

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

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*In re Smith Farm Enterprises, LLC,*

Appellant

Dkt. No. CWA-3-2001-0022

CWA App. 08-02

**COMPLAINANTS' RESPONSE BRIEF**

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various standards described in *Rapanos*. The record establishes the discharges at issue occurred in wetlands and other waters on the Site and that the wetlands on the Site have a hydrologic and continuous physical surface connection to relatively permanent waters on the Site that are tributaries flowing to traditionally navigable waters less than one mile from the Site. In addition, the wetlands and tributaries at issue in this case have a significant nexus to nearby downstream traditionally navigable waters because they perform and deliver important hydrologic and ecologic functions affecting the chemical, physical and biological integrity of those nearby traditionally navigable waters.

Respondent's appeal brief does not let the record stand in the way of Respondent's arguments. Respondent's brief refers selectively to portions of the record (and mischaracterizes those), ignoring the vast preponderance of the evidence. Respondent makes scattershot assertions unsupported by the record or logic, and glosses over impeached and recanted testimony by its witnesses. Most glaringly, Respondent's brief fails to reconcile contradictory testimony among *Respondent's* own expert witnesses.

It is not, however, Respondent's errors, but rather the overwhelming evidence in the record as a whole that establishes that exercise of regulatory jurisdiction under the CWA is appropriate in this matter. For the reasons set forth herein and in the portions of Complainants' briefs filed in CWA App. 05-05 as incorporated by reference herein, ALJ Moran's Decision Upon Remand issued March 7, 2008 (re-issued June 27, 2008), should be affirmed.

## **II. MATTERS OTHER THAN "NAVIGABLE WATERS"**

Section 301(a) (33 U.S.C. § 1311(a)) of the Clean Water Act prohibits persons from discharging pollutants from a point source to navigable waters without authorization pursuant to a permit issued under Section 402 or 404 of the Act. Following an October 2003 hearing, ALJ Charneski issued an Initial Decision on May 4, 2005, finding that Respondent had

violated Section 301(a) and assessing a penalty of \$94,000. Respondent appealed. That appeal (CWA App. 05-05) was fully briefed and oral argument was conducted. While CWA App. 05-05 was pending, the Supreme Court issued its decision in *Rapanos*. The Board determined "that the facts required to decide this matter using the CWA jurisdictional tests set forth in *Rapanos* are either not present or not fully developed in the factual record before us." The Board remanded the matter to the ALJ to take additional evidence, conduct further proceedings as necessary, and rule on the CWA jurisdictional question in light of *Rapanos*. Remand Order (EAB Dkt. No. 05-05). The Board instructed the ALJ to issue a new Initial Decision, which would have the effect described in 40 C.F.R. § 22.27.

A remand hearing was conducted before ALJ Moran in May 2007. ALJ Moran issued a Decision Upon Remand on March 7, 2008 (re-issued June 27, 2008). This brief focuses on the the "navigable waters" issue that was the subject of the Board's remand order and the May 2007 remand hearing. With respect to all other elements of the violation, Complainants incorporate by reference the briefs filed by Complainants in CWA App. 05-05 on July 1, 2005 and July 22, 2005, except as set forth herein. In addition, Complainants rely upon the Board's Final Decision and Order in *Matter of Vico Construction Corp. & Amelia Venture Properties, LLC*, 12 E.A.D. 298 (2005), decided after the briefs were filed in CWA App. 05-05.

With respect to the matter of penalty, Complainants rely upon the arguments set forth in their brief filed on July 22, 2005 in CWA App. 05-05 and upon the Stipulation of the Parties Concerning Penalty (May 14, 2008), in which Respondent waived any appeal related to the failure of a court reporter to produce a transcript of a June 2002 hearing before ALJ Charneski, necessitating a second hearing.<sup>1</sup> Accordingly, the portions of

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<sup>1</sup>In the Decision on Remand, ALJ Moran reduced the \$94,000 penalty awarded by ALJ Charneski by \$10,000 in consideration of the statutory (33 U.S.C. § 1319(d)) factor "as justice may require" to account for Respondent's costs associated with the untranscribed June 2002 hearing. The Decision on Remand invited Respondent to present additional evidence of Respondent's actual costs if greater than \$10,000. The parties ultimately stipulated to a



Respondent's appeal in CWA App. 05-05 related to the court reporter's failure to produce a transcript have been waived and do not remain before the Board.<sup>2</sup>

