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April 17, 2009

KC No.: 0058296

***Via* Hand Delivery**

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, DC 20005

Re: ***In the Matter of Smith Farm Enterprises, LLC***
CWA Appeal No.: 08-02; Docket No.: CWA-03-2001-0022

Dear Sir or Madam:

Enclosed are an original and five copies of Respondent's Appeal Brief, which I ask you to file on behalf of the Respondent in the captioned case.

Please call me if you have questions. Otherwise, thank you for your assistance in this regard.

Very truly yours,

Hunter W. Sims, Jr.

HWS/lsw

Enclosures

cc: Ms. Lydia Guy, Regional Hearing Clerk (*via* mail w/enc.)
Stefania D. Shamet, Esquire (*via* mail w/enc.)

1465377

BEFORE THE UNITED STATES
ENVIRONMENTAL APPEALS BOARD

In the Matter of

Smith Farm Enterprises, LLC

DOCKET NO CWA App. No. CL08-02

Regarding property known as the "Smith Farms" Site located north of Portsmouth Boulevard (Rt. 337) and east of Shoulders Hill Road and south of Rt. 17 in Chesapeake and Suffolk, Virginia (the "Property")

Docket No. CWA 3-2001-0022

RESPONDENT'S APPEAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

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In the Matter of

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Docket No. CWA App. No. CL08-02

Docket No. 03-2001-0022

RESPONDENT'S APPEAL BRIEF

Respondent Smith Farm Enterprises, LLC (hereinafter the "Respondent"), through its counsel, appeals the Remand Decision of the Honorable William B. Moran issued March 7, 2008 ("Remand Decision").

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case when he found jurisdiction both under the Scalia opinion in Rapanos and under the Kennedy opinion in Rapanos.

II. STATEMENT OF THE NATURE OF THE CASE

The Environmental Protection Agency ("EPA") brought this enforcement action against 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 contesting, among other things; 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 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 ("Initial Decision") where he found that the EPA had established jurisdiction under the CWA and CWA Section 402 and 404 violations even though he did not find that any fill material had been sidecast and that no roadbed had been created.

The Respondent appealed the Initial Decision to the Environmental Appeals Board ("EAB"). The EAB was about to issue an opinion when the United States Supreme Court granted certiorari in Rapanos v. United States, 547 U.S. 715 (2006). The EPA stayed this matter 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 motion and issued a remand order on October 6, 2006 which stated that "the facts required to decide the case using the Clean Water Act jurisdictional tests set forth in Rapanos were either not present or not fully developed in the record" and remanded the matter to an administrative law judge to hear evidence and then ultimately rule on the jurisdictional issue.

Administrative Law Judge William B. Moran heard evidence in this matter on May 14, 15, 16, 17, 18, 21, 22, and 23, 2007 and issued his Decision on Remand on March 7, 2008. ("Remand Decision"). In the Remand Decision, Judge Moran found Clean Water Act ("CWA") jurisdiction both under the Scalia opinion in Rapanos and under the Kennedy opinion in Rapanos.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. All of the seven drainages on the Property flow intermittently. Initial Decision at 27, Vol. II Tr. at 77.[1]

B. The Property contains some wetlands among its 300 acres.

C. The Property is not connected to any navigable waters by any continuous chain of wetlands or through a continuously flowing stream or river. R. Tr. at 1236-38[2].

D. The Property does contain a network of ditches and waterways that connect eventually, during times of flow, to Drum Point Creek and Bailey Creek. All of these ditches and connecting waterways have only intermittent flow. R. Ex. RX34, 52[3] and 53; R. Tr. at 329-31, 340-36, 349, 1225.

E. There are no seasonal rivers on the Property.

F. There are no unaltered streams on the Property. R. Tr. at 892.

G. The EPA failed to establish continuous flow off the Property from any point.

H. The EPA did not introduce any measure of the volume of flow.

I. It is not difficult to determine where the "water" ends and the "wetland" begins at the Property. R. Tr. at 247-49.

J. The portions of the Property which contain non-hydric soil are not and probably never were wetlands. R. Tr. at 1118.

K. The two primary outfalls from the Property are to the west under the railroad tracks (Drainage 6) and to the east at the bottom of the Property (Drainage 4). Both Drainage 4 and Drainage 6 go through non-hydric soil; R. Tr. at 1402 ("...the water traveling from south of

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[1] Hereinafter, citations to the transcript from the Initial decision shall appear as Vol. _ Tr. at __.
[2] Hereinafter all citations to the Remand Transcript shall appear in the form R. Tr. at ___.
[3] Hereinafter all citations to Remand Exhibits shall appear in the form R. Ex. ___.

the master ditch towards the confluence of the master ditch and the ditch leaving the property travels through non-hydric soils."); R. Tr. at 1411 ("Q: And with regard to the areas off the Smith Farm property depicted on Figure 12, do you have an opinion as to whether or not the water flowing off the Smith Farms property depicted in Figure 12 flows through hydric soils or non-hydric soils? This would be the soil off of the property. A: Yes. Q: And what is your opinion? A: That the drainage feature off the property is bordered on both sides by non-hydric soils."); Tr. at 1238 ("On the East side of the property, the connections to navigable water go through non-hydric soils."); R. Tr. at 1297 ("...the ditches pass through and water passes through non-hydric soil and also nonwetlands."); R. Tr. at 1301 ("Q: So any water in the tulloch ditches in order to get off the property has to flow through one of these preexisting ditches; is that correct? A: Correct. Q: And all the preexisting ditches flow at least at some point through nonwetlands or non-hydric soil; is that correct? A: Correct."); R. Tr. at 1181 ("I sampled on either side of the master ditch to see if these were hydric soils or non-hydric, and these were non-hydric on both sides of the ditch here. They were non-hydric on both sides of the ditch here. So that ditch was cut through, in my interpretation, cut through and up on a nonwetland."); R. Tr. at 1929-30 (Drainage 4 is not in wetlands).

L. To the extent water is conveyed off the Property to the South (through what the EPA has identified as Drainages 1, 2, and 3), even according to the EPA, those drainages are not in a wetlands area. R. Ex. CX-SF-125 (Figure 10); R. Tr. at 1930 (Steve Martin ("Martin") said he did not know whether this area was a wetland).

M. Non-hydric soils were verified by Blake Parker ("Parker"), the soil scientist who wrote the Corps' wetlands delineation manual soils section. R. Tr. at 1115. R. Ex. CX74 Appendix C shows the precise locations of all fully described soil samples (Appendix D to

CX74) as well as numerous other probes which revealed non-hydric soils (all Global Positioning Satellite located for accuracy). These additional probes satisfied Parker that the full samples were representative of the surrounding area rather than merely small inclusions of non-hydric soils.[4] R. Tr. at 1185. Furthermore, the samples did not evidence wetlands hydrology. No water was observed in seventeen samples except for Samples 2 and 8, despite the holes being dug down to depths as great as one and a half to two feet at a date (2/20/07) prior to the start of the growing season when the water table would be higher. R. Tr. at 1130-40.

N. EPA Data Point 2 had non-hydric soils. R. Tr. at 424.

O. Non-hydric soils categorically means the area is not a wetland. R. Tr. at 1118.

P. NWI maps are inaccurate on a small scale and "may overestimate or underestimate the amount of wetlands depending upon the landscape conditions." R. Tr. at 1239.

Q. The types of wetlands on the Property are difficult to identify from the air. R. Tr. at 602-03.

R. Appropriately calculated, the Property makes up only .11% of the Chesapeake Bay watershed. R. Ex. RX74 at 9-10.

S. Vegetation growing on the Property looks the same throughout the Property whether the vegetation is on wetlands or uplands. R. Tr. at 969; 1446.

T. The Property's vegetation is primarily facultative, see R. Ex. CX-SF-310 pp. SF944, 946; R. Ex. CX382 at p. SF1316.

[4] The EPA points to a soil sample Martin allegedly took along the western side of the Property at the outfall under the railroad track that was hydric. This area was excavated so lower soil layers were probably exposed or it could be a narrow swale. R. Tr. at 1653. Whatever the case, the area is surrounded by non-hydric soil and a poplar tree was growing at the spot, indicating no present wetlands hydrology. R. Tr. at 1982-83, 1931 and 1736.

U. The Property is not characterized by wetlands obligate species (those that grow in wetlands conditions 99% of the time). Id. at 1203.

V. The presence of vegetation that fulfills the vegetation parameter for wetlands determination is not determinative of current conditions because vegetation would remain after a wetland had been drained. R. Tr. at 513.

W. Of those areas that do have hydric soil and hydrophytic vegetation, the hydrology must be assessed. Hydric soil can form when an area is wet; it will continue to be hydric even if the area is drained. R. Tr. at 1118-19.

X. There are many species (over 30) of sphagnum moss, not all of which require long-standing moisture to grow. R. Tr. at 1518-19.

Y. Blackened leaves are themselves not sufficient proof of wetlands hydrology. R. Tr. at 370-71.

Z. Blackened leaves can form in any area (wetland or upland or even in roof gutters). R. Tr. at 764-65.

AA. Leaves can turn black within one week. R. Tr. at 1761-62.

BB. Once leaves turn black, they will remain black, and there is no way to assess how long leaves have been black. R. Tr. at 1752-53.

CC. EPA witnesses stressed the importance of leaf-out (referring to the time when vegetation develops leaves). See R. Tr. at 1912 ("water is most likely to be at or near the surface during that leaf-out period. . ." "Basically when the trees leaf out, the transpiration pump kicks in and you can actually see, in well data, water levels in the soil drop markedly."); R. Tr. at 354 ("Most plants transpire when temperatures are warmer, when they have leafed out during the growing season.").

DD. A wet signature can disappear when plants leaf-out and begin using water. Specifically, color infrared photography commissioned by the EPA reveals that leaf-out had not occurred on the Property at the time of the photo dated March 29, 1999. R. Ex. RX749 Figure 39; Tr. at 1315-16; 1318.

EE. The "growing season starts at leaf-out." R. Tr. at 1621.

FF. Hydrology should be assessed only once vegetation begins significantly using water or any measurement will overstate the hydrology. R. Tr. at 1359-60.

GG. Activity before leaf-out (such as budding) uses energy stored from the prior year. R. Tr. at 1948-49.

