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ENVIRONMENTAL APPEALS BOARD

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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WASHINGTON, D.C.

ENVIR. APPEALS BOARD

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In re: :

Smith Farm Enterprises, L.L.C. : CWA Appeal No.

: 05-05

Docket No. CWA-3-2001-0022 :

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Washington, D.C.

September 19, 2006

1 The above-entitled matter came on for status
2 conference, at the EPA East Building, 1201
3 Constitution Avenue, NW, Room 1152, Washington, D.C.
4 on Tuesday, September 19, 2006, at 11:01 a.m., via
5 videoconference hookup.

6
7 Before:

8 HON. KATHIE A. STEIN, Environmental Appeals Judge
9 with CHERYL MacKAY, Esq., Staff Counsel to the Board

10

11 Also present: Annette Duncan, Secretary

12

13 Appearances: (via videoconference hookup)

14

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1 APPEARANCES (CONTINUED):

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P R O C E E D I N G S

(Announcement by the Secretary.)

JUDGE STEIN: Good morning, counsel.

We're going to proceed first with the status conference in the Smith Farm matter. The conference is being held pursuant to the Board's orders of June 30th and July 13, 2006.

With me is Cheryl MacKay, who is the staff counsel for the Board in this matter. Mr. Hunter Sims has already introduced himself as representing Smith Farm.

Could counsel for the Region please identify herself?

MS. SHAMET: Good morning, Your Honor. My name is Stef Shamet, and I am a Senior Assistant Regional Counsel with EPA Region III. I represent the Complainants, and I will just note that in Region III, the 402 and 404 Clean Water Act programs are housed in different divisions, and therefore it's Complainants, plural.

JUDGE STEIN: I have, counsel, reviewed the statement that Smith Farm submitted on July 13th

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1 and the Region submitted on September 12th regarding
2 the next steps each party believes we should take in
3 this matter in the wake of the Supreme Court's
4 opinions in Rapanos and Carabell, which I will refer
5 to as Rapanos.

6 As the Board has indicated in prior
7 orders, it was nearing a final decision in this case
8 when the Supreme Court decided Rapanos. Prior to
9 this time, as I understand it, Smith Farm had not
10 raised the issue of jurisdiction to this Board other
11 than to reserve the question in the event that there
12 was a change in the legal landscape.

13 I think it's fair to say that there has
14 been a change in the landscape, and before taking any
15 next steps, the Board had wanted to solicit the
16 parties' views on what next steps we should take.

17 As I understand it, what we have before us
18 is a request or essentially a motion by the Region,
19 to remand the case to the ALJ to reopen the record
20 for the limited purpose of allowing additional
21 evidence or briefing on the jurisdictional question,
22 a request that is opposed by Smith Farm.

1 If I understand Smith Farm's position, it
2 believes the parties should have a chance to brief
3 the Board on how the Smith Farm case fits into the
4 post-Rapanos legal frame work, but they believe the
5 facts are sufficiently developed.

6 Now I'd like to give each party a chance
7 to speak to be sure that we, the Board, are clear in
8 what their respective positions are; and I'd like to
9 turn first to Smith Farm.

10 MR. SIMS: Thank you, Judge Stein.

11 When this case first arose, the
12 jurisdictional issue under the Clean Water Act was
13 one of the issues in the case. And it remained in
14 the case until the case law decided by various
15 circuits, specifically the Sixth and the Fourth
16 Circuits, reversed District Court decisions, and
17 ruled in effect, in a manner consistent with the
18 arguments being made by Region III.

19 Going back to the original record, Region
20 III argued that there was jurisdiction under the
21 Clean Water Act because they said there was a
22 hydrological connection between water bodies that the

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1 Smith Farm site was adjacent to, and navigable
2 waters.

3 Smith Farms is not adjacent to any
4 navigable waters, and any connection would have to be
5 a hydrological one, which the EPA argued, under some
6 existing case law, was sufficient nexus to provide
7 jurisdiction under the Clean Water Act.

8 Smith Farm argued that a hydrological
9 connection was not sufficient; that any connection
10 between any of the wetlands on Smith's site and
11 navigable waters were through intermittent water
12 bodies, man-made drainage ditches, culverts, and the
13 like. Therefore, any wetlands on Smith's site were
14 isolated wetlands and not subject to Clean Water Act
15 jurisdiction.

16 We believe that the parties fully vetted
17 this jurisdictional issue, and whether or not there's
18 any connection between any wetlands on the Smith Farm
19 site and navigable waters. In the hearings held in
20 this case, there was an extensive evidentiary hearing
21 that lasted, the first time eight days, I believe;
22 the second time six days, where a great deal of the

1 evidence and testimony taken was on this point.