### III. ANALYTICAL FRAMEWORK CONSTRUING "NAVIGABLE WATERS"

The purpose of the Board's remand was to allow the ALJ to develop additional facts and to apply the U.S. Supreme Court's decision in *Rapanos* to determine whether the wetlands and other waters to which Respondent discharged were "navigable waters" and "waters of the United States" within the meaning of Sections 301(a) and 502(7) of the Clean Water Act, 33 U.S.C § 1311(a) & 1362(7). Complainants must demonstrate by a preponderance of the evidence that the wetlands and other waterbodies on the Smith Farm Site were navigable waters of the United States in late 1998 and early 1999 when the discharges at issue occurred. *See In re Bricks, Inc.*, 11 E.A.D. 224, 226 (2003), *aff'd*, 426 F.3d 918 (7<sup>th</sup> Cir. 2005). Consistent with common usage, this brief refers to this concept as "CWA jurisdiction," though Complainants note that whether the wetlands and waterbodies at issue were navigable waters is an element of the violation and not a question of the tribunal's authority to decide this matter. *See United States v. Sea Bay Dev. Corp.*, 2007 U.S. Dist. LEXIS 29059, 65 Env't. Rep. Cas. (BNA) 1443 (E.D. Va. Apr. 18, 2007). Complainants rely on the portions of their brief filed July 1, 2005 in CWA App. 05-05 discussing navigable waters and on the remainder of this brief.

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\$60,000 reduction in the penalty as a "matter[] as justice may require" in calculating the penalty, and Respondent waived any appeal that would assert the court reporter's failure to produce a transcript of the June 2002 hearing. Stipulation of the Parties Concerning Penalty (May 14, 2008). ALJ Moran issued a Supplemental Decision incorporating the Stipulation of the Parties Concerning Penalty on June 27, 2008.

<sup>2</sup> There is one final procedural clarification related to CWA App. 05-05. In that matter, Complainants filed a motion to strike a portion of their briefs referring to Complainants' Exhibit 69 because that document had not been introduced into the record. (CWA App. 05-05 Dkt. 11 (March 29, 2006)). That document, however, now is part of the record for CWA App. 08-02. In May 2008 and in a follow up letter dated May 22, 2008, Robert F. Boyd, one of the principals of Respondent, conducted *ex parte* communications regarding this matter with then-Administrator Johnson. Complainants submitted Complainants' Response to *Ex Parte* Communication Pursuant to 40 C.F.R. § 22.8 dated June 23, 2008. CX 69 was attached as Attachment 1 to that response, and therefore is now part of the record before the Board.

The CWA prohibits the unauthorized discharge of pollutants from a point source to “navigable waters.” 33 U.S.C. 1311(a) & 1362(12). The Act in turn defines “navigable waters” as “waters of the United States, including the territorial seas.” *Id.* § 1362(7). The objective of the CWA is “to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). EPA and the Corps have issued regulations further defining “waters of the United States.” This case involves the assertion of jurisdiction pursuant to 33 C.F.R. § 328.3(a)(1), (5) & (7)<sup>3</sup> (waters currently used, previously used or susceptible to use in interstate commerce (including waters subject to the ebb and flow of the tide), tributaries to such waters, and wetlands adjacent to such waters or tributaries). None of the opinions in *Rapanos* purports to strike or overturn these subsections.<sup>4</sup>

*United States v. Rapanos* is the most recent Supreme Court decision to construe the terms “navigable waters” and “waters of the United States” as used in the CWA.<sup>5</sup> *Rapanos* involved two consolidated cases in which the CWA had been applied to discharges into wetlands adjacent to nonnavigable tributaries to traditional navigable waters. *Rapanos*, 547 U.S. 729-30 (Scalia, J.). The Court unanimously agreed that the term “waters of the United States” is not limited to waters that are navigable in the traditional sense (“traditionally navigable waters”) and their adjacent wetlands. *See id.* at 730-31 (Scalia, J.); *id.* at 767-68 (Kennedy, J. concurring in the judgment); *id.* at 792 (Stevens, J., dissenting). No rationale, however, commanded a majority of the Court, and the majority holding was limited to vacatur and remand.

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<sup>3</sup> For ease of reference, this brief cites the Corps regulations. EPA’s regulations at 40 C.F.R. § 232.2 are substantially the same.

<sup>4</sup> In *United States v. Wilson*, 133 F.3d 251 (4<sup>th</sup> Cir. 1997), the U.S. Court of Appeals for the Fourth Circuit held that 33 C.F.R. § 328.3(a)(3) is not authorized by the CWA. That regulation (jurisdiction based upon whether a particular activity “could affect” interstate commerce) was also the regulation interpreted in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (“*SWANCC*”), and is not at issue in this matter.

<sup>5</sup> In addition to *SWANCC*, the Supreme Court previously has construed the terms “navigable waters” and “waters of the United States” in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985). (“*SWANCC*”). *See also International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987).

