KAUFMAN & CANOLES
attorneys at law

Kaufman & Canoles, P.C.
150 West Main Street
Suite 2100
Norfolk, VA 23510

Mailing Address
Post Office Box 3037
Norfolk, VA 23514

T (757) 624.3000
F (757) 624.3169

kaufCAN.com

Hunter W. Sims Jr.
(757) 624.3272
hwsims@kaufcan.com

July 6, 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 Reply 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.)

1492055

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 REPLY BRIEF

Hunter W. Sims, Jr., Esquire
Marina Liacouras Phillips, Esquire
Christy L. Murphy, Esquire
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, Virginia 23510
Phone: (757) 624-3000
Fax: (757) 624-3169

BEFORE THE UNITED STATES
ENVIRONMENTAL APPEALS BOARD

In the Matter of

Smith Farm Enterprises, LLC

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 App. No. CL08-02

Docket No. 03-2001-0022

RESPONDENT'S REPLY BRIEF

Respondent Smith Farm Enterprises, LLC (hereinafter the "Respondent"), through its counsel, files this Reply Brief in reply to the Complainant's Response Brief ("Response") filed with the Environmental Appeals Board ("EAB") on or about June 2, 2009.

Procedural Status

On June 12, 2009 the Respondent, by counsel, filed a Motion for Permission to File a Reply Brief in this matter. The EAB granted that Motion by Order dated June 18, 2009. In that Order, the EAB ordered the Respondent to file its Reply Brief, limited to 20 pages, on or before Monday, July 6, 2009, which "shall be confined to the issues and arguments raised in the opponent's prior appellate brief and not previously addressed in the parties' own brief." The Region was granted the right to file a sur-reply on or before Monday, July 20, 2009, limited to issues and arguments raised in Respondent's Reply. In compliance with that Order, the Respondent states as follows:

The Complainant's Response Contains Legal and Factual Errors

Legal Error 1: Failure to Properly State and Apply the Kennedy Test under *Rapanos*

First, and most importantly, the Complainant misstated and, therefore, misinterpreted the opinion of Justice Kennedy in Rapanos v. United States, 547 U.S. 715 (2006) ("Kennedy Opinion"). The Response states "Justice Kennedy did not require that [a] significant nexus is present only when wetlands perform a function unique to wetlands; rather, he found that there is a significant nexus whenever the wetlands contribute to the physical, chemical, or biological integrity of traditionally navigable waters in a way that is neither speculative or insubstantial." Response at 46 (emphasis added). This is not the Kennedy test for jurisdictional wetlands for two reasons.

First, the Kennedy test does not state that there is a significant nexus whenever wetlands contribute to the integrity of navigable water. Rather the Kennedy test states that 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 integrity of other covered waters. Rapanos, 547 U.S. at 780. Complainant's replacement of the term "significantly affects" with "contributes" completely changes the test and greatly reduces the burden on the Complainant to show that the wetlands in this case meet the requirements of the Kennedy test.

Complainant states that "Respondent's conception of 'significance' is unrelated to anything in Justice Kennedy's opinion." Complainant further states that "[n]othing in Justice Kennedy's opinion requires quantification or documentation of the significance of the contribution of each undivided wetland." However, Complainant's own attempt to change and reduce the burden under the Kennedy test illustrates the importance of the term "significant" to the test. Kennedy states, and Complainant quotes, that the affect cannot be speculative or

insubstantial. Response at 46, Rapanos, 547 U.S. at 780. Therefore, it stands to reason, that there must be some measure of the affect on the navigable waters. That measure, as stated by Kennedy, is that the affect must be significant.

Second, Complainant's use of the word "or" in place of the word "and" in the Kennedy test again changes the test and greatly reduces the burden on the Complainant to show that the wetlands in this case meet the Kennedy test. Kennedy clearly states that the significant affect must be on the "chemical, physical, and biological integrity" of the navigable waters. Rapanos, 547 U.S. at 780 (emphasis added). Therefore, if Complainant failed to present evidence of the significant affect on the chemical, physical, and biological integrity, which it in fact failed to do, then the Complainant did not meet its burden of proof under the Kennedy test.

Complainant's attempt to change the Kennedy test and greatly reduce its burdens of proof under the Kennedy test is contrary to the intent of the Court in deciding Rapanos. Further, it is contrary to the purpose behind the Clean Water Act, which is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 547 U.S. at 722, 86 Stat. 816, 33 U.S.C. § 1251(a). Under Complainant's erroneous version of the Kennedy test, it is hard to imagine what land would not qualify as jurisdictional wetlands. The intent of the CWA was not to give jurisdiction over such a broad category of land to the government.

Legal Error 2: Failure to properly state and apply the Scalia test under *Rapanos*

In addition, Complainant stated that Respondent placed much emphasis on the term intermittent and intermittency is irrelevant to the analysis. Response at 32 and 37. Further, Complainant stated that Respondent "never points to any legal definition of that term . . . and Justice Scalia, while using the term, specifically declined to define it," Response at 32, and made it "amply clear that the term 'intermittent' . . . has no regulatory import." Response at 37. This,

again, is an incorrect statement of the law and also is an incorrect description of Respondent's representations in its Appeal Brief.

