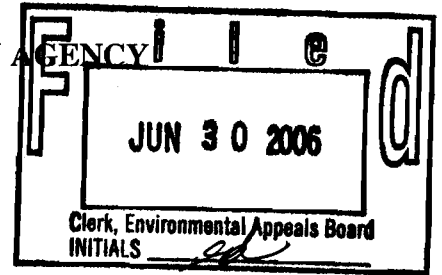


**ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**



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

**ORDER SCHEDULING STATUS CONFERENCE**

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 *Smith Farm* 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 *Smith Farm*, in light of *Rapanos* and Smith Farm’s procedural posture. 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.

In order to facilitate a prompt determination of next steps in this case, the Board is scheduling a status conference to discuss the Parties' respective response(s) to the Board's June 28, 2006 order. Accordingly, the Parties are hereby directed to appear for a status conference on Wednesday, July 19, 2006, at 11:00 a.m., in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, 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 Wednesday, July 12, 2006, to make arrangements for the use of such equipment.

So ordered.

Dated: June 30, 2006

ENVIRONMENTAL APPEALS BOARD

By:   
for Kathie A. Stein  
Environmental Appeals Judge

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER SCHEDULING STATUS CONFERENCE 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.

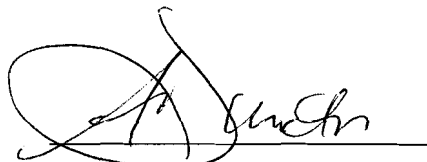
By First Class, U.S. Mail and facsimile:

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Dated: JUN 30 2006

A handwritten signature in black ink, appearing to read "Annette Duncan", written over a horizontal line.

Annette Duncan  
Secretary