Justice Scalia wrote an opinion expressing the views of himself, Chief Justice Roberts, and Justices Alito and Thomas. Justice Kennedy voted to remand the matters, but wrote a separate concurring opinion. Justices Stevens, Breyer, Souter, and Ginsburg dissented.

A. Scalia Opinion

With respect to flowing waterbodies, the four Justices joining the opinion authored by Justice Scalia,<sup>6</sup> would extend CWA jurisdiction to “relatively permanent, standing or continuously flowing bodies of water” that form geographic features, *id.* at 739 (Scalia, J.), and that are connected to traditional navigable waters, *id.* at 740-42 (Scalia, J.). The Scalia opinion does not exclude from CWA jurisdiction man-made bodies of water that form such relatively permanent geographic features.<sup>7</sup> The Scalia opinion’s standard also does not require perennial flow, but rather includes within CWA jurisdiction waters that flow at least some portion of the year. *Id.* at 732-33 n. 5 (Scalia, J.). *See infra*, pp. 37-39.

With respect to wetlands, the Scalia opinion would extend CWA jurisdiction to “those wetlands with a continuous surface connection to bodies that are ‘waters of the United States’ in their own right, so that there is no clear demarcation between waters and wetlands.” *Id.* at 741-42 (Scalia, J.) (emphasis in original). The Scalia opinion’s reference to a “continuous surface connection” is satisfied when the wetlands physically abut the other regulated body of water without a case-by-case inquiry into ecologic connection. *Id.* at 741-42 & 754 (Scalia, J.).

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<sup>6</sup> In his Initial Decision Upon Remand in *Matter of Vico Construction Corp. & Amelia Venture Properties, LLC*, CWA-3-2001-0021 (Sept. 8, 2008), ALJ Moran took issue with the parties’ reference to the opinion authored by Justice Scalia as a “plurality” opinion. According to *Black’s Law Dictionary* 1125 (8<sup>th</sup> ed.), the term “plurality opinion” refers to “[a]n opinion lacking enough judges’ votes to constitute a majority, but receiving more votes than any other opinion.” Since the dissent authored by Justice Stevens also commanded four votes, the Scalia opinion does not represent the greatest number of votes. This brief will refer to the “Scalia opinion.”

<sup>7</sup>The waters considered by the Court were “four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters” (Rapanos) and “a man-made drainage ditch [that] runs along one side of the wetland, separated from it by a 4 foot-wide man-made berm. . . . The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair” (Carabel). 547 U.S. at 729-30 (Scalia, J.). No Justice voted that these waters were non-jurisdictional because they were man-made. *See also United States v. Moses*, 496 F.3d 984 (9<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 2963 (2008) (human manipulation did not remove water’s character as a navigable water).

### B. Justice Kennedy's Opinion

Justice Kennedy rejected the Scalia opinion's rationale as inconsistent with the CWA's text, structure, and purpose (*Rapanos*, 547 U.S. at 776 (Kennedy, J., concurring in the judgment)), and instead authored an opinion concurring in the judgment. Like the Scalia opinion, Justice Kennedy held that CWA jurisdiction extends beyond traditionally navigable waters and their adjacent wetlands. *Id.* at 767-68 (Kennedy, J., concurring in the judgment).

Justice Kennedy would extend CWA jurisdiction 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 759 & 779-80 (Kennedy, J., concurring in the judgment). Nothing in Justice Kennedy's analysis suggests any CWA jurisdictional distinction between man-made waters and those that formed naturally, and Justice Kennedy rejected any argument that CWA jurisdiction or significant nexus requires continuous flow. *Id.* at 770-71 (Kennedy, J., concurring in the judgment).

Justice Kennedy's concept of significant nexus is informed by the goals of the CWA as set forth in Section 101(a) (33 U.S.C. § 1251(a)), *i.e.*, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Thus, 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 780 (Kennedy, J. concurring in the judgment). Justice Kennedy did not specifically discuss whether or how his significant nexus standard would apply to flowing bodies of water, as opposed wetlands.

### C. The Dissent

Justice Stevens, writing on behalf of the four dissenting Justices, would extend CWA jurisdiction to wetlands that are adjacent to traditionally navigable waters and their tributaries. The views of the dissenting Justices align with pre-*Rapanos* case law, under which ALJ

Charneski found CWA jurisdiction, a holding as to which Respondent did not present arguments in CWA App. 05-05. *See* Respondent's Appeal Brief (EAB Dkt. No. CWA App. 05-05) at p. 6 (“The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case. (Based 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 legal landscape).”).