HH. If the wells were assessed under the proper standards (the growing season beginning after leaf-out occurred in this case after March 29, 1999), they indicate wetlands hydrology is largely absent at the property and is certainly absent in the critical areas nearest the ditches. See R. Ex. CX-SF-378 (individual well data).

II. Water present along the highway right of way was not emanating from the Property. R. Tr. at 1979.

JJ. The flow pattern at the Property is complex at places, but water all now goes to the master ditch (Drainage 6) or the boundary ditches and then the water may flow during times of flow through Drainages 4 and 6 to Bailey Creek and Quaker Neck Creek. R. Tr. at 217-220. More specifically, water from the southwest quadrant "flows up to the master ditch," R. Tr. at 219, and eventually flows to the west into Quaker Neck Creek. Vol. II Tr. at 134. Water from the northeast quadrant flows south to the master ditch. R. Tr. at 215. Water from the northwest quadrant flows south to the master ditch and to Drainage 7. R. Tr. at 217-19; see also Initial Decision at 27. Water from the southeast quadrant flows to the east. R. Tr. at 220.

KK. Prior to any ditching whatsoever, any wetlands on the Property were isolated and not connected to navigable waters. R. Tr. at 985 and R. Ex. RX74.

LL. No branching or dendritic pattern indicating a stream course can be found on the Property, R. Tr. at 893; 55-56; 275. This shows that "the only connections from the Property off of the Property were through minor ditches that had been excavated." R. Tr. at 1258.

MM. Once the Property began to be farmed, ditches were installed. This was long before the Tulloch ditches in question were dug.

NN. The system of preexisting ditches is extensive, R. Tr. at 874-75, 1271-76, and ditches were present throughout the property. R. Ex. RX74 Figures 17, 35 and 36, RX82-84.

OO. It is a non-controversial proposition that ditches drain adjacent soil. R. Tr. at 1987, 878, 883 ("inconceivable that the ditch, as deep as that ditch is, did not drain some of the adjacent property"), 616, 1442.

PP. Assuming equivalent features on either side of a ditch, a ditch will drain land on each side of it. R. Tr. at 616-17.

QQ. "The deeper the ditch, the wider the lateral [draining] effect." R. Tr. at 1443.

RR. The master ditch on the Property (Drainage 6) was considerably deeper than the deepest ditches assessed in the Havens draft report. R. Tr. at 1444 ("Well, the Havens report only goes to a three-foot deep ditch. The main ditch on the site towards the western end was closer to six feet deep.").

SS. That ditches alter hydrology is evidenced by the lower agricultural field (or southeast quadrant) of the Property. The ditches there have lowered the water table enough that it can support the cultivation of crops. R. Tr. at 879-80, 808.

TT. There is no impediment to draining on the Property, R. Tr. at 1984-85, and the soil at the Property is drainable. R. Tr. at 808.

UU. The soils at the Property contain significant amounts of sand, R. Tr. at 1450; R. Ex. RX74 Figure 23, and (irrespective of whether sandy soils are present in a technical soil scientist sense or in a layman sense) sand in general means more drainage. R. Tr. at 1484 ("When you construct a drainage ditch through soils, the width of the lateral effect of the ditch on the drainage will be greater the higher the sand concentration is in the soils generally."). The EPA did not disagree. R. Tr. at 604-605 (Martin) (soils at Smith are fairly drainable).

VV. Generally speaking, the coarser the texture or the more sand there is in the profile, the faster the water moves through the soil profile, all other things being equal. R. Tr. at 1142.

WW. Corps inspector Steve Martin admitted the empirical evidence of drainage due to the ditches. R. Tr. at 1937-41.

XX. Tree roots along the ditches corroborate that the ditches drained adjacent land. R. Ex. RX74 at 22-23; Figures 18 and 19.

YY. Trees form shallow roots when the water table is high. R. Tr. at 881.

ZZ. The EPA did not consider or assess what was going on below the soil surface and it admitted shallow tree roots at the surface would not reveal whether an area had been drained. R. Tr. at 535-36.

AAA. If a tree has shallow roots but then the water table is lowered, the shallow roots remain at or near the surface, but longer roots develop underground. Id.; R. Ex. RX74 at 22.

BBB. That tree would then look like it has shallow roots but underneath the tree, the roots would extend down deeper under the soil surface. Id.

CCC. Along the master ditch (Drainage 6), the water table has been lowered such that the area could not be considered a §404 wetland. R. Tr. at 1366. ("And the trees nearest the ditch and for a considerable distance had root masses that were not at all characteristic of wetland conditions. They were characteristic of nonwetland conditions."); R. Tr. at 1382-83 ("That none of the trees show a root system that would be consistent with a water table during the growing season that remained within the top 12 inches of the land surface and that all of the trees showed some draining effect from the master ditch or the ditch to the south.").

DDD. No wetlands abut the master ditch.

EEE. A tulip poplar is an example of a tree that would not grow in a present wetland area. R. Tr. at 1736.

FFF. There are numerous tulip poplars growing along the sides of the master ditch (Drainage 6) and which were documented in the tree root study. R. Tr. at 1385-86; R. Ex. 72 Figure 18 and 19.

GGG. At the point where Martin said he sampled (Sample Point 6) and found hydric soil along the railroad at the westernmost exit point for water, a poplar tree was growing right there. R. Tr. at 1931.

HHH. For several hundred feet along the master ditch and along the other preexisting ditches, there is a band of drained soil blocking flow from the wetlands because the water would not move along the soil surface. R. Tr. at 1444, 1985-86.

III. The Property is essentially flat with no significant slope, so water would not readily flow along the soil surface. R. Tr. at 832.

JJJ. The surface flow of water would be impeded by the drained areas, thereby isolating any wetlands. R. Tr. at 1981, 1985-86.

KKK. Accordingly, any wetlands on the Property are isolated and are not contiguous or adjacent even to the ditches on the property. R. Tr. at 1383 ("Since the installation of that master ditch, the areas would be drained and not, not considered 404 wetlands."); R. Tr. at 1444 ("That there would have been zones, at a minimum, assuming that we were in hydric soils, there would have been zones bordering every ditch on the site that would be dewatered and would not have wetland hydrology out to some distance which will vary depending upon the depth of the ditch.").

LLL. The presence of water at or near the surface after a rain, however, would not indicate that no drainage had occurred, R. Tr. at 1977-78, as the EPA contended. e.g. R. Tr. at 1698.

MMM. The fact that water may sit on the surface for some time is not indicative of whether it is draining, R. Tr. at 1739, because drained areas fill back up with rainfalls and look wet on photos taken after a rain. R. Tr. at 910-11.

NNN. Photographic signatures of areas with hydric and non-hydric soils are very similar, indicating that areas with hydric soils were drained and not wetlands. R. Tr. at 1280, 1292-93.

OOO. Both EPA and Respondent agreed that the areas that would be considered wetlands look the same as non-wetlands areas on the Site. R. Tr. at 747 (Martin stating you cannot tell visually where hydric soils begin and end); R. Tr. at 1445-46 (Pierce testifying: "The areas on the site between hydric soils that are drained and non-hydric soil areas were essentially identical as far as landscape elevation, relation to the water table, relationships to ditches and the

dominant species on the plant communities, very little difference whatsoever. And the areas that may have been wetlands still prior to 1998 were of very similar vegetation with slight elevational differences . . . .And so I did not see that there was a great deal of difference throughout the site in, in the landscape features or how those landscape features would affect various attributes that we call function."). Because the landscape is so similar between uplands and wetlands, the functioning of the landscape is the same for both uplands and wetlands. R. Tr. at 1445-56 ("Q: All right. Is there any difference in the significance in that regard of the functions between a wetlands on Smith Farms and the nonwetlands on Smith Farms as they may relate to navigable waters? A: In my opinion, no. Q: And for what reason? A: Because they are all intermixed on the site, they are all very similar and the functions that I can possibly attribute to these wetlands and nonwetlands would be basically the same and would have very minor effect on any navigable water.").

PPP. The Property is already completely surrounded by development. R. Ex. CX56, 72 and R. Tr. at 1812-1823; see also R. Tr. at 1460 (noting multitude of features of anthropic origin).

QQQ. EPA's testimony about wetlands functions was very general and speculative. E.g., R. Tr. at 757 (Rhodes admitting he never saw an animal); see also R. Tr. at 1455 (Pierce stating he never saw an animal).

RRR. Although the written expert report submitted by EPA mentions bears, the expert admitted there was no evidence that bears have ever been to the Property. R. Tr. at 759.

SSS. The EPA claimed that the hummocky depressions and tree tip-ups provide a breeding ground for salamanders, but no witness (from either side) who had been to the Property testified that they ever saw a salamander at any point. E.g., R. Tr. at 502.

TTT. Martin said he saw a woodcock on the Property, but no testimony was offered about how woodcocks could impact navigable water, and Martin admitted on cross-examination that woodcocks are simply birds that like forested areas (as opposed to birds that like wetlands). R. Tr. at 615.

UUU. Any wetlands on the site are fragmented and not continuous, diminishing the importance generally of the land as a habitat. R. Tr. at 1294 ("The other point that is brought out by the analysis is that internally the site is extremely fragmented."); R. Tr. at 1460 ("...the property itself, Smith Farm, is broken between a series of wetland areas, nonwetland areas, areas that were wetlands probably but are drained, there are roads intervening, there are agricultural fields, and then once you leave the site, there are all types of features of anthropic origin, buildings and roads that's nothing near being an unbroken swath.").

VVV. Hummocks are not an exclusive wetlands feature. Hummocks are also found on non-wetlands areas and they function the same way with regard to storing water if they are on uplands. R. Tr. at 1450; R. Ex. RX74 at 35-36; 756.

WWW. Flood desynchronization can also be provided by non-wetlands. R. Tr. at 549-53.

XXX. Within the Property the non-wetland areas have the same microtopography as wet areas. R. Tr. at 1429, 1485; R. Ex. RX70. Nothing differentiates the two.

YYY. When a wetland is drained, its microtopography remains. Therefore, even if the water table was lowered through ditching, the Property still would hold water and in fact would hold more water than an undrained property. R. Tr. at 888.

