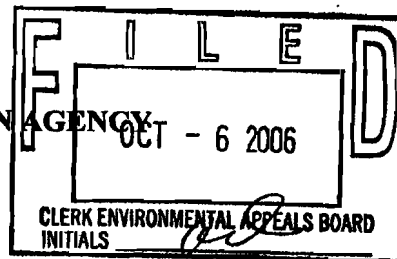


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____))
In re:))
))
Vico Construction Corporation and) CWA Appeal No. 05-01
Amelia Venture Properties, L.L.C))
))
Docket No. CWA-3-2001-0021))
_____)

REMAND ORDER

On September 29, 2005, the Environmental Appeals Board (the "Board") issued a Final Decision and Order in the above-captioned case upholding an Initial Decision issued by Administrative Law Judge Carl C. Charneski (the "ALJ") which found Vico Construction Corporation and Amelia Venture Properties, L.L.C., (the "Respondents") liable for two violations of section 301(a) of the Clean Water Act (the "CWA"), 33 U.S.C. § 1311(a), and assessed a \$126,800 penalty pursuant to CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1). Specifically, the Board upheld the ALJ's findings that the Respondents had discharged fill material into wetlands that were waters of the United States without a permit under CWA section 404, 33 U.S.C. § 1344, and that they had discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System permit under CWA section 402, 33 U.S.C. § 1342.

The Respondents filed a Petition for Review of the Board's Final Decision and Order with the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") on October 27, 2005. On December 6, 2005, the Fourth Circuit, acting on the Respondents' unopposed motion, placed the case in abeyance pending the United States Supreme Court's decision in the consolidated cases of *Rapanos v. United States*, No. 04-1034, and *Carabell v. United States Army Corps of Engineers*, No. 04-1384, which challenged the reach of the CWA's grant of jurisdiction over wetlands. On June 19, 2006, the United States Supreme Court decided the *Rapanos* and *Carabell* cases. See 2006 WL 1667087 (U.S. June 19, 2006), 547 U.S. ___. 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 July 18, 2006, the Respondents, together with the U.S. Environmental Protection Agency (collectively, the "Parties"), filed a Joint Motion for Voluntary Remand ("Remand Motion") with the Fourth Circuit. The Remand Motion requested that the Fourth Circuit remand the case to the Board to "allow the Board an opportunity to assess the impact, if any, of the Supreme Court's *Rapanos* decision on the issues" raised in the case. Remand Motion at 3. On August 14, 2006, the Fourth Circuit granted the Remand Motion, and issued its mandate remanding the case to the Board. A certified copy of the mandate was received by the Board on September 6, 2006.

On September 7, 2006, the Board issued an Order Scheduling Hearing, directing the Parties each to submit a statement explaining what, if any next steps they believe the Board

should take with respect to the jurisdictional issue in this matter, in light of *Rapanos*, and ordering the Parties to appear for a hearing on September 19, 2006.

The Respondents filed their statement on September 18, 2006. In it, they state their view that “the Board should decide the legal issue of whether the United States has jurisdiction in this case based upon the factual record developed before [the ALJ] rather than remanding the case” Statement of Respondents Pursuant To the Board Order Entered September 7, 2006 at 1. According to the Respondents, “[w]hile the Supreme Court’s decisions in *Rapanos* and *Carabell* changed the law with respect to federal jurisdiction over any wetlands on Amelia’s land, and therefore jurisdiction under the [CWA] in this case, all of the facts to be considered in applying *Rapanos* and *Carabell* were presented when this matter was heard before [the ALJ].” *Id.* at 4.

The Region filed its statement on September 15, 2006. In it, the Region recommended that “the Board remand this matter to the ALJ for the limited purpose of reopening the record to take additional evidence as to CWA jurisdiction in light of *Rapanos*. The Supreme Court’s decision in *Rapanos* is fractured and introduced new tests for CWA jurisdiction, which were not anticipated by either party during the initial hearing. Accordingly, the [Region] believe[s] that the Board may benefit from further development of the record to address the tests introduced by the *Rapanos* decision.” Complainants’ Statement Pursuant To the Board’s Order Dated September 7, 2006 at 5.

Pursuant to the Board's September 7, 2006 order, the Parties appeared for a hearing to argue their positions on September 19, 2006.

Having heard the Parties' arguments and having considered the Court's opinion in *Rapanos*, the Board finds 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. Therefore, the Board finds that it is 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. This approach is consistent with the recent decision of the Court of Appeals for the Seventh Circuit to remand a wetlands case with similar jurisdictional issues to the district court, explaining that "Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires fact finding not yet undertaken by the district court."¹ *United States v. Gerke Excavating, Inc.*, No. 04-3941, slip op. at 4 (7th Cir. Sept. 22, 2006). Accordingly, the Board hereby remands the above matter to the ALJ to take additional evidence, conduct further proceedings as necessary, and to rule on the CWA jurisdictional question, consistent with this Order and the Court's opinions in *Rapanos*. The ALJ shall

¹ The Board makes no findings at this time as to what jurisdictional test or tests should govern on remand. The Board will consider such issues if the matter is appealed to the Board following remand.

thereafter render a new initial decision, which shall have the effect described in 40 C.F.R.

§ 22.27. Either party may appeal from the new initial decision as prescribed in 40 C.F.R.

§ 22.30.²

So ordered.³

Dated: October 6, 2006

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

² 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.

³ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1).

ADDITIONAL CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing REMAND ORDER in the matter of Vico Construction Corporation and Amelia Venture Properties, LLC, CWA Appeal No. 05-01, were sent to the following persons in the manner indicated.

By Inter-Office Mail:

Judge Susan L. Biro
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Dated: **NOV 14 2006**


Annette Duncan
Secretary