D. CWA Jurisdiction May Be Found Whenever Either the Standard Described in the Scalia Opinion or the Standard Described by Justice Kennedy is Satisfied

The fractured nature of the *Rapanos* decision has caused confusion as to which test or tests should be applied. Complainants believe the correct approach is the one taken by the U.S. Court of Appeals for the First Circuit in *United States v. Johnson*, 467 F.3d 56 (1<sup>st</sup> Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007), which held CWA jurisdiction may be established whenever *either* the Scalia opinion or the Kennedy concurrence is satisfied.<sup>8</sup>

While some courts have looked to *Marks v. United States*, 430 U.S. 188 (1977), that case does not offer guidance in this circumstance. In *Marks*, the Supreme Court stated: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (citation and internal quotation marks omitted). The *Marks* approach, however, does not work where the “narrowest grounds” among various opinions cannot be easily ascertained, and no opinion represents “the

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<sup>8</sup> This is the same approach taken in joint guidance to the field issued by EPA and the Corps. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008) (available at [www.epa.gov/owow/wetlands/guidance/CWAwater.html](http://www.epa.gov/owow/wetlands/guidance/CWAwater.html)).

common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994) (en banc) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991)).

In cases where there is no obvious "narrowest grounds," several members of the Supreme Court, as well as several lower courts, have indicated that the lower courts should examine the various opinions to extract the principles embraced by a majority of the Court.<sup>9</sup> That is the situation here, where there is no "narrowest ground" because Justices Kennedy and Scalia arrive at their conclusions by different routes without a common denominator. Because the four dissenting Justices in *Rapanos* stated explicitly that they would sustain the exercise of CWA regulatory jurisdiction whenever either Justice Scalia's or Justice Kennedy's standard is satisfied, see 547 U.S. at 810 & n. 14 (Stevens, J., dissenting), the views of a majority would be satisfied whenever either standard is satisfied. See *United States v. Johnson*, 467 F.3d at 65-66; see also *United States v. Bailey*, 516 F. Supp. 2d 998, 1006 (D. Minn. 2007); *United States v. Evans*, No. 3:05CR159, 2006 U.S. Dist. LEXIS 94369 (M.D. Fla. Aug. 2, 2006).

Respondent's argument that *Johnson* and *United States v. Cundiff*, 555 F.3d 200 (6<sup>th</sup> 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 at 49-51) misreads both cases. The First Circuit in *Johnson*, plainly followed the suggestion of the *Rapanos* dissenters and held that CWA jurisdiction may be found whenever *either* the Scalia test *or* the Kennedy test is satisfied. *Johnson*, 467 F.3d at 65-66. The Sixth Circuit in *Cundiff* found that the waters at issue in that case satisfied *both* tests, and explicitly declined to determine whether either test controlled.

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<sup>9</sup> See *Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (analyzing the points of agreement among the various opinions); cf. *League of United Latin American Citizens v. Perry*, 548 U.S. 33, 413-14 (2006) (analyzing concurring and dissenting opinions in a prior case to illuminate positions of members of the Court); *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001) (analyzing concurring and dissenting opinions in a prior case); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 285 (1995) (same); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 17 (1983) (controlling legal standard is the one adopted by the concurrence and four dissenting Justices in *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978)).

*Cundiff*, 555 F.3d at 210. Indeed, no court has adopted Respondent's suggestion that CWA jurisdiction may be rejected solely through application of Justice Scalia's standard.<sup>10</sup>

#### IV. STANDARD OF REVIEW

In an enforcement proceeding, the Board conducts a *de novo* review of the administrative law judge's factual findings and legal conclusions. See 40 C.F.R. § 22.30(f); see also 5 U.S.C. § 557(b); *In re Vico Constr. Corp.*, 12 E.A.D. 298, 312-13 (EAB 2005); *In re Bricks, Inc.*, 11 E.A.D. 224, 226 (EAB 2003), *aff'd*, 426 F.3d 918 (7<sup>th</sup> Cir. 2005). The Board typically grants deference to an administrative law judge's determinations of witness credibility and factual findings based thereon because the ALJ is able to observe the witness' demeanor first-hand and is therefore in the best position to evaluate his or her credibility. See *In re J. Phillip Adams*, CWA App. No. 06-06, slip op. at 12 (EAB June 29, (2007)), 13 E.A.D. \_\_\_\_; *In re Vico Constr. Corp.*, 12 E.A.D. at 313.