ZZZ. Not only did Respondent's experts find little evidence of erosion, Corps inspector Martin observed no downstream erosion, R. Tr. at 756, and Straw saw no erosion on the Property. R. Tr. at 884, 834. Martin also admitted observing no evidence of overland flow in the northeast quadrant. R. Tr. at 221.

AAAA. Denitrification also occurs in non-wetlands, and it occurs in open water. R. Tr. at 765.

BBBB. Martin said he saw some mottles in soil at the Property, but many samples lacked mottles entirely, R. Tr. at 411, leading further support to the fact that any wetlands at the Property are at best contained in a patchwork quilt of wetlands and uplands.

CCCC. Furthermore, the red color from a mottle can last for hundreds or thousands of years as "relic" features. R. Tr. at 1132.

DDDD. The presence or absence of mottles or oxidized rhizospheres reveals very little about the present extent of denitrification at the Property. See R. Tr. at 1132-33 (Parker explaining that soil scientists are still developing criteria to determine whether features are relics versus indicators of current activity).

EEEE. The only source of nitrates at the Property is atmospheric deposition. R. Tr. at 547-48.

FFFF. Nitrates falling on the Smith Farm property are falling at equal rates on every other piece of property (be it a wetland or a non-wetland) in the area. R. Tr. at 548, 609.

GGGG. The amount of pollutants would be as low at Smith Farms as at any other piece of Property in the area, be it wetland or non-wetland. R. Tr. at 597.

HHHH. Any wetlands on the Property are fed only by precipitation, R. Tr. at 1422-23.

IIII. Any wetlands on the Property are a one-way street to downstream waters. Vol. V Tr. at 12; there is no upstream interchange.

JJJJ. Denitrification does not occur in sand, so the sandier the soil, the less the rate of denitrification. R. Ex. RX74 Figure 29; R. Tr. at 1142 ("I guess the sandier the soil, the less denitrification there probably would be); R. Tr. at 1488 ("...the higher the concentration of the sand in a soil, the lower is going to be the denitrification rate"); ("The soils on Smith Farm, a lot of the soil surface layer is in the sand concentration to the right of that diagram which has the most minimal of denitrification. And so what it suggests is that even in those soils that would qualify as being hydric and not drained, you still could not expect to have very much denitrification occurring.").

KKKK. More denitrification occurs in the soil below the surface than when the water is standing in depressional storage on top of the surface. R. Tr. at 892, 966.

LLLL. The Property has an extremely minimal contribution regarding denitrification. R. Tr. at 968 ("If the wetland does not have the opportunity to perform that function, then that wetland has a very small function for that particular thing. So that if the water is essentially sourced from the rain, there is virtually nothing in it that needs to be strained out or filtered out by the wetland. So that function is low. We don't see that as a function of this particular wetland because the water is essentially pure and the groundwater—not the surface water in the wetland—takes care of the nitrate that has been identified virtually as the only pollutant in the atmosphere. Although there are others, they are just in tiny amounts.").

MMMM. Carbon in the water is beneficial according to the EPA. See R. Tr. at 25, 611-12; see also R. Tr. at 986 (decomposition of wood would not harm navigable waters).

NNNN. The EPA offered no testimony that anyone observed intact leaves leaving the Property. R. Tr. at 796.

OOOO. The "tea-stained" water and foam seen at the Property at various points both on and off the Property by various observers indicates that carbon is dissolved in the water. R. Tr. at 1682, 1690.

PPPP. The EPA failed, however, to establish any specifics about origins of the tea-stained water.

QQQQ. Dennis Francis Whigham ("Whigham") claims he observed tea-colored water "everywhere," R. Tr. at 1732, but he has no records of where he went specifically.

RRRR. William Thomas Straw ("Straw"), the Respondent's hydrologist, looked for the origin of the tea-stained water and found that it was coming from areas of Tulloch ditching. R. Tr. at 917.

SSSS. Any dispersal of wood chips did not alter the flow of water across the site. R. Tr. at 957. It is highly unlikely that any wood chips left the Property at all, R. Tr. at 917, 921-22, much less in any appreciable quantity.

TTTT. Any wood chips at the Property would not negatively impact navigable waters. R. Tr. at 922.

UUUU. No witness testified that any wood chips were seen leaving the Property. E.g. R. Tr. at 509 (Martin admitting no wood chip was seen).

VVVV. In fact, more wood chips on the surface are a good thing for water quality because they add surface roughness, which slows down any overland flow to the extent there is overland flow. R. Tr. at 731-32. Additionally, wood chips decompose into dissolved organic carbon which all witnesses agreed are beneficial to the environment.

WWWW. The Tulloch ditching itself had no negative impact on navigable waters. R. Tr. at 987-88; R. Ex. RX74 at 29-32.

XXXX. The testing by the only water quality expert to testify, called by the Respondent , demonstrated that the water leaving the Smith Farms Property after the activities at issue was pure and less turbid than tap water. R. Tr. at 911, 961, R. Ex. RX28 and 29; see also R. Tr. at 960 ("the water is essentially about as pure as water gets because it's virtually all rainwater, altered a bit by going into the ground and augmented by places on the site...").

YYYY. Any water leaving the Property would travel through other off-Property wetlands systems and stormwater control features already installed in connection with area development. R. Tr. at 541-42.

ZZZZ. The list of data and information not collected by the EPA which was necessary for the EPA to meet its burden of proof, includes:

(a) The EPA did not systematically chronicle flow from the Property despite testimony that it could be done.

(b) The EPA never measured sediment leaving the Property or entering navigable waters despite the ease of performing such measurements.

(c) The EPA never tested for any contaminants in the water leaving the Property or entering navigable waters from the Property.

(d) The EPA never tested for pollutants leaving the Property or entering navigable waters from the Property.

(e) The EPA never took a sediment inventory.

(f) The Corps or the EPA never measured carbon in the water leaving the Property or entering navigable waters from the Property.

(g) The EPA never measured phosphates in the water leaving the Property or entering Navigable waters from the Property.

(h) The EPA never measured oxygen in the water leaving the Property or entering navigable waters from the Property.

(i) The EPA never measured nitrates in the water leaving the Property or entering navigable waters from the Property.

(j) The EPA never measured nitrogen in the water leaving the Property or entering navigable waters from the Property.

(k) The EPA never performed an HGM analysis of the Property.

(l) The EPA performed no wildlife studies in connection with the Property.

(m) The EPA performed no habitat evaluations in connection with the Property.

(n) The EPA never performed any water testing of any type related to the Property.

Tr. at 555-559.

Further, Judge Moran incorporates Judge Charneski's Initial Opinion and the Findings of Fact therein by reference into the Remand Opinion. R. Tr. at 2, FN 3. Judge Moran concludes that the findings of fact incorporated "were not altered by the testimony received during the proceedings upon remand." However, the record reflects otherwise.[5] Throughout the Remand proceeding, in accordance with what the EAB ordered in the Remand Order, the Respondent presented an abundance of evidence which altered most of the testimony received at the initial proceedings.

First, Judge Moran cites Judge Charneski for the proposition that "William Parker, Respondent's soil expert, agreed with the EPA's soil expert, [Ms.] Vasilas, that the Smith Farm

[5] Respondent has previously made objections to the factual findings of Judge Charneski as not being supported by the evidence, among other reasons. For purposes of raising objections to facts on the record, all briefs of the Respondent are incorporated by reference here and all previous objections made to findings of fact are incorporated by reference into this brief on appeal.

site contains hydric soils." Remand Opinion at 5. This is an incorrect assessment of what was agreed to. Respondent only agreed that some forested area contained some wetlands.

Second, Judge Moran relies on Judge Charneski's conclusion that the evidence in the case "establishes a significant hydrological connection exists between the waters adjacent to the Smith Farm wetlands and navigable waters." Remand opinion at 5. However, since Rapanos, after Judge Charneski's conclusion, the law has changed, been further developed and in light of Rapanos, this issue had to be revisited. That is the reason the EAB entered the Remand Order and ordered the Remand hearing. The Remand Order states "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. Remand Order at 5. Therefore, Judge Moran's adoption of Judge Charneski's undefined conclusion that there was a significant hydrological connection here is misplaced as it was made in a pre-Rapanos era when the term meant something different, was less defined, and clearly requires more evidence as the EAB itself stated in the Remand Order.

Third, Judge Moran incorrectly makes a finding that Judge Charneski did not make in the Remand Opinion. Judge Moran states "Judge Charneski also found that 'the wetlands on the northern portion, northeast quadrant of Smith Farm are part of a larger wetland complex that extends appreciably north of the Smith Farm Property." Judge Moran cites Vol. II Tr. 31 of the initial trial transcript and Tr. 134-35 of the same transcript. This finding is wrong for several reasons. First, Judge Charneski did not make a finding on this, but simply stated that this was something Martin testified to. Second, even if Martin testified to this, it was prior to the Rapanos decision. Post-Rapanos, and at the Remand hearing, the Respondent offered a plethora of evidence which directly refutes this point. See section IV(A)(2) below on the absence of

continuous surface connection between the wetlands and waterbodies. That is exactly what the Remand hearing was supposed to do. Third, Stokely did not make this representation on the record. Stokely merely testified about the wetlands and the drainage patterns on the Smith Farm Site by referring to the specific quadrants on the Site. Vol. II p. 134-35. Therefore, this characterization of Stokely's testimony is incorrect. Therefore, any reliance on the same is in error.

IV. ARGUMENT

A. In the Remand Decision the Administrative Law Judge Erred in Finding Clean Water Act Jurisdiction Over the Wetlands in this Case under the Scalia Opinion in Rapanos

Under the four Justice opinion within the plurality in Rapanos ("Scalia Opinion"), establishing that wetlands are under the jurisdiction of the CWA requires two findings: "[F]irst, that the adjacent channel contains a "wate[r] of the United States," (i.e. a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742. The EPA bears the burden of proving both prongs of the Scalia test in order to prove that CWA jurisdiction exists.

In a discussion of what constitute "relatively permanent" waters, in the Scalia Opinion, Footnote 5 states "[b]y describing "waters" as relatively permanent we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months - such as the 290- day continuously flowing stream postulated by JUSTICE STEVENS' dissent." (emphasis added). 547 U.S. at 732. The footnote goes on to explain that "channels containing permanent flow are

plainly within the definition" and "intermittent and ephemeral streams- that is streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' Webster's Second 1296" are not. Id.