2 We believe that the Supreme Court's
3 decision in Rapanos is teed up, if you will,
4 factually, without the necessity of any further
5 facts. Moreover, we don't know of any other facts
6 that could be introduced.

7 As the Court knows, the Environmental
8 Appeals Board sits de novo as to legal issues, and we
9 believe that the sufficient facts really for the EAB
10 to make the legal decision on the jurisdiction issue
11 based upon the factual record as it now stands.

12 Also I believe it is important to note
13 that if the case is remanded for further evidentiary
14 as well as legal arguments to the ALJ, that that will
15 necessarily trigger additional expenses in this case.
16 We have briefed at various times the procedural
17 status of this matter, and just in a nutshell, we
18 believe it's important to note that before the owners
19 of Smith Farms launched upon their project that
20 brought this case to the Court, they met with the
21 Army Corps of Engineers, which at the time the time
22 was exercising Joint Exhibit over this matter, in an

1 attempt to determine whether or not a permit on the
2 404 was necessary before they started the work that
3 they contemplate doing.

4 They were assured, in a face-to-face
5 meeting between the Corps, owners, and the owners'
6 environmental expert -- who, by the way, used to be
7 an Army Corps of Engineers person as well -- that a
8 permit was not required.

9 JUDGE STEIN: Mr. Sims --

10 MR. SIMS: They then sent a letter
11 confirming -- Yes?

12 JUDGE STEIN: Let me interrupt you for a
13 moment here, because the Board is fully familiar with
14 the underlying facts that you are describing; and as
15 I mentioned, we were hearing a final decision, so
16 we're certainly familiar with the fact that there
17 were a number of communications between your client
18 and the Corps during the course of the underlying
19 action; and we're also familiar with the fact that
20 there was a retrial due to the inability of the court
21 reporter hired by the Region to prepare a transcript.

22 What I'm struggling with is, despite the

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1 length of, and the necessity of a retrial, we now
2 have in this case the jurisdictional question. If a
3 -- certainly a different way of looking at the
4 question of jurisdiction, with the benefit of the
5 Supreme Court decision, and while the Board clearly
6 has the authority to deny cases to de novo, we
7 certainly like a full development of a factual
8 record; and obviously we'll hear from the Region in a
9 few minutes, but I'm struggling with why -- and I
10 don't disagree with you that there's been a fair
11 amount of -- it's been a long process in this hearing
12 to get to the point that we're at thus far; but it's
13 hard to say that one could have predicted where the
14 Supreme Court was going to go; and why is it with the
15 Region bearing the burden of proof on the question of
16 jurisdiction and the necessity of the Board grappling
17 with jurisdiction, that we would not want a full
18 development of that factual record.

19 MR. SIMS: Well, thank you very much, and
20 I won't delve anymore into the expenses that my
21 client has incurred so far. You I'm sure appreciate
22 the reason I would want to mention that, because it

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1 is an important part of the remand.

2 But I believe, Judge Stein, that the facts
3 on jurisdiction are already in the record. They have
4 already been developed. Rapanos is another way to
5 look at those facts. It is clear that no one could
6 have predicted Rapanos; in fact, as you know, the
7 District Court in Michigan decided Rapanos one way;
8 the Sixth Circuit decided it another way; and the
9 Supreme Court decided it maybe even a third way,
10 awkwardly.

11 But in our view, they're all legal views,
12 albeit different to some extent, the same factual
13 scenario. We simply believe that the facts on this
14 jurisdictional issue have already been developed in
15 the record.

16 JUDGE STEIN: Let me ask one final
17 question, and then I'll turn to the Region.

18 As I understand it, and this is for Mr.
19 Sims, what was developed below were facts related to
20 this hydrological connection theory, and it's not
21 entirely clear to me, and I've looked a bit at the
22 record, whether or not the test that may be suggested

1 by these plurality of and dissenting and concurring -
2 - plurality opinions have necessarily been developed
3 in this case.

4 And that is the point on which we find
5 ourselves struggling a bit. Obviously if
6 everything's been developed below, the matter
7 wouldn't necessarily be a need to remand. On the
8 other hand, typically the Board allows the trier of
9 fact, who's had the opportunity to observe the
10 witnesses in the first instance, apply the law to an
11 existing set of facts.

12 If there's anything else you want to add
13 in response to that, that would be fine.

14 MR. SIMS: Judge Stein, I also believe,
15 with particular respect to the 402 violation, that
16 there was evidence produced by the Region and by the
17 Respondent, concerning the potential environmental
18 harm and what not, which was discussed by Judge --

19 Again, it's a long factual record, and
20 nobody today could sit here and point to every single
21 fact in the record; but just believe that that is
22 complete, and is sufficient to allow the Board to

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1 decide the legal issue presented by Rapanos.