<sup>10</sup> The U.S. Courts of Appeals for the Ninth and Seventh Circuits have held that Justice Kennedy's standard controlled the facts in the cases before those courts. See *Northern California River Watch v. City of Healdsburg*, 496 F.3d 993 (9<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 1225 (2008) (superseding opinion published at 457 F.3d 1023 (9<sup>th</sup> Cir. 2006)); *United States v. Gerke Excavating, Inc.*, 464 F.3d 723 (7<sup>th</sup> Cir. 2006), *cert. denied*, 128 S. Ct. 45 (2007). (The Sixth Circuit, however, has interpreted the Seventh Circuit's decision in *Gerke* as holding that the CWA confers jurisdiction whenever either standard is applied. *Cundiff*, 555 F.3d at 208.) The U.S. Court of Appeals for the Eleventh Circuit has adopted Justice Kennedy's significant nexus standard as the governing definition of "navigable waters." See *United States v. Robison*, 505 F.3d 1208 (11<sup>th</sup> Cir. 2007), *cert. denied sub nom United States v. McWane, Inc.*, 129 S. Ct. 627 & 630 (2008). In *United States v. Lucas*, 516 F.3d 316, 325-27 (5<sup>th</sup> Cir.), *cert. denied*, 129 S. Ct. 116 (2008), the Fifth Circuit, like the Sixth Circuit in *Cundiff*, found that the evidence supported a finding of CWA regulatory jurisdiction under all of the *Rapanos* standards and did not identify a controlling standard. In *Natural Resources Def. Council v. Kempthorne*, 525 F. Supp. 2d 115, 124 n. 11 (D.D.C. 2007), in the course of denying a preliminary injunction motion the court cited to the Scalia opinion in a footnote, the court held plaintiffs in that case had waived their CWA claims and there is no indication that the question of the controlling *Rapanos* test was briefed or decided by the court. Though no court has so held, it also could be argued that the effect of *Rapanos* would be analogous to the effect of an affirmance by an equally divided court, wherein there is no resultant governing principle and the decision is conclusive only as to a determination between the parties to the matters adjudged. Cf., *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1261-62 & n. 10 (11<sup>th</sup> Cir. 2005) (*Marks* does not compel courts to identify a holding as to each issue); *United States v. ALCAN Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003), *cert. denied*, 540 U.S. 1103 (2004); *Rappa v. New Castle County*, 18 F.3d 1043, 1058 (3d Cir. 1994); *King v. Palmer*, 950 F.2d 771, 780-85 (D.C. Cir. 1991), *cert. denied sub nom King v. Ridley*, 505 U.S. 1229 (1992). In that circumstance, the governing law remains Circuit precedent, in this case *United States v. Deaton*, 332 F.3d 698, 711 (4<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 972 (2004); See also *Treacy v. Newdunn Associates, L.L.P.*, 344 F.3d 407, 416-17 (4<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 972 (2004) (Corps can regulate any branch of a tributary system that eventually flows to a navigable water).

## V. FACTUAL BACKGROUND

When the record is viewed in its entirety, the preponderant evidence supports CWA regulatory jurisdiction under all tests described in *Rapanos*. The record in its entirety consists of the testimony and exhibits admitted at both the October 2003 and May 2007 remand hearings.<sup>11</sup> On reviewing the record as a whole, it quickly becomes apparent that Respondent did not like the testimony of its expert witnesses in the October 2003 and attempted a “do over” in 2007 using different expert witnesses who presented testimony more to Respondent’s liking.

For the October 2003 hearing, Respondent presented the testimony of Mr. Charles Wolfe, whom Respondent designated as an expert in “identification of wetlands and the connection of wetlands to other waters,” (see Joint Stipulations of the Parties (filed Sept. 8, 2003)) and Mr. Robert Needham, whom Respondent designated as an expert in “wetlands identification and delineation” (see Joint Stipulation of the Parties (filed Sept. 8, 2003); Tr. V-164-65. Both Mr. Wolfe and Mr. Needham work locally in the Tidewater, Virginia area. See *U.S. Army Corps of Engineers Wetlands Delineation Manual* (1987) (hereafter “1987 Corps Manual”) (CX 29 (October 2003) (admitted by stipulation of the parties filed September 8, 2003)) (recommending use of local expertise); see also Remand tr. 1597 (Pierce) (*1987 Corps Manual* recommends consulting persons with local knowledge). Respondent did not, however, present expert testimony from either Mr. Wolfe or Mr. Needham on remand. Instead, Respondent presented the testimony of two new expert witnesses, Dr. Straw and Dr. Pierce, who have far less local experience and whose testimony, while apparently more to Respondent’s liking, in many