First, Scalia, contrary to the Complainant's contention, does in fact provide a definition for intermittent. He states "that the dissent's 'intermittent' and 'ephemeral' streams, *post*, at _, 165 L. Ed. 2d at 216 (opinion of Stevens, J.)--that is, streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' Webster's Second 1296, or 'existing only, or no longer than, a day; diurnal . . .short-lived," *id.*, at 857--are not'" waters of the United States. (emphasis added). By labeling Respondent's argument about intermittency as irrelevant and summarily dismissing it, Complainant further illustrates its failure to meet its burden of proving that there is a relatively permanent body of water on the Smith Farm Site as required by Scalia.

Second, Complainant's statement that Respondent offered no definition for intermittent is incorrect. Not only did Respondent offer the above quoted definition from Scalia's opinion, Respondent also offered the parameters suggested by the Department of the Army's publication: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States (Complainant cites to and relies on this publication on pages 8, 39, and 40 of the Response). Respondent then asserted, through pages of argument, that the Complainant did not meet its burden of proof under either definition that the wetlands on Smith Farm were relatively permanent bodies of water that the Scalia test requires for CWA jurisdiction to exist.[1] Complainant did not offer evidence to the contrary and still has not met its burden on this issue. Therefore, the only result is that any wetlands on Smith Farm are not under the jurisdiction of the CWA.

[1] Despite the fact that their witness testified that testing required to prove this, if it were true, readily could have been done

Factual Errors

Complainant also made several incorrect representations in the Response and/or incorrectly stated that the Respondent made misrepresentations. First, Complainant, in its criticism of the testimony of Charles Wolfe ("Wolfe"), states "Respondent failed to disclose that Mr. Wolfe's observations were made at the end of a drought" and, therefore, were excluded by Scalia under the Scalia test. Response at 35. However, this assertion that Respondent failed to disclose this fact is disingenuous considering the evidence.

Wolfe testified that there was a drought as classified by the state climatologist, but he also testified that "[i]n certain portions of the state, the drought conditions were severe and in other areas it was less severe. In some areas it was probably hardly noticeable." T. Tr. at Vol. V, p. 104, ll. 15-20[2]. Further, Wolfe testified that "the rainfall during the early part of the year of 2002 was above normal rainfall." When asked about the Smith Farm Site in particular, Wolfe testified to the following:

Q. So nothing in this batch of photographs you would characterize as showing evidence of a drought?

A. No ma'am.

Q. But in your visits to the site during 2002, did you observe any vegetation changes that you thought were consistent with drought-like conditions on the Smith Farms property?

A. No, ma'am.

T. Tr. at Vol. V, p. 123, ll. 4-15. Therefore, Complainant's assertion that Respondent failed to disclose that the observations were at the end of a drought are irrelevant considering there was no

[2] Hereinafter, citations to the Trial Transcript from October, 2003 shall appear in the form: T. Tr. at Vol. _, p. _, ll. _.

evidence of a drought at Smith Farm. Further, Complainant's conclusion that, because the dryness was due to this alleged drought it is excluded under the Scalia test, is incorrect.

This testimony also further illustrates the point that there is not a relatively permanent body of water on the Smith Farm Site. The presence of water on the Smith Farm Site is completely dependent on rainfall. The evidence as pertains to these facts, including the analogy quoted by the Complainant pertaining to the table-top, the evidence of lack of water on the Site, and all of the evidence on intermittency, prove that there is not a relatively permanent body of water on the Smith Farm Site. Therefore, Complainant cannot meet its burden of proof under the first prong of the Scalia test.

Second, Complainant relies heavily on the fact that the "discharges occurred in the forested portion of the Site." Response at 20. Complainant relies, in part, on ALJ Moran's statement in footnote 40 on page 24 of the Decision on Remand that "[n]othing presented at the hearing on remand operated to undermine the determinations made by Judge Charneski at the initial hearing that the forested portions of the Site are wetlands." However, ALJ Moran's statement in footnote 40 and Complainant's reliance on it is incorrect. What ALJ Charneski actually found was that "much of the forested portion of the site contained wetlands."[3] (emphasis added). Initial Decision at 4. This is not the same as categorically stating that the forested portions of the Site are wetlands. This differentiation goes to the very heart of Respondent's argument that there is not a continuous surface connection between the waterbodies and a relatively permanent body of water on the Smith Farm Site as required under the Scalia test.[4]

This is why Respondent's arguments pertaining to the presence of non-hydric soils is important to this case and to the decision on remand. In the Scalia opinion, the second prong,

[3] Complainant is aware of the fact that this is what Charneski actually found as it cited this language in the Response at p. 14. Therefore, it should be estopped from relying on anything to the contrary.
[4] See Appeal Brief at 22.

which must be proven by the Complainant, is that there must be a continuous surface connection between the waterbody in question and water of the United States. The Complainant almost entirely ignores this argument in the Response. The presence of non-hydric soils means that the waterbodies *are distinguishable* from waters of the United States. The Scalia test requires the opposite, i.e., that the waterbodies must be *indistinguishable* from the waters of the United States. See Rapanos, 547 U.S. at 742. Therefore, the Complainant failed to meet its burden under the second prong of the Scalia test.

