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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

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ENVIR. APPEALS BOARD

In the Matter of )  
Smith Farm Enterprises, L.L.C., ) CWA Appeal No. 05-05  
Respondent. )  
\_\_\_\_\_ )

**COMPLAINANTS' MOTION FOR EXTENSION OF TIME REGARDING THE  
BOARD'S ORDERS DATED JUNE 28, 2006 AND JUNE 30, 2006.**

Complainants, the Director of the Environmental Assessment and Innovation Division and the Director of the Water Protection Division, United States Environmental Protection Agency, Region III, through counsel, hereby move, pursuant to 40 C.F.R. § 22.16, for a 62-day extension of time to respond to the Environmental Appeals Board's Order dated June 28, 2006, and to appear for a status conference pursuant to the Board's Order dated June 30, 2006. Counsel for Complainants has consulted with counsel for Respondent and has been informed that Respondent intends to oppose this motion.

On May 5, 2005, the Administrative Law Judge issued an Initial Decision finding Smith Farm Enterprises, L.L.C. ("Smith Farm") liable for two violations of section 301(a) of the Clean Water Act (the "CWA"), 33 U.S.C. § 131 l(a). Specifically, the ALJ found that Respondent had discharged fill material into wetlands that were waters of the United States without a permit under CWA section 404, and that Respondent had discharged storm water associated with construction activities to waters of the United States without a permit under CWA Section 402.

On June 3, 2005, Smith Farm appealed the Initial Decision to the Board and filed its supporting brief. Pursuant to the Board's order, Complainants filed an Appellate Brief As To Liability on and an Appellate Brief as to Issues Other than Liability on July 22, 2005. The Board held oral argument on liability on July 14, 2005.

Before the ALJ, Respondent had argued that the wetlands at issue were not within the jurisdiction of the CWA. The ALJ found otherwise. In its appellate brief to the Board, Respondent acknowledged that the caselaw did not support its position as to the scope of CWA jurisdiction. Respondent did not include arguments regarding jurisdiction, but incorporated by reference its post-hearing briefs before the ALJ and purported to reserve the issue in case of subsequent changes in the caselaw. Respondent's Appeal Brief at 41.

In its June 28, 2006 Order, the Board indicated that it was nearing a final decision in this matter when the Supreme Court decided *Rapanos v. United States*, and *Carabell v. United States Army Corps of Engineers*, \_\_\_ U.S. \_\_\_ (June 19, 2006) (Nos. 04-1034 & 04-1384). The Board directed the parties to submit by July 13, 2006 statements to the Board setting forth their views as to what steps the Board should take regarding the CWA jurisdictional issues in this case in light of *Rapanos* and *Carabell*. In an Order dated June 30, 2006, the Board directed the parties to appear for a status conference on July 19, 2006.

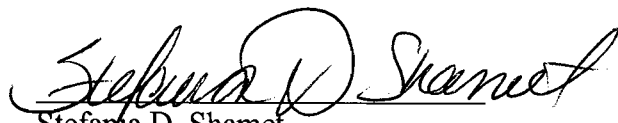
Based on a plurality opinion authored by Justice Scalia and a separate opinion concurring in the judgment authored by Justice Kennedy, the Supreme Court vacated the judgments of the Sixth Circuit, which had held that the Corps' exercise of jurisdiction over certain wetlands was within the authority of the CWA, and remanded both cases for further proceedings.

To the extent Respondent's appellate brief effectively preserved the jurisdictional question, Complainants request additional time to determine the meaning of the fractured opinions of the Supreme Court in *Rapanos* and *Carabell* and what impact the decision may have on this matter. The U.S. Environmental Protection Agency's ("EPA") Office of General Counsel, Office of Water, and Office of Enforcement and Compliance Assurance currently are considering the implications of the Supreme Court's decision in *Rapanos* and *Carabell* for this and other pending CWA cases. In addition, EPA is conferring with the U.S. Department of Justice, the U.S. Corps of Engineers and other federal agencies to ensure that the federal government is presenting a consistent position in its cases. As a consequence, EPA, the Corps of Engineers, and the Department of Justice as a matter of policy are seeking similar extensions in other matters before various tribunals to allow adequate consideration of the impact of *Rapanos* and *Carabell*.

Complainants believe that the Board would benefit from the government's careful consideration of the impact of *Rapanos* and *Carabell* on this and the range of pending CWA cases. Accordingly, Complainants respectfully request an extension until September 12, 2006 to respond to the Board's June 28, 2006 Order and that the status conference scheduled by the Board's June 30, 2006 Order be postponed until after September 12, 2006.

Respectfully submitted,

Date: 7/6/06

  
Stefania D. Shamet  
Senior Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region III

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Motion for Extension of Time Regarding the Board's Orders dated June 28, 2006 and June 30, 2006 in the Matter of Smith Farm Enterprises, LLC, CWA Appeal No. 05-05 to be served in the following manner:

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7/6/06  
Date

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