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<sup>11</sup> This brief will cite to evidence presented both as part of the October 2003 hearing and as part of the remand hearing conducted in May 2007. The transcript of the October 2003 hearing previously has been cited by volume and page number because the court reporter for that hearing started each day’s transcript at page 1. The same format will be followed here, and the transcript for the October 2003 hearing will be cited as “Tr.-Vol.-Page (Witness).” The transcript for the May 2007 remand hearing runs in consecutive pages across the days. The transcript for the May 2007 remand hearing will be cited as “Remand tr. \_\_\_.” With respect to exhibits, the exhibits will be cited as either “CX \_\_\_” for Complaints’ exhibits or “RX \_\_\_” for Respondent’s exhibits, with a parenthetical of either “October 2003” or “May 2007” to indicate the hearing during which a particular exhibit was introduced.



instances flatly contradicts the October 2003 testimony of Messrs. Needham and Wolfe regarding the characteristics of the Site, including the presence and extent of wetlands and the frequency with which various waterbodies flow.

Examples of unreconciled discrepancies among Respondent's two sets of experts abound. Here are but a few examples. In describing how water flows from the Smith Farm wetlands into drainages that flow to traditionally navigable waters, Mr. Wolfe used the analogy of water being poured on a tabletop. When asked about that analogy, Dr. Straw disagreed. *Compare* Remand tr. 1052-53 (Straw), *with* Tr. V-12 (Wolfe); Tr. V-119-20 (Wolfe). Dr. Straw also disagreed with Mr. Wolfe's testimony that water strikes the surface of the Smith Farm Site and flows in a downhill direction through drainageways. *Compare* Remand tr. 1053-54 (Straw), *with* Tr. V-11 (Wolfe); *see also* Tr. V-119-20 (Wolfe). Dr. Pierce disagreed with Mr. Needham's testimony that Complainants' reference sample location was in a wetland. *Compare* Remand tr. 1588 (Pierce), *with* Tr. VI-20 (Needham). Dr. Pierce also disagreed with Mr. Wolfe's testimony that the wetlands on the Smith Farm Site were largely consistent with the NWI. *Compare* Remand tr. 1594 (Pierce), *with* RX34A (Oct. 2003) (exhibit prepared by Mr. Wolfe); Tr. V-10-11.

There are many other examples where the testimony of Dr. Pierce and Dr. Straw is impeached, recanted, and/or contradictory. Regardless, it is not the errors of Dr. Pierce and Dr. Straw, but rather the overwhelming preponderance of the credible evidence in the record that establishes that the wetlands and other waterbodies on the Smith Farm Site are within the jurisdiction of the Clean Water Act ("CWA" or "Act"), regardless of whether one applies the test described by Justice Scalia in *Rapanos*, or that described by Justice Kennedy's concurring opinion.

A. Pollutants were discharged to wetlands on the Site

The property at issue will be referenced hereinafter as the "Smith Farm Site" or the "Site." The 300-acre Site straddles the border between Chesapeake and Suffolk, Virginia. At the time of the discharges at issue, approximately 95.7 acres of the Site were under cultivation as cropland in two large fields. RX 42 (October 2003). The discharges at issue in this matter occurred in the uncultivated, forested portions of the Site.

As set forth more fully in Complainants' briefs filed in CWA App. 05-05, the actions of Respondent and its contractors discharged fill material, consisting of a layer of ground up woody debris approximately 0.5-5 inches thick and stormwater associated with construction activity from a point source to wetlands and other navigable waters on the Site. Respondent's assertion that wetlands on the Site were "fragmented and small in area," (Appeal Brief at 32) is unsupported and contrary to the overwhelming preponderant evidence demonstrating the forested portions of the Site are wetlands and discharges occurred in forested wetlands on the Site.

The applicable regulations define wetlands as "those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." See 33 C.F.R. § 328.3(b). The U.S. Army Corps of Engineers (Corps) has provided guidance for identifying wetlands in the field in the form of the *U.S. Army Corps of Engineers Wetlands Delineation Manual* (1987) (hereafter "1987 Corps Manual"). CX 29 (October 2003) (admitted by stipulation of the parties filed September 8, 2003). The presence of wetlands is characterized by the presence of three parameters: (i) hydric soils; (ii) a predominance of wetlands vegetation; and (iii) the presence of wetlands hydrology. Tr. I-74 (Lapp);<sup>12</sup> CX 29 (October 2003). Neither the Scalia opinion nor Justice Kennedy's concurring

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<sup>12</sup> Jeffery Lapp was EPA Region III's wetlands and enforcement team leader. Tr. I-71 (Lapp).

opinion purports to strike or overturn the regulatory definition of "wetlands" or to modify the method for identifying wetlands described in the Corps' 1987 Manual.