Judge Moran uses three and one half pages of the Remand Decision to criticize the Scalia opinion showing his lack of objectivity in making an evaluation under the Scalia opinion. Remand Decision at 9-12. ("The plurality is in conflict . . .," "[t]he plurality does not accurately describe . . ." Remand Opinion at 10). Not only is Judge Moran's assessment of the Scalia opinion inaccurate, but, most respectfully, he is not in a position to hold that the logical analysis and opinion of four Justices of the Supreme Court of the United States are wrong. Admittedly, as Rapanos is a 4-4-1 decision, at a minimum here Judge Moran must make an analysis both under the Scalia and Kennedy opinions. However, Judge Moran cannot unilaterally decide that four Justices of the United States Supreme Court were incorrect in their analysis of the jurisdictional issues under section 404 of the CWA. Therefore, in order to conduct a proper analysis in this case, Judge Moran was required to objectively conduct an analysis both under the Scalia and the Kennedy opinions. His harsh criticism of the Scalia opinion leads only to the conclusion that even though he did an analysis under the Scalia Opinion, it was not a legally sufficient one. All of the evidence established that any flow from the Property was intermittent.

Judge Moran, in the Remand Decision, held that both that the waterbodies in this case contain a water of the United States and that the wetland has a continuous surface connection with those waterbodies, despite the fact that the evidence provided at the original trial and at the Remand Hearing, even the evidence from the EPA's witnesses, did not support this holding.

1. The waterbodies did not contain a water of the United States as they were not relatively permanent bodies of water connected to traditional interstate navigable waters

There were seven drainages identified which the EPA alleged were waterbodies which were relatively permanent bodies of water connected to traditional interstate navigable waters. All of the evidence from both the EPA and the Respondent established that these drainages, referred to as drainages 1, 2, 3, 4, 5, 6, and 7, flowed intermittently. Judge Moran placed great weight on the fact that EPA witness Steve Martin testified that he saw water flowing in drainages 6 and 7 on January 6, 1999, March 16, 1999, March 31, 1999, April 5, 1999, April 19, 1999, September 10, 1999, March 19, 2003, December 18, 2006, January 24, 2007, and April 18, 2010.[6] R. Tr. at 330-31, Remand Decision at 22, that Martin testified that he saw water flowing in drainages 1, 2, and 3 on August 3, 1999, February 8, 2000, December 16, 2006, January 24, 2007, and April 18, 2007, and that Martin testified that he saw water flowing in drainages 4 and 5 on March 17, 1998, August 3, 1999, November 18, 1999, August 22, 2005, June 2, 2006, August 23, 2006, December 18, 2006, January 24, 2007, and April 18, 2007. Remand Decision at 23. Judge Moran did observe that Martin admitted that on May 29, 2002 there was no flow in drainages 4, 5, 6 and 7, and on July 15, 1999 there was no flow in drainages 1, 2, and 3. Remand Decision at 22-23, 43, R. Tr. at 340-41. In placing great weight on this testimony, Judge Moran took note that Martin had observed flow in "in each calendar quarter," Remand Decision at 23 and that "the drainages contain flow during all quarters of the year." Remand Decision at 56. Judge Moran then relied on these facts, in part, in finding that the first prong of test under the Scalia opinion was met.

However, Judge Moran's factual findings do not result in the first prong of the Scalia test being met. Footnote 5 in Rapanos specifically addressed the applicability of the CWA to water

[6] Of course, this is a typographical error.

which flows during some months and not in others. Specifically, the court suggested that seasonal rivers, such as those that would flow 290 days a year, would be covered by the CWA. As much as Judge Moran attempted to find that type of water here, it is not.

Clarification of the term "relatively permanent waters" was provided in the EPA and the Department of the Army's ("Corps") publication: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States on June 5, 2007. See reference in Remand Decision at 58, FN 98. In that publication, the EPA and the Corp recognized the constraints of footnote five and suggested that waters that have a seasonal flow, as contemplated by the footnote, typically flow for three months. Publication at p. 6.

Here, Martin did not testify and the EPA did not offer evidence of water flowing through the waterbodies for the three month minimum span announced in the Corps' Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States despite the fact that Martin testified that testing "readily" could have been done (but wasn't) to measure flow from the outfalls of the property and sediment leaving the site at any point. R. Tr. at 554-55. In fact, the EPA only established that the intermittent waterbodies had flow on ten days in nine years. Not only did the EPA fail to meet its burden of proving that the waterbodies were relatively permanent waterbodies despite the fact that their witness testified that this readily could have done testing to determine if this were so, but Judge Moran completely ignored evidence to the contrary. First, Carl Duncan ("Duncan"), a nearby property owner and caretaker of the Property, testified that he was on the Property two times a week for thirty years. Duncan testified that he had observed all the points at which water leaves the property dry during each and every season both before and after the Tulloch ditching. R. Tr. at 1858, 1860-64. However, Judge Moran completely dismissed Duncan's testimony as he stated

that Duncan's focus on "sojourning" the site was not to assess frequency of water flows and that his testimony was refuted by the evidence in the record of water flow.

This conclusion made by Judge Moran is fatally flawed for two reasons. First, it does not matter what Duncan's focus was for "sojourning" the property for the thirty year span for which he was on it two times a week. He testified from personal observation that during all seasons the waterbodies identified by the EPA were dry over the years. Despite his purpose for being on the property, a fact is a fact. For all the emphasis Judge Moran placed on Martin's testimony, the truth of the matter is he was only on the Property ten times in nine years. He was never on the Property in February, May, June, July, August, October, or November. The EPA offered no evidence despite their admitted ability to do so, to refute Duncan's testimony.

Second, Judge Moran makes an absolute error when he finds that the evidence on the record actually does refute Duncan's testimony. Judge Moran makes the assumption that Duncan's testimony and the evidence of flow on the record are mutually exclusive, but this is simply untrue. Based on the Scalia opinion, as explained in this section, the EPA had the burden of proving arguably a minimum of three continuous months of flow, referenced in the Corps' publication, and as much as 290 continuous days of flow, referenced in the Scalia Opinion. The only evidence the EPA presented was that on ten separate days over a nine year span there was water flowing in the waterbodies. This does not refute Duncan's testimony that at other times during each and every season over the years the waterbodies were dry. The EPA had the opportunity to offer evidence which could have directly refuted this and it did not.

Further, James M. Boyd ("Boyd"), one of the owners of Smith Farms Enterprises, LLC which owns the Property, similarly testified that he has been on the property hundreds of times from 1985 to the present. R. Tr. at 1771. Boyd testified that he had seen the waterbodies dry at

various times. R. Tr. at 1774. This further substantiates Duncan's testimony and the Respondent's position that the EPA failed to meet its burden of proof under the first prong of the Scalia test.

As noted below, Peter M. Stokely acknowledged, Martin agreed, Charneski found, and the EPA admitted, that the waterbodies are all intermittent. Vol. II Tr. at 77, See R. Tr. at 277-78, R. Tr. at 349. Further, Stokely testified that even the USGS maps indicate that the waterbodies on the Property were not continuous intermittent connections. See R. Tr. at 187. This is based on the USGS maps use of dotted lines to illustrate the waterbodies on the mapping. According to Stokely, the use of dotted lines is indicative of intermittency. R. Tr. at 67. Based on this testimony, it is a large leap in logic to assume that because there was evidence from Martin that water was flowing on ten separate occasions over a nine year span, and other irrefutable evidence introduced by the Respondent established many, many more days where the waterbodies were dry, that the waterbodies continuously flow for months at a time as required by the Scalia Opinion. In fact, Martin testified at the Remand hearing that there was no systematic effort to chronicle the extent of the intermittency. R. Tr. at 555. At the Initial hearing before Judge Charneski, Charles Wolfe testified at length as to the dryness of the drainages. Charles Wolfe testified on multiple exhibits, Initial hearing exhibits 34, 51, 52, and 56 and on multiple photographs, numbered 330, 332, 334, 337, 338, 354, 360, 361, 362, 363, 386, 388, 389, 390, 400, 424, 426, 427, 432, 437, 440, 441-444, and 445, all which showed dry drainages over periods of time. Vol. V. pp. 35-46. The EPA introduced no evidence to refute this.

Perhaps the clearest showing of Judge Moran's error under the first prong of the Scalia Opinion is when he finds that the Court "has not concluded . . . that the water flowed intermittently." Remand Opinion at 55, Remand Opinion at 58 ("the Site does have relatively

permanent standing or flowing bodies of water which flow more than occasionally and more than intermittently."). One thing that was never in dispute in this case was that all seven waterbodies are intermittent. Remand Opinion at p. 6, Vol. II Tr. at 77, See R. Tr. at 277-78, R. Tr. at 349. Judge Charneski made that finding, the EPA admitted that in its testimony and in its opening, R. Tr. at p. 19, and the EPA's witnesses admitted that. Yet, Judge Moran still concludes that the water on Smith Farm did not flow intermittently. This conclusion is clearly in error and is contrary to all of the evidence produced in this matter both to Judge Charneski and to Judge Moran.

In Footnote 6 of the Rapanos decision, Scalia takes great pains to explain that, due to the definition of a stream, there must be emphasis placed on continuous such that the words intermittent streams are oxymora. 547 U.S. at 733. He goes on to explain that even Justice Kennedy "concedes that an intermittent flow can constitute a stream only when it is flowing, which would mean that the channel is a water covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." Id. Under this reasoning, absent one of the exceptions in Footnote 5, like an extraordinary exception such as a drought, an intermittent flow does not fall under CWA jurisdiction. Therefore, by the evidence offered by the EPA, Judge Charneski's findings, Stokely's testimony, and Martin's own testimony the EPA failed to meet its burden of proof under the first prong of the requirements under the Scalia Opinion.

The EPA simply did not present evidence to satisfy the first requirement under the Scalia test for when the CWA has jurisdiction over a wetland. Sufficient evidence was not shown that the waterbody in this case was a relatively permanent body of water connected to traditional interstate navigable waters. At most, the EPA presented evidence of admittedly intermittent

waterbodies which had water flowing through it on ten separate occasions in nine years. This evidence, coupled with the fact that the Respondent showed multiple times when water was not flowing through any of the waterbodies and evidence that over a thirty year span the waterbodies were dry in each season, certainly are enough to place this channel in the category of broken streams whose flow is coming and going at intervals. Pursuant to footnote 5 under the Scalia Opinion in Rapanos, this is exactly the type of water which the CWA does not have jurisdiction over.