Third, Complainant states that "Respondent's argument that Johnson and United States v. Cundiff, 555 F.3d 200 (6th Cir. 2009), *petition for cert. filed* May 5, 2009 (No. 08-1376), stand for the proposition that the Board may apply *only* the Scalia opinion standard (Appeal Brief 49-51) misreads both cases." Response at 9. No where in Respondent's Appeal Brief did it state that either of those cases stood for the proposition that the Board may apply *only* the Scalia opinion standard. In fact, Respondent, in its Appeal Brief stated "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." (emphasis added). Therefore, Complainant's assertion on page 9 of its Response is absolutely incorrect.

Fourth, Complainant used multiple pages of the Response to address what it considered to be Respondent's expert's, Dr. Pierce, attempt to "paint an incomplete and misleading picture." Response at 18. However, this is not at all what Pierce did and Complainant misses the point. Complainant takes issue with the fact that Respondent recorded and testified about soil samples which showed only non-hydric soils. However, even if this were true, this is all Respondent needed to do to illustrate that the Complainant did not meet its burden of proof under the second prong of the Scalia test, i.e., that there is a continuous surface connection. It was not the duty of

the Respondent to take and put on evidence of hydric soils nor did Respondent try to convince the Board that there were not hydric soils on the Site. Rather, Respondent presented evidence to the Board which proved there was not a continuous surface connection on the Site and, therefore, the Complainant did not meet its burden of proof under the Scalia test.

Finally, Complainant's assertion that Respondent should not be able to challenge ALJ Charneski's finding that "[i]t is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm" is also incorrect. This case was remanded to the ALJ by Remand Order dated October 6, 2006. The reason for the remand was the issuance of the opinion in Rapanos which changed and defined the law on wetlands jurisdiction. Therefore, this case was remanded to "hear additional evidence as to CWA jurisdiction in light of Rapanos and to thereafter rule on the jurisdictional question." Charneski's finding as stated above was and is a disputed finding and the relevance of such finding changed as the law changed during the course of litigation in this case.

The question of whether "the wetlands were adjacent and contiguous to water bodies which flow from Smith Farm" was a part of the determination of whether or not any wetlands at Smith Farm were under the jurisdiction of the CWA at the time ALJ Charneski issued his Initial Decision. In its Appeal Brief in the first appeal, Docket No. CWA-3-2001-0022, filed on June 2, 2005, Respondent stated "[b]ased on the current status of the law, Respondent will not reiterate its arguments on jurisdiction in this appeal brief, but instead incorporates by reference its post-trial briefs and expressly reserves the issue in the event any subsequent decisions alter the applicable legal landscape." Respondent's First Appeal Brief at 41. Rapanos was decided on June 19, 2006 and it certainly altered the applicable legal landscape on the issue of CWA

jurisdiction. This was the reason the Board, at the urging of the Complainant, and over the objection of the Respondent, remanded this case for a further evidentiary hearing.

Therefore, Charneski's finding was and is challenged insomuch as it affects the analysis under either the Scalia opinion or the Kennedy opinion. Further, reading Respondent's reservation of the issue along with the Remand Order, and the Complainant's position urging remand, illustrates that this issue has been properly challenged and is properly challenged on appeal. Consequently, Complainant's assertion that Respondent cannot now challenge that finding is incorrect.

Conclusion

The Complainant completely failed to prove that CWA jurisdiction exists over the Smith Farm wetlands under either the Scalia Opinion or the Kennedy Opinion in Rapanos. For the reasons stated in this Reply Brief, this Board should disregard the statements and incorrect representations of both law and fact made by Complainant in the Response, and for the reasons stated in Respondent's Appeal Brief and in this Reply Brief this Board should find that the Smith Farm site is not within the jurisdiction of the Clean Water Act.

SMITH FARM ENTERPRISES, LLC

By: _____
Of Counsel

Hunter W. Sims, Esquire
Marina Liacouras Phillips, Esquire
Christy L. Murphy, Esquire
Kaufman & Canoles, P.C.
150 West Main Street, Suite 2100
Norfolk, Virginia 23510
(757) 624-3000
(757) 624-3169 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2009, and original and five copies of the foregoing ***Respondent's Reply Brief*** were furnished via hand-delivery to:

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

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

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fax: (215) 814-2603

and

Stefania D. Shamet, Esquire
United State Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fax: (215) 814-2603