ALJ Charneski held that the discharges at issue in this matter took place in wetlands. Initial Decision at 20-21. Respondent did not present argument in CWA App. No. 05-05 regarding that aspect of ALJ Charneski's opinion, and therefore it is questionable whether Respondent can raise it now.<sup>13</sup> Regardless, ALJ Charneski's conclusion was and remains supported by the overwhelming evidence and appropriately was accepted by ALJ Moran. Decision Upon Remand at 2, n. 3 & 4 & n. 5. The following evidence from the October 2003 hearing supports ALJ Charneski's conclusion.

- In 1991, at the request of the former Site owners (including one of Respondent's principals), the Corps made a preliminary determination that much of the forested portion of the Site contained wetlands. The Site owners withdrew their request before a delineation could be performed or confirmed. CX 27; Tr. I-267 (Martin).
- The parties stipulated that, as of September 8, 1999, the soils underlying the forested areas at the Smith Farm Site were predominantly hydric soils, and the predominant vegetation in the nos. 24 and 25 (filed September 8, 2003).
- The parties stipulated that, as of September 1999, some of the forested portions of the Site in which the discharges occurred contained wetlands which satisfy the parameters for identifying wetlands in the 1987 Manual. See Joint Stipulations of Facts No. 26 (filed September 8, 2003).
- The parties stipulated that the National Wetlands Inventory ("NWI") map, prepared by the U.S. Fish and Wildlife Service, mapped approximately 180 acres of wetlands in the forested portions of the Smith Farms Site. Joint Stipulations of Facts No. 27 (filed September 8, 2003); CX 87, Figure 3 (Oct. 2003). Respondent's expert on identification of wetlands and the connection of wetlands to other waters accepted the NWI mapping as accurate with respect to the extent of wetlands on the Smith Farm Site. Tr. V-8-10 & 19 (Wolfe); RX 34A (Oct. 2003).

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<sup>13</sup> It is well established that a party "cannot use the accident of a remand to raise in a second [proceeding] an issue that he could just as well have raised in the first [proceeding]." *United States v. Parker*, 101 F.3d 527, 528 (7<sup>th</sup> Cir. 1996). See also *United States v. Husband*, 312 F.3d 247, 250 (7<sup>th</sup> Cir. 2002), cert. denied, 539 U.S. 961 (2003); *United States v. Morris*, 259 F.3d 894, 989 (7<sup>th</sup> Cir. 2001); see also *United States v. Bell*, 5 F.3d 64, 65 (4<sup>th</sup> Cir. 1993) (issues decided by a district court but foregone on appeal or otherwise waived are foreclosed on remand for further proceedings).

- Mr. Martin, a scientist with the U.S. Army Corps of Engineers, visited the Site in January and March 1999. On both occasions, Mr. Martin confirmed the presence of wetlands in the forested portion of the Site where work was being conducted. Tr. I-235-37 & 250-51 (Martin); Remand tr. 360-74 (Martin); CX 26 (EPA 0314-0319) (Oct. 2003); CX 28 (Oct. 2003). During the January 1999 Site visit, Mr. Martin was accompanied by and discussed his findings with Robert Needham, Respondent's consultant whom Respondent designated as an expert in "wetlands identification and delineation" at the October 2003 hearing. Joint Stipulations of the Parties (filed Sept. 8, 2003); Tr. V-163-65. Mr. Needham did not object to Mr. Martin's conclusion that wetlands were present. Tr. I-240 (Martin).
- Aerial photographs from 1994 depicted a wetlands "signature" on the forested portions of the Site, largely consistent with the NWI mapping, and fully consistent with the NWI mapping in the areas where the work had been performed. Tr. I-109-10, 118-19 (Lapp); Tr. II-135-38 (Stokely).

In addition to the foregoing, Complainants' field investigators confirmed the presence of wetlands in the locations where the discharges had occurred by confirming the presence of wetlands at an undisturbed reference sample location and extrapolating to the remainder of the Site based on aerial photography. See Tr. I-109,118, 125-26 (Lapp). Complainants' methodology was consistent with the *1987 Corps Manual* methodology for disturbed sites. CX 29. Mr. Needham, Respondent's expert witness on identification and delineation of wetlands during the October 2003 hearing, agreed that Complainant's reference sample ("Sample Point B") was in wetlands. Tr. VI-20 (Needham). On pre-activity aerial photographs, the area where Sample Point B was located exhibited a "drier" wetland signature than most of the Site. Mr. Stokely, Complainants' expert in aerial photographic interpretation, identified the remainder of the forested area on the Smith Farms Site as containing the same wetlands signature or a wetter wetlands signature. Tr. I-119 (Lapp); Tr. II-165-66 (Stokely).

As ALJ Moran noted, "Nothing presented at the hearing on remand operated to undermine the determination made by Judge Charneski at the initial hearing that the forested portions of the Site are wetlands." Decision on Remand at 24, n. 40.