2 JUDGE STEIN: Let me hear from the Region
3 for just a few moments on this question.

4 MS. SHAMET: Good morning, Your Honor,
5 again.

6 I should mention that the call was dropped
7 during your colloquy with Mr. Sims, so I missed a
8 little of it. So if I don't fully respond to that
9 colloquy, I apologize.

10 As Your Honor has noted, the question
11 mainly boils down to whether the Board should apply
12 Rapanos on the current record, or remand to the ALJ
13 with instructions to reopen the record to take
14 further evidence to address Rapanos. And the region
15 recommends remanding to the ALJ.

16 I would point out, the Board has the
17 authority to remand for reopening the record, and
18 that authority can be found at 40 CFR 22.30
19 Subsection C. Which states in relevant part that,
20 quote:

21 If the Environmental Appeals Board
22 determines that issues raised but not appealed by the

1 parties should be argued, it shall give the parties
2 reasonable written notice of such determination to
3 permit preparation of adequate argument, the
4 Environmental Appeals Board may remand the case to
5 the presiding officer for further proceedings.

6 Close quote.

7 Your Honor, in this case the original
8 record was not deficient under the case law that was
9 then governing. The respondents concede that. They
10 conceded it when they declined to argue the
11 jurisdictional question on the present record under
12 the prior case law. The tests that were enunciated
13 by the Supreme Court in Rapanos were not, nor could
14 they reasonably have been anticipated by the parties.

15 In fact, the theory set forth by Mr. Sims
16 just moments ago when he was describing the
17 proceedings below, did not match up with any of the
18 tests under Rapanos. In fact, the Rapanos court
19 itself indicates that the pluralities test and
20 Justice Kennedy's tests, were not foreshadowed by the
21 existing case law.

22 Justice Scalia noted that the various

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1 cases that were relied upon by the ALJ, and mentioned
2 three in this matter, were quote "not outliers" close
3 quote, but rather, represented the majority.

4 Similarly, Justice Kennedy noted the
5 pluralities analysis, was quote "unprecedented"
6 unquote.

7 And Justice Scalia had this to say about
8 Justice Kennedy's test. Quote: To begin with,
9 Justice Kennedy's reading of significant nexus bears
10 no easily recognizable relation to either the case
11 that used it -- which was Swank -- or to the earlier
12 case that that case purported to be interpreting,
13 which was Riverside Bayview.

14 Region submits, Your Honor, that the
15 record was simply developed with two other tests in
16 mind, neither of which anticipates the tests set
17 forth in Rapanos. Accordingly, while the record is
18 not deficient, this is not a case where the Region
19 did not put in a good record and is now seeking to
20 fix a mistake.

21 JUDGE STEIN: Ms. Shamet?

22 MS. SHAMET: Yes, Your Honor.

1 JUDGE STEIN: If we were to remand this
2 case to the ALJ for the purpose of reopening the
3 record to take additional evidence, is the Region
4 prepared to say approximately how long they think
5 they would need to put on their case? You know,
6 we're talking about --

7 MS. SHAMET: Yes, Your Honor.

8 At this point, the evidence would consist
9 of no more than three witnesses; it may be two.
10 We're trying to figure out whether we can combine two
11 of them.

12 All three witnesses will be witnesses who
13 appeared in the prior proceeding; and we anticipate
14 that the presentation of their direct testimony would
15 take about five to six hours.

16 JUDGE STEIN: Is that all the witnesses
17 combined? Those five to six hours.

18 MS. SHAMET: Yes, Your Honor.

19 How do you respond to the concerns raised
20 by Smith Farm about the cost to their client and the
21 length of this proceeding?

22 MS. SHAMET: We certainly agree that the

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1 length of this proceeding is unfortunate. However,
2 this is not a respondent who was caught in the trap
3 of an unwary landowner. This respondent knew --

4 JUDGE STEIN: Let me interrupt you here.
5 And I'm going to do the same thing that I did to your
6 co-counsel, which is that I'm familiar with the
7 underlying facts, and I really don't want to get into
8 that at this moment. The Board is really trying to
9 decide whether to remand this case or not.

10 Am I correct that in your request for
11 remand to reopen the record that you would anticipate
12 that the ALJ would then make findings of fact and
13 apply the law, or are you just suggesting that we're
14 remanding this case for a more limited purpose? It
15 was difficult for the Board to determine from the way
16 you phrased things in your statement.

