BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of Vico Construction Corporation and Amelia Venture Properties, L.L.C., Respondents. Docket No. CWA-3-2001-0021	)	CWA Appeal No. 05-01

COMPLAINANTS' STATEMENT PURSUANT TO THE BOARD'S ORDER DATED SEPTEMBER 7, 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 submit this statement in response to the Environmental Appeals Board's Order dated September 7, 2006.

On December 13, 2004, the Administrative Law Judge issued an Initial Decision finding Vico Construction Corporation and Amelia Venture Properties, LLC ("Respondents") 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 Respondents had discharged fill material into wetlands on a Site known as the "Lewis Farm site" that were waters of the United States without a permit under CWA section 404, and that Respondents had discharged storm water associated with construction activities at the Lewis Farm site to waters of the United States without a permit under CWA Section 402. As to CWA jurisdiction, the ALJ, relying on *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) and various appellate decisions, found the wetlands on the Lewis Farm site were adjacent to "waters of the United States" and therefore within the jurisdiction of the CWA. Initial Decision at 23. The ALJ also credited testimony that the

wetlands on the Lewis Farm site performed important and valuable water quality functions within the tributary system and the Chesapeake Bay watershed. Initial decision at 39-40.

Respondents appealed the Initial Decision. The Board held oral argument as to liability on July 14, 2005. With respect to CWA jurisdiction, Respondents had argued to the ALJ that the wetlands at issue were not within the jurisdiction of the CWA. The ALJ found otherwise. On appeal to the Board, however, Respondents conceded that their position as to CWA jurisdiction was not supported by the applicable caselaw. Respondents did not brief arguments regarding jurisdiction, although Respondents purported to incorporate by reference their post-hearing briefs before the ALJ and to reserve their arguments on CWA jurisdiction in the event there was a change in the caselaw. The question of CWA jurisdiction was not presented during oral argument.

On September 29, 2005, the Board issued a Final Decision upholding the Initial Decision. Respondents appealed to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit granted Respondents' unopposed motion to hold the appeal in abeyance pending the U.S. Supreme Court's decision in *Rapanos v. United States,* and *Carabell v. United States Army Corps of Engineers* (hereafter referred to as "*Rapanos*"), which were then pending. On June 19, 2006, the Supreme Court issued its decision in *Rapanos,* 126 S. Ct. 2208 (2006). In *Rapanos*, the Supreme Court construed the term "waters of the United States" as used in the CWA. All Members of the Court agreed that the term "waters of the United States" encompasses some waters that are not navigable in the traditional sense, but disagreed on the scope of the term and issued plurality, concurring, and dissenting opinions. In the end, "no opinion command[ed] a majority of the Court." *Id.* at 2236 (Roberts, C.J., concurring). 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. However, the plurality opinion authored by Justice Scalia and the separate concurring opinion by Justice Kennedy set forth different tests for identifying "waters of the United States" within the jurisdiction of the CWA.

Four Justices, in the plurality opinion authored by Justice Scalia, agreed with the United States that the term "waters of the United States" included at least some waters that are not navigable in the traditional sense. *Rapanos*, 126 S. Ct. at 2220 (plurality opinion of Scalia, J.). The plurality concluded that regulatory authority extended to only "relatively permanent, standing or continuously flowing bodies of water," *id.* at 2225 (including "seasonal rivers" that flow some part of the year, *id.* at 2221 n. 5), that are connected to traditional navigable waters, id. at 2226-2227, as well as wetlands with a continuous surface connection to such waterbodies, id. at 2227.

Justice Kennedy did not join the plurality's opinion but instead authored an opinion concurring in the judgment. *See Rapanos*, 126 S. Ct. at 2236-52 (Kennedy, J., concurring in judgment). Justice Kennedy agreed with the plurality that the statutory term "waters of the United States" extended beyond water bodies that are navigable-in-fact, i*d.* at 2241, but found the plurality's interpretation of the scope of the CWA to be "inconsistent with the Act's text, structure, and purpose." *Id.* at 2246. Specifically, Justice Kennedy disagreed with the plurality's limitation of jurisdiction to bodies of water that are relatively permanent, standing or continuously flowing, and rejected the plurality's analysis as making "little practical sense in a statute concerned with downstream water quality." *Id.* at 2242, 2246.

Justice Kennedy also found "unpersuasive" the "plurality's exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters[.]" *Id.* at 2244. Instead, Justice Kennedy would have held that jurisdiction extends to wetlands that "possess a 'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." *Id.* at 2236. Wetlands "possess the requisite nexus" if the wetlands "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *Id.* at 2248. "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction." *Id.* at 2249; *see also id.* 2245-46. With respect to wetlands adjacent to nonnavigable tributaries, "[a]bsent more specific regulations, . . . the Corps must establish a significant nexus on a case-by-case basis[.]" *Id.* at 2249.

Four Justices, in a dissenting opinion authored by Justice Stevens, would have upheld EPA's and the Corps' interpretation of "waters of the United States" in its entirety. *See Rapanos*, 126 S. Ct. at 2252-65 (Stevens, J., dissenting). Justice Stevens explained:

> In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation's waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps' resulting decision to treat these wetlands as encompassed within the term "waters of the United States" is a quintessential example of the Executive's reasonable interpretation of a statutory provision.

Id. at 2252.

While agreeing with many aspects of Justice Kennedy's analysis, the dissent would find any "significant nexus" requirement of the CWA to be "categorically satisfied as to wetlands adjacent to navigable waters or their tributaries." *Id.* at 2263-64.

On August 14, 2006, the Fourth Circuit granted a joint motion by the U.S. Environmental Protection Agency and Respondents to remand this matter to the Board "to allow the Board to assess the impact, if any" on this matter of the Supreme Court's decision in *Rapanos*. On September 7, 2006, the Board directed the parties to submit by September 15, 2006 statements to the Board setting forth their views as to what next steps the Board should take in light of *Rapanos.*

To the extent Respondents' appellate brief effectively preserved the jurisdictional question, Complainants recommend that the Board remand this matter to the ALJ for the limited purpose of reopening the record to take additional evidence as to CWA jurisdiction in light of *Rapanos.* The Supreme Court's decision in *Rapanos* is fractured and introduced new tests for CWA jurisdiction, which were not anticipated by either party during the initial hearing. Accordingly, Complainants believe that the Board may benefit from further development of the record to address the tests introduced by the *Rapanos* decision.

Complainants believe that the Board has authority to remand this matter to the ALJ to take further evidence. *See* 22 C.F.R. §§ 22.30(c) & (f); *cf. Harrisburg Coalition Against Ruining the Environment v. Volpe*, 330 F. Supp. 918, 928 (M.D. Pa. 1971) (where intervening change in law after administrative decision and before district court decision is significant, remand is permissible).

Respectfully submitted,

Date: 9/14/06

Stefania D. Shamet/mtg

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' Statement Pursuant to the Board's Order dated September 7, 2006 in the Matter of Vico Construction and Amelia Venture Properties, L.L.C., CWA Appeal No. 05-01 to be served in the following manner:

BY FEDERAL EXPRESS and FAX:

Hunter W. Sims
Kaufman & Canoles
150 West Main Street
Suite 2100
Norfolk, VA 23514

(757)624-3169 Fax

Original and Five Copies BY FEDERAL EXPRESS:

Ms. Eurika Durr, Clerk of the Board
Environmental Appeals Board
Colorado Building
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Copy filed BY HAND DELIVERY:

Lydia Guy
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103

9/14/06
Date

Stefania D. Shamet /mtg
Stefania D. Shamet