Contrast the factual scenario here with the one in United States v. Cundiff, No. 055469 (6th Cir., 2/4/2009), which conducted a post-Rapanos analysis of whether there was CWA jurisdiction over tributaries of the Green River which flows into the Ohio River. The court found that the district court took evidence which proved that water flowed through the channel "for all but a few weeks a year" and that two creeks were "open waterbodies with significant flowing water" which flowed into the Green River. Therefore, based on this evidence, the Sixth Circuit concluded that the first prong of the Scalia opinion's test was met. In Smith Farm, no such evidence was presented by the EPA. At best, the EPA presented evidence that on ten separate occasions over an nine year span, during which this case has been pending, water flowed in the waterbodies. This is simply not the level of proof required to satisfy the first prong of the Scalia opinion's test for when there is CWA jurisdiction.

Finally, Judge Moran drew an incorrect legal conclusion in his analysis of the Scalia Opinion which also illustrates his error. Judge Moran held "relatively permanent waters include small, shallow and intermittent waters, as long as they are more than ordinarily dry channels through which water only occasionally or intermittently flows." Remand Decision at 17. First, Judge Moran contradicts himself in that very sentence. Another way to write the sentence is:

relatively permanent waters include intermittent waters as long as they are more than ordinarily dry channels through which water intermittently flows. How else does intermittent water travel than intermittently? Second, this is not the correct application of the law as presented by the Scalia Opinion. Scalia states specifically, in Footnotes 5 and 6, that the true test of the first prong is continuity, but that continuity must be analogous to seasonal, i.e. a minimum three months straight or as much as 290 days or more as stated in Footnote 5. The evidence that Judge Moran used to find that the Scalia test was satisfied showed only that the flow was occasional, i.e. ten times in nine years. Martin's testimony certainly did not prove that any flow in the waterbodies was continual for a minimum of three months. At best, his testimony only established sporadic flow on discrete days. It is not enough to find that the flow must be occasional or even more than occasional. It must be continuous.

Therefore, because he made incorrect legal findings, failed to consider all of the evidence, and incorrectly applied the standard under the Scalia Opinion, Judge Moran erred as a matter of law in finding that the first prong of the Scalia test for CWA jurisdiction was met in this case.

2. The wetlands at issue in this case do not have a continuous surface connection with that water

Even assuming arguendo that the EPA properly proved that the waterbody contained a "water of the United States," which Respondent does not concede, it did not prove that the wetlands have a continuous surface connection with that water. The wetlands must have a continuous surface connection with the waterbodies which makes it difficult to determine where the tributary ends and the wetlands begin. See Rapanos, 547 U.S. at 742. Basically, wetlands are "waters of the United States" if they have such a physical connection to "waters of the United States" that they are *indistinguishable* from them. Id. at 755.

Judge Moran heard the following evidence at the Remand Hearing on this issue: any flow of water leaving the Property was intermittent, non-hydric non-wetland soils bordered the waterbodies, R. Tr. at 1231, the ditches in question here were connected to the waterbodies through non-hydric soils, R. Tr. at 2131, the non-hydric soils were verified by William Blake Parker, the soil scientist who wrote the Corps' wetlands delineation manual soils section, R. Tr. at 1130-1141, the Smith Farms wetlands were fragmented and small in area, R. Tr. at 1294, water traveling off of the Smith Farm site travels through non-hydric soils, R. Tr. at 1401-02, the Smith Farm site is broken up by a series of nonwetland areas, roads, agricultural fields and buildings, R. Tr. at 1460, Charles Andrew Rhodes, Jr. ("Rhodes"), the EPA's wetland ecology expert, testified that he made no determination of how much soil on the Property was hydric and how much was non-hydric, R. Tr. at 722, and Lenore Vasilas and Rhodes acknowledged that non-hydric soils were on the Property, R. Tr. at 1962-63, 704-06. Of course, hydric soils must be present to meet with definition of a wetland. Therefore, the Respondent presented evidence, and the EPA provided no evidence to the contrary, that non-hydric non-wetland soils bordered the waterbodies (called drainages 1-7). In fact, the EPA's witnesses acknowledged the non-hydric soils. Consequently, the evidence showed that the wetlands did not have a continuous surface connection to the waterbodies.

It is beyond question that the Property contains non-hydric soils. Judge Moran noted in the Remand Opinion that no one has contended that the Property does not contain non-hydric soils. Remand Opinion at 35, FN 55. Respondent's' witnesses Parker and Pierce testified that they observed non-hydric soils on the Property. Parker took multiple soils samples, many of which were non-hydric soil. In addition to not producing any contrary evidence on this testimony, the EPA agreed that the Property does contain non-hydric soil. Martin testified to

this. Rhodes testified that it is not unusual to find non-hydric soil within large wetlands. R. Tr. ay 704. Lenore Vasilas, the EPA's soil expert, confirmed this.

Judge Moran completely rejected this evidence, but provided no factual or legal reasoning for rejecting this evidence, in the form of scientific data, including soil samples, or . Judge Moran completely rejected this evidence for two main reasons. First, he thought Dr. Pierce, one of the Respondent's experts, was not an objective observer and found him to be biased. Remand Opinion at 35, FN 60. However, the facts are to the contrary as the scientific data, the validity of which has not been challenged, proved, itself, that non-hydric soils divided the wetlands from the waterbodies. This evidence certainly cannot be ignored regardless of Judge Moran's assessment of the credibility of Dr. Pierce as a witness. If Dr. Pierce testified that non-hydric soil is present at Smith Farm, soil samples and testimony from other witnesses, including EPA witnesses, established that fact, and the EPA concedes the presence of non-hydric soils at Smith Farm, there is no basis to find Dr. Pierce's testimony on this point to not be credible. Further, Judge Moran offers no discernable reason for his characterization of Pierce. He states that Pierce had an "agenda" and even goes so far as to tie Respondent's witness, Steve Ferguson into this agenda, but he offers no explanation for this so-called "agenda." R. Tr. at 35, FN 60. The only fact Judge Moran provides to attempt to explain this complete dismissal of Pierce's scientific evidence is Pierce's criticism of the Corps' 404 program. R. Tr. at 35. However, and hopefully, certainly Judge Moran is not taking the position that any witness who criticizes the Corps is biased and is not to be considered.

Second, Judge Moran states that will not consider the soil samples taken and introduced by Parker, which show the non-hydric soils, R. Tr. at 1130-1141, because Judge Charneski found the March 2002 samples were too old to be informative and, therefore, the 2007 samples must be

too old to be informative, because Parker's 2007 visit was "planned" to find non-hydric soils, and this was a staged event. Remand Opinion at 32. First, Judge Moran provides no citation to the Initial Decision from which he draws his conclusions. Further, Judge Moran completely misunderstands and misstates Judge Charneski's findings in the Initial Decision. Judge Charneski considered Parker's soil samples only insomuch as they were used to explain the absence of wood chips in Parker's fifty-some soil samples taken in March, 2002. This evidence went to the issue of whether the Respondent "filled" in the wetlands with wood chips, a separate issue still before the EAB. Initial Opinion at 32. While Respondent does not agree with the findings of Judge Charneski, Judge Charneski did not conclude or even consider that the soil samples showed hydric or non-hydric soil, or whether they were "too old to be informative" on that issue. Moreover, since soil is either hydric or non-hydric, the fact that Parker's samples were taken in 2007 or in 1998 before the ditches were dug does not matter. Hydric soil will not become non-hydric soil with the passage of time. Hence Judge Moran is simply wrong on this point.

Third, Judge Moran places great significance on the fact that Parker limited his 2007 search to a search for non-hydric soils, but in doing this Judge Moran misses the point. The EPA's burden of proof, under the second prong of the Scalia test, was to show a continuous surface connection between the wetlands and the waterbodies. Therefore, it stands to reason, if the Respondent can show that there is not a continuous surface connection, i.e. band of non-hydric soil which means band of uplands, then the EPA cannot meet its burden of proof. Consequently, Parker, in taking the 2007 soil samples, was doing exactly what he was supposed to do in order to show that the EPA could not meet its burden of proof ,that is, presenting evidence of where non-hydric soils, and therefore an absence of wetlands, was located on the

Property. This process does not require a random search to be valid. Judge Moran's criticism of his methods is misplaced.

Further, Judge Moran's criticism of Parker's methods further shows his lack of objectivity in this case as it completely ignores the fact that the EPA's witnesses did exactly the same thing in their "ground truthing" to verify its findings in the aerial photography. Stokely testified that he did his ground truthing by visiting and examining the wetlands to verify what he believed to be the case as indicated on the aerial photographs he was attempting to interpret. Naturally, this means that he did not examine areas that were shown in the photos to be nonwetlands or take samples in nonwetlands. However, Judge Moran offered no criticism of this method by Stokely nor did he discount Stokely's testimony at all for this "planned" analysis in a wetlands only area. Therefore, Judge Moran's refusal to consider the 2002 and 2007 soil sample evidence offered by the Respondent's witnesses was an incorrect reading of Judge Charneski's findings, an unfair treatment of witnesses in this case, a failure to objectively consider all of the evidence and was absolute error.

Judge Moran's failure to consider the Respondent's 2007 soil evidence also shows his lack of objectivity in this case. Judge Moran placed great weight with respect to the testimony of Stokley on ground sampling which was conducted by the EPA in January of 2007. Certainly if soil data from the Respondent's is outdated and uninformative if done in 2007 then ground data from the EPA from 2007 should be treated the same. However, it was not. Remand Decision at 21. In fact, this ground sampling helped Judge Moran in reaching the conclusion that everything on the Site with the same signature would be wetlands, Remand Decision at 21 (even though the evidence was otherwise), thus making this an important part of his decision on the issue of continuity of wetlands to the waterbodies.