17 MS. SHAMET: I believe the usual process
18 would be for the ALJ to make findings of fact, and
19 present conclusions of law. Unless the parties could
20 somehow stipulate to the facts, and I have not
21 explored that with opposing counsel; then it would
22 seem the ALJ at a minimum would have to make findings

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1 of fact. The Board has authority to make a de novo
2 legal determination; and perhaps the remand could be
3 limited to the factual record.

4 JUDGE STEIN: But in terms of the
5 statement that you submitted to us, you were
6 envisioning a typical remand for reopening the record
7 on the evidentiary points and for the ALJ to make
8 findings of fact and conclusions of law on those
9 points? Is that correct?

10 MS. SHAMET: Yes, Your Honor.

11 JUDGE STEIN: Okay. Leaving aside this
12 question of possible stipulation of facts, I think
13 I've got a feel for where the parties are, and we'll
14 obviously have a chance to go over this a little bit
15 in Vico as well; but where are we on the question of
16 the possibility of ADR in this case?

17 The Board does not want to waste anybody's
18 time and money if an ADR process here is fruitless;
19 but we do, as we indicated in our statement, have the
20 possibility of having a judge of the Board who's not
21 a member of the panel to this case, probably assisted
22 by a senior counsel of the Board whom is also an

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1 experienced mediator, to perhaps stay the case for 60
2 days while the parties explore mediation through this
3 vehicle if the parties are interested.

4 This is not something that the Board is
5 insisting on; it's really something that if the
6 parties think it would be fruitful with one of our
7 other judges, helping to see if we could resolve
8 something, that's fine.

9 Where does the Region stand on this?

10 MS. SHAMET: As our statement expresses,
11 we're willing to participate in mediation. As
12 recently as I think last week, I had spoken with
13 opposing counsel regarding general parameters of
14 settlement, and I don't know if he's taken that back
15 to his client and whether he has a view that ADR or
16 mediation would bear fruit in light of that
17 discussion.

18 JUDGE STEIN: But on behalf of the Region,
19 then, you are prepared to participate in such a
20 process. Is that correct?

21 MS. SHAMET: Yes, Your Honor.

22 JUDGE STEIN: Let me ask Mr. Sims, and I'm

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1 really not trying to explore settlement here; I'm
2 really trying to figure out with -- and I'm not going
3 to rule on the request to remand from the bench
4 today; I'm going to take that under advisement. But
5 I would like to know where we stand.

6 I understand that Smith Farm obviously
7 wanted to wait to hear where the Region was coming
8 from before they fully responded to the Board's query
9 on mediation, and if Mr. Sims could let us know where
10 he stands on that, where his client stands on that
11 question, I'd appreciate it.

12 MR. SIMS: Judge Stein, just by
13 background, I will tell you that this case and the
14 Amelia case that you'll hear next are two of five or
15 six different enforcement actions brought by Region
16 III, and by Ms. Shamet in the same general geographic
17 area of Virginia.

18 Ms. Shamet and I have been able to resolve
19 every one of the cases except these two. And I say
20 that to you to demonstrate that while Ms. Shamet and
21 I have fought hard against each other as to the
22 matters that have been litigated, they'd be a shot;

1 but we have been able to either agree on things or
2 agree to disagree in a -- manner.

3 So I believe that my clients are certainly
4 willing to continue discussions with Ms. Shamet; she
5 mentioned something to me last week, which is about
6 the time I learned the Region's position. We have
7 that under consideration, and I believe that we would
8 like to have discussions with the Region about
9 resolving it.

10 You may not be familiar with Virginia; but
11 in addition to the EPA, the Virginia Department of
12 Environmental Quality, called the DEQ, also asserts
13 jurisdiction over wetlands or lands that purportedly
14 have wetlands on them. So any resolution of the
15 case, from our point of view, also has to include the
16 DEQ. So we only have one result; it does us little
17 good to resolve the case with EPA and then turn
18 around and start anew with the DEQ.

19 It is true that the EPA and the DEQ work
20 hand-in-glove as to some matters but not as to all
21 matters; and it's been our experience that if we
22 resolve a case with the EPA, that does not mean that

1 the DEQ will just go away.

2 I say that because it is very difficult,
3 if not impossible, to include the DEQ in any
4 mediation. For that reason, at least at this point,
5 we believe the prospects of a resolution using ADR
6 are not very good. We would prefer to continue our
7 discussions with Ms. Shamet, and counsel-to-counsel
8 through ADR.

9 And principally, because it's difficult
10 but not impossible to include the DEQ, which is an
11 integral component to resolving this case, in our
12 view.

