BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

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

COMPLAINANTS' STATEMENT PURSUANT TO THE BOARD'S ORDERS DATED JUNE 28, 2006 AND JULY 13, 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 Orders dated June 28, 2006 and July 13, 2006.

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. 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 there was a "'significant' hydrologic connection" between the wetlands on the Smith Farm site and navigable waters. Initial decision at 26. The ALJ also found that the wetlands on the Smith Farm site performed important and valuable water quality functions within the tributary system. Initial decision at 41-43.

On June 3, 2005, Smith Farm appealed the Initial Decision to the Board and filed its supporting brief. Complainants filed an Appellate Brief AsTo Liability on July 1, 2005 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, however, Respondent conceded that its position as to CWA jurisdiction was not supported by the applicable caselaw. Respondent did not brief arguments regarding jurisdiction, although Respondent purported to incorporate by reference its post-hearing briefs before the ALJ and to reserve its arguments on CWA jurisdiction in the event there was a change in the caselaw. Respondent's Appeal Brief at 41. The question of CWA jurisdiction was not presented during oral argument.

Before the Board issued its final decision in this matter, the Supreme Court decided *Rapanos v. United States,* and *Carabell v. United States Army Corps of Engineers,* 126 S. Ct. 2208 (2006) (referred to hereafter as "*Rapanos*"). 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, *id.* 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.

In light of the Supreme Court's decision in *Rapanos*, the Board directed the parties to submit by July 13, 2006 statements to the Board setting forth their views as to how the Board should proceed regarding CWA jurisdiction in this case. On July 7, 2006, Complainants requested a 62-day extension of time to provide their statement to the Board. Complainants' request for an extension was based upon the need for the U.S. Environmental Protection Agency ("EPA") to review *Rapanos* and to consult with the U.S. Army Corps of Engineers and other federal agencies to develop a consistent position across cases. Respondent opposed Complainants' request for an extension, and Respondent filed its statement on July 13, 2006. The Board granted Complainants' request for an extension by Order dated July 13, 2006.

To the extent Respondent's 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).

In its June 28, 2006 Order, the Board directed the parties to state whether they are interested in attempting to resolve this matter through alternative dispute resolution with a Board member who is not a member of the panel deciding this case. In its July 13, 2006 statement, Respondent indicated that it would be open to utilizing this alternative dispute resolution mechanism after the U.S. Environmental Protection Agency had an opportunity to formulate its position regarding *Rapanos*. In the interest of candor to both the Board and to Respondent, it is Complainants' position that the Smith Farm wetlands remain within the jurisdiction of the CWA after the Supreme Court's decision in *Rapanos*. Nevertheless, Complainants recognize the factors noted by the Board's June 28, 2006 Order, including the considerable time and resources expended by both parties in litigating this matter thus far. Accordingly, Complainants are willing to participate in alternative dispute resolution to attempt to resolve this matter.

Respectfully submitted,

Date: 9/11/06

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Statement Pursuant to the Board's Orders Dated June 28, 2006 and July 13, 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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