Additionally, the EPA completely failed to meet its burden of proof with respect to offering evidence which shows a continuous surface connection. Despite the fact that EPA was given full access to the Property on which it could have conducted conclusive soil analysis to prove the continuous surface connection, it failed to do so. The only evidence presented, which Judge Moran placed great emphasis on, was that soil sample B showed hydric soils. Stokely concluded that everything on the Site which showed the same signature as Stokely's one soil sample, labeled B, was wetlands. Judge Moran erroneously adopted this conclusion. Remand Opinion at 21. However, this is a large leap in logic and is an incorrect scientific conclusion. The EPA's witnesses already admitted that non-hydric soils were on the Property. R. Tr. at 704. Therefore, in order to prove the continuity required by the Scalia Opinion, the EPA was required to present evidence which showed the continuity, not just evidence of one hydric soil sample.

Further, the EPA and Judge Moran relied almost entirely on the testimony of Stokely on the issue of whether the wetlands have a continuous surface connection to the waterbodies. Judge Moran takes every possible opportunity in the Remand Opinion to criticize, discount, and ignore the expert and factual testimony of each of the Respondent's witnesses. Some of this he does for no discernable reason. The rest of this he does because he finds the experts and witnesses to not be credible due to changes in their reports and testimony. This is particularly odd considering Stokely himself was found to have made multiple grave errors which could have greatly affected the outcome of this case in his testimony, yet he was not ridiculed, questioned or discounted in the least by Judge Moran for having done any of this. To the contrary, Judge Moran adopted Stokely's findings and conclusions and made them his own in erroneously deciding that the wetlands in this case has a continuous surface connection to the waterbodies despite unrefuted evidence to the contrary, the same as his erroneous finding that the flow of all

the drainage exiting the Property was not intermittent despite all of the evidence on the case, from both the Respondent and the EPA, that the flow of all the drainages exiting the Property were intermittent.

Stokely used the National Wetlands Inventory ("NWI") to determine a suite of comparable wetlands to Smith Farm despite the fact that the NWI disclaimer warns against this. R. Tr. at 137. On cross-examination Stokely admittedly extended the wetlands on the Property past what the NWI showed without samples justifying this extension, R. Tr. at 144. This extension caused it to appear as if the wetlands were continuous to the waterbodies which, was incorrect. R. Tr. at 145. This is particularly egregious with respect the second prong under the Scalia Opinion as it creates a false sense of continuous connection between the wetlands and the waterbodies which is simply not present here. Judge Moran acknowledged Stokely's error, but simply ignored it. Remand Opinion at 20, FN 23. Stokely admittedly mislabeled where the land was in relation to the water, R. Tr. at 185, did not use accurate property boundaries or wetlands acreage, R. Tr. at 176, and left Smith Farm property off his included areas and placed areas which were not Smith Farm property in his included areas, R. Tr. at 194. Stokely admitted at the Remand hearing that his georeferencing was flawed. R. Tr. at 188. Additionally, and perhaps more egregiously, is that Stokely marked drainages on an exhibit he created with solid blue lines which would indicate perennial streams, when he knew full well that the drainages were not perennial steams but were only intermittent waterbodies and the proper way to identify intermittent waterbodies is with broken, not solid, blue lines, R. Tr. at 67, 101-02.

Despite all of these errors, admitted discrepancies, admitted contradictions, and absence of explanations for contrary evidence, Judge Moran relies almost entirely on Stokely's testimony to find that the wetlands here had a continuous surface connection to the waterbodies as required

under the Scalia Opinion.[7] Again, this illustrates Judge Moran's lack of objectivity as he completely dismisses all of the Respondent's witnesses for either no discernable reason or for allegedly similar reasons. This unfair treatment of the evidence and failure to consider all of the evidence is clear error. Even assuming arguendo that Stokely's evidence was enough to show a continuous surface connection, which as shown by all of the evidence it was not, his discrepancies, contradictions, and absence of explanations should have been enough to discount the weight of his evidence and his credibility.

Therefore, both due to Judge Moran's failure to properly consider the evidence and his failure to apply the facts to the law, Judge Moran erred as a matter of law in finding that the second prong of the Scalia test for CWA jurisdiction was met in this case.

B. In the Remand Decision, the Administrative Law Judge Erred in Finding Clean Water Act Jurisdiction Over the Wetlands at issue in this Case under the Kennedy Opinion in Rapanos

Justice Kennedy is of the opinion that the proper test for jurisdiction under the CWA was established in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). Citing SWANCC, Kennedy held that the applicable test for determining whether or not a water or wetland is navigable and therefore jurisdictional is the "significant nexus" test. Rapanos, 547 U.S. at 759. Justice Kennedy further stated that a water or wetland is only navigable (jurisdictional) under the CWA if it possesses a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Id. A wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and

[7] Further illustrative of Judge Moran's misapplication of Stokely's testimony, he finds that Stokely used the words ditch and stream interchangeably and the terms were imprecise. Remand Opinion at 21, FN 34. This completely ignores that fact that Stokely testified that a stream and a ditch were different i.e. were not the same thing and were defined in the dictionary. R. Tr. at 120.

biological integrity of other covered waters more readily understood as 'navigable'" Id. at 780. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." Id.

The Sixth Circuit, in Cundiff, held that there was a significant nexus between wetlands and a navigable-in-fact water where there was evidence which proved the wetlands performed ecological functions such as providing temporary and long term water storage, filtering of acid runoff and sediment from a nearby mine, and providing important habitats for plants and wildlife. Further, the court in Cundiff found that the landowners' unauthorized ditch digging undermined the wetlands' ability to store water which increased flooding and impacted crop production, erosion, and sedimentation. Additionally, the court in Cundiff found that the ditch digging caused acid mine runoff which bypassed the wetlands and went directly into the river and had a direct impact on aquatic food webs. The court held this was enough to establish a significant nexus both because of the ecological functions and because of the effect the ditch digging had on the water. No. 05-5469 at p. 12-13.

The Ninth Circuit, in Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), held that there was a significant nexus between a pond and a river creating CWA jurisdiction. In Healdsburg, the evidence showed that there was an actual surface connection between the pond and the river such that the bodies of water commingled. Id. at 1000.Evidence also showed that 26% of the pond's volume reached the river annually. Additionally, the pond and its wetlands supported birds, mammals, and fish. The river supported cormorants, great egrets, mallards, sparrows, and fish-eaters. Id. at 1001. Finally, the court found that the pond "significantly" affected the chemical integrity of the river "by increasing its chloride levels." Id. This was as a result of the discharge of sewage in the pond. The court found that this was

enough to establish a significant nexus between the pond and the river both because of the pond's affects on the physical, biological, and chemical integrity of the river and because of the fact that the effects were not speculative or insubstantial. Id.

Finally, in Environmental Protection Inform. v. Pacific Lumber, 469 F.Supp.2d 803 (N.D. Cal. 2007), the court found that sufficient evidence was not presented to establish a significant nexus because the party bearing the burden of proof failed to prove that the streams in question were significant to the water quality of the water of the United States. Id. at 824. The court found that, while the party had shown a hydrologic connection that alone was not enough. Id. The party must also show that the stream has "some sort of significance for the water quality" of the navigable water. Id. at 823.

Reading these cases together, one can get a sense of the applicability of Kennedy's test for when CWA jurisdiction exists. Under Kennedy's test, CWA jurisdiction does not exist here. First, the EPA failed to show that the wetlands here affect the chemical, physical, and biological integrity of the navigable water. Second, even if the EPA could show all of the enumerated effects, which it did not, the EPA completely failed to show that those effects have any significance for the water quality of the navigable water. At best, the EPA's evidence only showed speculative or unsubstantiated effects on navigable or "covered" water, which, as noted by Kennedy, are not enough to establish CWA jurisdiction.

1. The EPA failed to prove that any chemical, physical and biological functions at the Smith Farm Site were unique to the wetlands at issue in this case

Judge Moran's conclusions on the ecological functions of the wetlands here were drawn largely from the testimony of Rhodes. Rhodes testified that the wetlands were performing ecological functions, mainly, flood moderation and storm water retention, Remand Opinion at

26, R. Tr. at 686, and denitrification. Remand Opinion at 26. However, Judge Moran failed to take into consideration Rhodes' reluctant responses on cross examination which explained that these functions occur both in wetlands and in non-wetlands. Rhodes agreed that flood moderation occurs in non-wetlands. R. Tr. at 753. Rhodes agreed that water would slow down in dry non-wetlands as well. R. Tr. at 756. Rhodes admitted that he did not measure nitrates, even though he could have. R. Tr. at 757. Rhodes admitted that black leaves can occur in non-wetlands (even in gutters or f. R. Tr. at 764. Rhodes agreed that the described microtopography was also found in non-wetlands. R. Tr. at 748. Rhodes agreed that denitrification also occurs in non-wetlands. R. Tr. at 765. Judge Moran's failure to consider that these functions were also being performed in non-wetlands caused him to incorrectly conclude that the wetland functions were significant as required in Rapanos. Wetlands functions which are also occurring in non-wetlands are not significant as any potential effects on the navigable water can be provided by both the wetland and the non-wetlands. The test is not whether wetlands have any affect on the chemical, physical, and biological integrity of the navigable water, but whether the wetlands have a significant affect on it.

Further, Rhodes testified that he did not see any living creatures on the Smith Farm site when he was there, yet he still made the conclusion that the wetlands were providing habitat support. R. Tr. at 674, 757. The test under the Kennedy Opinion is an "and" test such that the EPA must show that the wetlands have a significant affect on the chemical and physical and biological integrity of the navigable water. However, aside from simply asserting that the wetlands here were providing habitat support, that is only a conclusory statement, and Rhodes was unable to offer any scientific or other specific evidence of the same. Therefore, the Kennedy

test was not met insomuch as the EPA was unable to show that the wetlands had a significant effect on the biological integrity of the navigable water.