13 JUDGE STEIN: Let me ask a separate
14 question, then: In light of that, in terms of next
15 steps, does it make sense to stay this matter for a
16 period of 30 days, initially 30 days, for the counsel
17 to explore settlement possibilities and then report
18 back to the Board as to whether those are continuing
19 to be productive; or alternatively we can go ahead
20 and rule on essentially the pending motion as to next
21 steps, while you folks continue to explore
22 settlement. And I don't know whether our choices

1 would influence where you head in terms of
2 settlement; but I'm wondering if, given your
3 settlement discussions, it makes sense at this point
4 for us to stay this matter for 30 days or whether we
5 ought to just cut on the -- get your views on whether
6 we ought to just cut on the pending motion,
7 statements, whatever's pending before us while your
8 settlement discussions continue.

9 MS. SHAMET: Your Honor, the call was
10 dropped and I didn't hear the question at all.

11 JUDGE STEIN: I'm sorry about these
12 technical difficulties we're having.

13 My question was, did you hear what Mr.
14 Sims said about his view of the prospects of court-
15 sponsored ADR? Did you hear that point?

16 MS. SHAMET: Yes, Your Honor.

17 JUDGE STEIN: Okay. My question was,
18 whether it made sense to stay this case for a period
19 of 30 days while the parties explore settlement,
20 counsel-to-counsel, or whether the Board should just
21 go ahead and rule on the pending motion; and you can
22 explore settlement as you wish.

1 MS. SHAMET: And was that question
2 addressed to me or Mr. Sims?

3 JUDGE STEIN: Well, it's going to be
4 addressed to both of you, so it doesn't really matter
5 to me which order you proceed in.

6 MS. SHAMET: Hunter, do you want me to go
7 first?

8 MR. SIMS: That would be fine.

9 MS. SHAMET: I would be extremely
10 surprised, Your Honor, if the matter could be
11 resolved within 30 days. The settlement that's being
12 contemplated would be a fairly complex one; and not
13 only would it involve the DEQ, but our sister agency,
14 the Corps, as well.

15 I think that proceeding along a dual track
16 might be more efficient.

17 JUDGE STEIN: Let me clarify; there's no
18 magic to 30 days, and if people think a stay of this
19 case, pending the expiration of settlement is what
20 makes sense. The Board is certainly open to
21 considering a longer period of time to explore
22 settlement.

1 What I don't want to do is to prolong this
2 indefinitely. This case has obviously gone on long
3 enough.

4 Mr. Sims?

5 MR. SIMS: Judge Stein, I agree with Ms.
6 Shamet; I believe the better course would be to
7 proceed in a parallel fashion. I think if once you
8 make your decision, if the case is not remanded we'll
9 have a briefing schedule; if the case is remanded we
10 will have to get together with Judge Charneski and
11 schedule further hearings; all of that's going to
12 take some time.

13 I believe that that should allow Ms.
14 Shamet and I to have further discussions in parallel
15 fashion, so that we'll be able to determine whether
16 or not we can settle the case. If it turns out we're
17 very, very close at a critical time as far as the
18 next proceeding, then at that time we could ask for a
19 short stay.

20 JUDGE STEIN: Okay, well, I think I'm
21 hearing from both parties that you're interested in a
22 dual track; and I want to thank both of you this

1 morning. This has been very helpful to the Board in
2 figuring out next steps; and unless either party has
3 anything else that they want to say in terms of the
4 Smith Farm matter, I think I will bring the status
5 conference in Smith Farm to a close.

6 Mr. Sims, anything additional?

7 MR. SIMS: No, Your Honor.

8 JUDGE STEIN: Ms. Shamet?

9 MS. SHAMET: I would only ask, if Mr. Sims
10 would clarify that Respondent's request is for a
11 briefing schedule, and not for the Board to decide on
12 the record about briefs.

13 MR. SIMS: Oh, you mean not remanded?

14 MS. SHAMET: Right.

15 MR. SIMS: My view would be if the case is
16 not remanded, that the Board should set a briefing
17 schedule so that both sides would be given an
18 opportunity to argue the law before the Board based
19 upon the facts that are already on the record.

20 JUDGE STEIN: This is how I had understood
21 Smith Farm's statement from what they had submitted
22 earlier.

1 But let me now bring this status
2 conference to a close. I thank both counsel, it's
3 been tremendously helpful. And the status conference
4 in Smith Farm is now adjourned.

5 (Announcement by the Secretary.)

6 (Whereupon, at 11:43 a.m., the status
7 conference concluded.)

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Daniel W. Hawkins (Dj)

Shorthand Reporter

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