Further, Rhodes' analysis relied in part on a comparison between the Shoulders Hill preservation site and the Smith Farm site which Rhodes stated on direct were similar vegetation communities and were comparable. R. Tr. at 736. In fact, Judge Moran called Rhodes' view that Shoulders Hill was very similar to Smith Farm "unwavering." Remand Opinion at 26, FN 41. However, on cross examination, Rhodes admitted that Shoulders Hill preservation and Smith Farm were different in that Shoulders Hill had no farm fields, R. Tr. at 736, had no dominance of Water Oak while Smith Farm did, R. Tr. at 742, had no dominance of Tulip Poplar while Smith Farm did, R. Tr. at 743, had no dominance of Laurel Oak while Smith Farm did, R. Tr. at 743, had no dominance Horse Sugar while Smith Farm did, R. Tr. at 744, had dominance of Sallow Wood while Smith Farm did not, R. Tr. at 744, had dominance of American Beech while Smith Farm did not, R. Tr. at 745, had dominance of Loblolly Pine while Smith Farm did not, R. Tr. at 745, had dominance of White Oak while Smith Farm did not, R. Tr. at 746, and had dominance of Sweet Gum while Smith Farm did not, R. Tr. at 746. Clearly, when Judge Moran classified Rhodes' comparison of the Shoulders Hills Site to Smith Farm as "unwavering," he failed to take his testimony under cross examination into account.

Judge Moran erred in failing to consider the discrepancies in Rhodes' testimony. Second, even if Rhodes' testimony is taken as correct, Judge Moran erred in its application to the Kennedy test. Even Rhodes' testimony itself explains that the functions allegedly being performed, flood moderation, denitrification and habitat support, could have been performed by non-wetlands, this belying the significance of the wetlands' effect on the navigable water. Therefore, Judge Moran erred in concluding that the wetland functions had a significant affect on

the integrity of the navigable water. Further, Rhodes testimony shows that he made an assumption (guess) that the wetlands were supporting habitats without ever seeing a living creature on Smith Farm.

Even more damning to the EPA's case is that Rhodes did not testify that any of the functions identified which were occurring at Smith Farm had any significant affect on the chemical, physical and biological integrity of navigable water which is essential of the EPA to prove. Any evidence offered by Rhodes on this point was speculative or unsubstantial. Without evidence, the EPA cannot establish CWA jurisdiction.

Additionally, as he had numerous times previously to other witnesses for the Respondent, Judge Moran completely dismissed the testimony of Dr. Pierce and Dr. Straw that the wetlands did not have a significant effect on the integrity of the navigable water. Judge Moran simply calls Dr. Pierce "agenda driven" and biased, Remand Decision at 33, 35 and calls Dr. Straw "honest, though incorrect" and dismisses their testimony in whole. Remand Decision at 30. However, once again, scientific data speaks for itself. Pierce discerned no appreciable difference between the functions performed by wetlands at Smith Farm as compared to the functions performed by non-wetlands. R. Tr. at 1449. Further, Pierce stated that Rhodes completely ignored the non-wetlands and the fact that the non-wetlands perform the same functions as the wetlands. R. Tr. at 1449. Had Judge Moran considered Rhodes' testimony on cross examination he would have seen that even Rhodes' testimony substantiates this opinion. Pierce also could not find any evidence of animal life on Smith Farm, R. Tr. at 1455. Even Rhodes testified that he never saw a living creature on Smith Farm.

Further, Judge Moran dismissed the testimony of Straw calling it "incorrect." Judge Moran found that Straw's knowledge of the Site was limited because of the amount of time he

spent there and because of the fact that it occurred "late in the game" eight years after the ditching. However, Judge Moran does not make these same criticisms of the EPA's "late in the game" witnesses with arguably less knowledge of the Site. In fact, Judge Moran places great weight on the testimony of Dr. Dennis Francis Whigham ("Whigham") who went to the Site only one time in April of 2007. Nonetheless, despite his limited amount of time spent at the Site and the fact that it was eight years after the ditching, Judge Moran adopted Whigham's opinions with respect to the explanation for water flow and the tannic-colored water. Ironically, Straw went to the Site on six times over two time periods, R. Tr. at 1068, six times as many as Whigham did, yet Judge Moran found this to mean his knowledge of the Site was limited and incorrect. Conversely, Whigham went to the site one time, in 2007 and Judge Moran found that this was enough to give Whigham personal knowledge to testify and have his opinions adopted on a number of key issues in this case. There simply is no explanation on the record for this disparaging treatment of the Respondent's' witnesses in this case. It once again shows Judge Moran's erroneous decision and is grounds for reversal.[8]

Judge Moran also adopted the opinions of Martin with respect to this issue. Judge Moran adopted Martin's view that the wetlands were performing flood storage and flow moderation functions (desynchronization), as well as denitrification, and habitat functions. However, Judge

[8] Judge Moran also spent an entire paragraph suggesting that Straw's testimony actually hurt the Respondent's contentions. However, this paragraph actually shows again Judge Moran's lack of objectivity and misstatement of the testimony. First, Judge Moran stated that "[c]ounsel asked the Doctor if he forgot to mention some factors for determining if there is a significant nexus . . ." This is not an accurate account of the testimony as what counsel actually said was "[w]as your explanation complete before, or were there additional factors you think would be relevant?" There certainly is a great effect that comes from suggesting that an expert witness in a trial such as this "forgot" to mention something as important as factors for significant nexus. That is not what was said. Second, Judge Moran is incorrect is his finding that Straw's answer to the question actually hurt the Respondent's' contentions. This is partly because Judge Moran paraphrased the testimony (he quoted only part of the testimony, but left out the part where Straw said "I don't think the wetland areas that are a matter of this case are among those.") and left out pertinent information and partly because Judge Moran failed to recognize that Straw was speaking in a hypothetical when responding to the question. Straw did not state simply "water comes from this site goes to Bailey's Creek thence to navigable waters." Straw said "if water that comes from this site goes to Bailey's Creek and thence to navigable waters."

Moran completely failed to consider Martin's testimony on cross examination that he saw no salamanders on Smith Farms, R. Tr. at 496, saw a woodcock, but woodcocks simply like forested areas not necessarily forested wetlands, R. Tr. at 502, hummocks are also found in non-wetlands, R. Tr. at 536, flood desynchronization also occurs in non-wetlands, R. Tr. at 548-549, he conducted no wildlife studies, no water testing, no testing for contaminants, pollutants, sediment inventory, carbon, phosphates, oxygen, nitrates, or nitrogen, R. Tr. at 556-58[9], and that nitrogen can get to the Chesapeake Bay through land and air just at can through water. R. Tr. at 650. Again, this negates the argument that any wetland function has a significant effect on the integrity of navigable water. Further, as previously stated, Respondent offered an abundance of evidence on the denitrification issue which Judge Moran dismissed without consideration.

Judge Moran again erred in failing to consider the discrepancies in Martin's testimony. Second, even if Martin's testimony is accepted as the evidence of the case, Judge Moran erred in its application to the Kennedy test. Even Martin's testimony itself explains that the functions allegedly being performed are being performed by non-wetlands. Moreover, Martin, like the other EPA witnesses, did not offer any evidence on how any of the functions identified at Smith Farm significantly affected the chemical, physical, and biological integrity of navigable water as required under the Kennedy test. Any evidence offered by Martin on this point is merely speculative and unsubstantial. Again, Judge Moran erred in finding that the wetland function had a significant effect on the integrity of the navigable water since non-wetlands were performing the same functions

[9] This, again, is a very important point. There are several opportunities which the EPA could have taken to absolutely proven its case here which it simply did not do. Here, it admittedly could have performed this testing which would have answered the question of the significant affect of the wetlands on the physical, chemical and biological integrity of the navigable waters, but the EPA simply failed to do so.

The EPA failed to meet its burden under the Kennedy Opinion as it failed to prove that the wetlands at issue in this case significantly affect the chemical, physical, and biological integrity of navigable water.[10]

2. The EPA failed to prove that any potential effects on the quality of navigable water were significant

Even if the EPA proved that the wetlands at issue in this case may have had some affect on the chemical, physical, and biological integrity of navigable water, which the Respondent's' do not concede, the EPA failed to show that those affects have significance for the quality of that water. Like in Pacific Lumber, this is a fatal flaw in the EPA's case here under the Kennedy Opinion.

First, even if wetlands may be performing some functions of flood flow alteration, desynchronization, denitrification, primary production, and habitat support the EPA's own witnesses admitted that non-wetlands perform many, if not all, of the same functions. See Argument B(1) above. Therefore, the wetlands functions, if any, are not significant in and of themselves as required by the Kennedy Opinion.

Second, unlike evidence in Healdsburg, large and multiple wildlife and *significant* chemical affects and increased chloride levels, and the evidence in Cundiff of increased flooding leading to affects on crop production and acid runoff affecting aquatic life, there was no such proof present here. The basic violation complained of here is the spreading of wood chips in violation of Section 404 of the CWA. The irony of this is that the Respondent actually produced

[10] The Remand Opinion at FN 50 illustrates Judge Moran's misunderstanding of this prong of the Kennedy test in Rapanos. He stated "[r]espondent's contention that 'the non-wetland areas and the drained wetland areas have a larger flood storage potential than the wetlands themselves,' is irrelevant and a distraction because, whether true or not, it is not up to the Respondents to make their own value judgments and effectively privately legislate which wetlands are valuable via-a-vis competing non-wetlands." He completely misses the point under the Kennedy test that the wetlands must have a significant affect on the chemical, physical, and biological integrity of the navigable water. Respondent is simply trying to show that the EPA, once again, has failed to meet its burden. Judge Moran, in his misapplication of the Kennedy test fails to see that the EPA failed in this regard.

evidence that the "conduct of depositing wood chips onto the Site's wetlands" actually provides a benefit to the wetlands as wood chips provide a source of carbon. See R. Tr. at 731. Further, there was testimony from multiple witnesses, specifically from Martin, that the water was tea-colored which is an indication of good water quality. R. Tr. at 611. Therefore, evidence of good water quality clearly negates the notion that the integrity of navigable water is compromised by wetland function.

3. The EPA failed to prove that the wetlands at issue in this case actually had any significant affect on the chemical, physical, and biological integrity of navigable waters

As noted above, under the Kennedy "significant nexus" test, to be jurisdictional, a wetland, either alone or in combination with similarly situated lands, must " . . . significantly affect the chemical, physical and biological integrity of other covered waters or readily understood as 'navigable.'" Rapanos, 547 U.S. at 780. However, when the ". . . wetlands' effects on water quality are speculative or insubstantial . . . ," Id., the wetlands are not jurisdictional under the CWA. This test required the EPA to carry its burden to prove that the wetlands at Smith Farm actually significantly affected the chemical, physical and biological integrity of navigable waters. However, any evidence on these critical points is at best speculative or insubstantial. Importantly, there was very little evidence on the effects on navigable waters as the EPA's emphasis seemed to be on what was occurring at Smith Farm. However, the link between whatever was occurring at Smith Farm and the effects on navigable waters was never made. The EPA failed to carry its burden to prove that the wetlands at Smith Farm significantly affected the chemical, physical and biological integrity of navigable waters.

The EPA produced evidence that the land at the Smith Farm site had flood storage capabilities. However, there was no evidence of the volume of water which could be stored at

Smith Farm or the effect of this storage capacity on navigable waters. The EPA produced evidence of dissolved carbons in the form of tannins or tea-colored water leaving the site, but there was no evidence of the amount of dissolved carbons in the water or how often the water containing dissolved carbons left the site. We know from Martin's testimony that it did not occur very often. Additionally, all of the evidence established that any flow was intermittent. There was no evidence of the number of days of the flow, the volume of the flow, or the effect or lack thereof on these dissolved carbons on navigable waters. The EPA did no water testing. R. Tr. at 559. The EPA did not measure contaminants, carbon, phosphates, oxygen, nitrates, nitrogen, or sediment, turbidity, nutrient levels, or pollutant levels. R. Tr. at 556. As to the carbon in the water intermittently flowing from Smith Farm, there is no evidence that they ever reached navigable waster.

The same is the case with the EPA's testimony concerning desynchronization, denitrification and sediment trapping. There was no evidence of what, if any, affect these functions at Smith Farm had on navigable waters. There was no evidence of any affect on navigable waters if desynchronization, denitrification or sediment trapping did not occur or if any of these particles ever reached navigable water.

The EPA produced evidence concerning the types of plants found at Smith Farm. However, beside the fact that it was shown that these plants are not unique to wetlands because they also grow in uplands, there was no evidence of any affect, or lack thereof, on navigable waters.

The same is the case with animals. Mr. Martin testified that he saw a woodcock at Smith Farm. There was no testimony that there is any connection between woodcocks and wetlands or any affect woodcocks have on navigable waters. An EPA witness testified that he thought that

the Smith Farm site would make a good habitat for bears. Although admittedly, a substantial portion of Smith Farm is uplands, not wetlands, the EPA produced no testimony that this supposed bear habitat was in the wetlands on Smith Farm. In addition, there is no testimony that anyone had ever seen a bear at Smith Farm. The EPA performed no wildlife evaluations. R. Tr. at 558. Moreover, as is in the case with the other testimony concerning functions occurring at Smith Farm, there is no evidence of what the affect any bears or any other animal life in wetlands on Smith Farm on navigable waters.

Clearly, the EPA has failed in its proof to show under the Kennedy test how wetlands at Smith Farm significantly affect chemical, physical and biological integrity of navigable waters. Hence, the EPA has failed to show that the wetlands at Smith Farm are under the jurisdiction of the CWA.

C. This Board has the Discretion to Use the Test Under the Scalia Opinion or the Test Under the Kennedy Opinion to Analyze CWA Jurisdiction and, Therefore, Should Use the Test Under the Scalia Opinion

Some of the circuits have concluded that Kennedy's Opinion controls and have adopted the "significant nexus" test for determining when CWA jurisdiction exists. U.S. v. Robison, 505 F.3d 1208 (11th Cir. 2007); See Healdsburg, 496 F.3d at 999-1000; U.S. v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006). Other circuits have concluded that "the Act confers jurisdiction whenever either Justice Kennedy's or the plurality's test is met." Cundiff, supra (citing U.S. v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006)).

In the 7th, 9th, and 11th Circuits, where the courts have used only the Kennedy Opinion to determine whether there is CWA jurisdiction, the courts did so from an analysis under Marks v. United States. 430 U.S. 188 (1977). Under Marks, "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the

holding . . .may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. However, this case often requires a strict application which is not easily applicable here.

The 1st and the 6th Circuits each gave a splendid explanation for the inapplicability of Marks in Cundiff and Johnson. In Cundiff, the Sixth Circuit explained that "Marks is workable . . . only when one opinion is a logical subset of other broader opinions." No. 05-5469 at p. 11. However, in Rapanos, neither Scalia's Opinion nor Kennedy's Opinion is a subset of the other. Therefore, it is highly likely that application of the two different opinions could result in different outcomes in the same case. This presents just one of the problems with the application of Marks here. Johnson, 467 F.3d at 64. Another problem with the use of Marks here is that there is no clear guidance or authority on what is the narrowest ground under the Rapanos decision and, therefore, the narrowest ground can change case-by-case. Therefore, under Marks, sometimes the Scalia Opinion could be the narrowest ground and sometimes the Kennedy Opinion could be the narrowest ground. See Johnson, supra. That certainly does not create a workable framework for determining the proper opinion to use.

Therefore, here, this Board should adopt the holdings of the 1st and 6th Circuits and use the discretion to adopt either the Scalia Opinion or the Kennedy Opinion to determine whether there is CWA jurisdiction. Further, with the discretion to use either opinion to determine jurisdiction, the Respondent urges this Board to use the Scalia Opinion to find there was no CWA jurisdiction here. The Scalia Opinion represents the opinions of Four Justices of the Supreme Court and encompasses a two-part definable test for jurisdiction. Further, the Scalia Opinion provides a test which is simple and easily applied to this case while the Kennedy Opinion provides a test which is murky and ill-defined. Therefore, this Board should use the test

as provided in the Scalia Opinion. If the Board adopts the Kennedy Opinion, read with the Scalia Opinion, it is clear that there is no jurisdiction over the wetlands at Smith Farm because the EPA failed to prove a significant nexus between the wetlands at Smith Farm and navigable water. That is, there is no proof to establish that either alone or in combination with similarly situated land, the wetlands at Smith Farm significantly affects the chemical, physical, and biological integrity of other navigable water.

With its numerous failures of proof, all the EPA is left with is the opinion of the dissent in Rapanos which clearly is not the law and which has been rejected by every court to consider this issue.

V. CONCLUSION

Judge Moran clearly erred when he failed to consider facts which were not in dispute in this case. It was never in dispute that the seven drainages were all intermittent, yet Judge Moran found that the water flowed more than intermittently. It was never in dispute that the Property contained non-hydric soils. It was never in dispute that the water, when it flowed, flowed through non-hydric soils. It was never in dispute that the water, when it flowed, flowed under roads and through manmade barriers. However, despite the fact that these undisputed facts goes to the very core of the issues in this case, Judge Moran failed to consider them when rendering his decision in the Remand Opinion.

Judge Moran clearly erred when he made findings of fact which were not supported by the record. Judge Moran made a finding that facts from the hearing before Judge Charneski "were not altered by the testimony received during the proceedings upon remand." However, the record reflects otherwise. Judge Moran held that the water on the Property flowed more than intermittently despite undisputed evidence agreed to by the EPA witnesses that when it flowed it

flowed intermittently. Judge Moran made a finding that water flowed on the Property in each season based on the fact that Martin saw it flow on ten separate occasions in nine years despite the fact that there was no testimony that the water flowed in each season. In fact, there was testimony to the contrary.

Judge Moran clearly erred when he refused to consider evidence offered by the Respondent which was not refuted by the EPA. The Respondent's offered the testimony of Parker who took over seventy soil samples, but his testimony was completely dismissed. The EPA offered no evidence to refute Parker's evidence of the presence of non-hydric soils at and around the seven drainages, yet Judge Moran refused to consider Parker's evidence. The Respondent offered testimony from Duncan which proved that water did not flow in the seven drainages in each season for over thirty years. The EPA offered no evidence to refute this despite the fact that Martin testified that it could have readily been done. Nonetheless, Judge Moran failed to consider this evidence.

Judge Moran clearly erred when he treated the EPA witnesses differently from the Respondent's' witnesses. He dismissed the testimony of Straw because he came into it "late in the game" and had a lack of knowledge of the site when he went there six times eight years after the ditches were dug. Yet, Judge Moran credited Whigham with personal knowledge on multiple aspects of the case when he went to the Property one time for seven hours eight years after the ditches were dug. Judge Moran gave Whigham accolades for his "notable experience and familiarity with the intracostal plain of Virginia, including Nanticoke watershed," but did not realize that the Nanticoke watershed is in Delaware and Maryland. Judge Moran completely dismissed the testimony of Pierce as being agenda-driven and Straw as being incorrect because he made some corrections, but completely credited and relied on the testimony of Stokely despite

the fact that his testimony was admittedly filled with error including some substantial errors which could significantly impact the outcome of the case.

In sum, the Remand Decision's finding of jurisdiction under the Clean Water Act was clear error. Further, Judge Moran's failure to consider facts which were not in dispute was clear error. Judge Moran's finding of facts which were not supported by the record was clear error. Judge Moran's refusal to consider evidence offered by the Respondent which was not refuted by the EPA was clear error. Finally, Judge Moran's failure to hold the witnesses for the EPA and the Respondent to the same standards was clear error. For one or all of these reasons, Judge Moran's decision should be reversed and the Environmental Appeals Board should find that the Smith Farm site is not within the jurisdiction of the Clean Water Act.

The EPA failed to prove CWA jurisdiction under Rapanos using either the Scalia Opinion or the Scalia Opinion in combination with the Kennedy Opinion. Under the Scalia Opinion, there is no proof that the drainages were relatively permanent bodies of water or that the wetlands have a continuous surface connection with the drainages. Under Kennedy, there is no proof of any significant nexus between the wetlands at Smith Farm and navigable waters because there is no proof to establish that the wetland at Smith Farm, either alone or in combination with similarly situated land, significantly affect the chemical, physical, and biological integrity of navigable water.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2009, an original and five copies of the foregoing ***Respondent's Appeal Brief*** were furnished *via* Hand Delivery to:

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and one copy of the foregoing ***Respondent's Appeal Brief*** was furnished *via* United States Mail, first-class postage prepaid, to:

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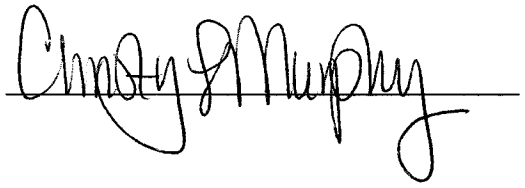

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