Respondent's argument that the Site contained only small, fragmented wetlands areas appears to be based on an assertion that there are large areas of non-hydric soils on the Site (apparently notwithstanding Respondent's stipulation that "As of September 9, 1999, the soils underlying the forested areas at the Smith Farm Site are *predominantly hydric soils*" (Joint Stipulation of Facts No. 24 (filed September 3, 2003) (emphasis added)). ALJ Moran appropriately rejected Respondent's arguments based upon soils data collected in 2007 because Respondent's data was incomplete and presented a misleading depiction inconsistent with the preponderant evidence. Decision Upon Remand at 33, n. 57 & 35.

The evidence goes beyond the parties' stipulation that the soils underlying the forested areas at the Smith Farm Site were predominantly hydric soils. The National Resource Conservation Service of the Department of Agriculture maps the forested portion of the Smith Farm Site as containing hydric soils. CX 386 (May 2007); Remand tr. 1957, 1962-63, 1964-65 (Vasilas). In addition, samples taken by *both* Complainants' and Respondent's field investigators demonstrate that the Site is predominantly underlain by hydric soils. Complainants' witness Mr. Martin, whom ALJ Moran found to be "reliable and highly credible" (Decision Upon Remand at 56) took soils samples and confirmed the presence of hydric soils on the Site both in 1999 and 2007. CX 26 (2003); Tr. I-235-37 & Remand tr. 364 (Martin); CX 28 (2003); Remand tr. 368-73 (Martin); CX 310 (2007); Remand tr. 408-09, 411, 427-29, 431, 432 (Martin). Ms. Vasilas, Complainants' soils expert, who has worked as a soils scientist for the Natural Resources Conservation Service for more than 18 years concentrating in the Mid-Atlantic region, has taken thousands of soil samples, serves on the National Technical Committee for Hydric Soils, and has co-edited that Committee's *Guide to Hydric Soils in the Mid-Atlantic United States* and the *Field Indicators of Hydric Soils in the United States* Version 6.0, (see Remand tr. 1950-53 (Vasilas), recorded several soils samples on the Site and found them to be hydric in 1999. CX

104 (2003); Tr. III-87 (Vasilas). Dr. Dennis Whigham, a senior scientist and deputy director of the Smithsonian Environmental Research Center, who has extensive research and publication credentials (CX 374 (2007) (Dr. Whigham's curriculum vitae) and whom ALJ Moran found to be a "particularly credible expert witness for EPA" (Decision Upon Remand at 56), testified that he had participated in examination of numerous soil samples throughout the site and found them to be hydric. Remand tr. 1713-14 (Whigham).

*Respondent's* soils expert, Mr. Parker testified that in 2002 he had sampled along transects (or straight lines spaced approximately every 50 feet) described two to three soil samples along each transect. RX 32 (Oct. 2003); Tr. III-166 (Parker); Remand tr. 1161-62 (Parker). In October 2003, Mr. Parker testified that his sampling method in 2002, using transects, "eliminates human bias." Tr. III-168 (Parker). Under those circumstances, Mr. Parker described 55 soil samples in the areas at or near where the discharges occurred. RX 32 (Oct. 2003). Of those 55 soil samples at the Smith Farm Site, Mr. Parker described 53 as hydric soils. RX 32 (Oct. 2003); Remand tr. 1162-63 (Parker). The two non-hydric samples described by Mr. Parker in 2002 had hydric soils on either side. Remand tr. 1162-63 (Parker); RX 32 (Oct. 2003).

Against the foregoing, Respondent offers the testimony of Dr. Pierce that he had located numerous instances of non-hydric soils (thus, non-wetland areas), in the forested portions of the Smith Farm Site, giving the impression that much of the Site was underlain by non-hydric soils. See Remand tr. 1294 (Pierce). While Dr. Pierce and Respondent's Brief give the impression that Dr. Pierce described numerous non-hydric samples throughout the Site, a review of the latitude and longitude of his sample locations shows that his samples were concentrated in a few small areas. Dr. Pierce did not record samples throughout the Site. CX 444 (May 2007) (aerial photograph of the western portion of Smith Farm Site depicting with orange dots locations of Dr. Pierce's soil probes based on latitude and longitude provided in Respondent's expert report); CX

443 (May 2007) (aerial photograph of the entire Smith Farm Site depicting with white dots the locations of the samples described by Mr. Parker at Dr. Pierce's direction); Remand tr. 1887-93 (Martin) (describing preparation of CX 443 and 444).

In addition to being concentrated in a few small areas, the sampling evidence presented by Dr. Pierce was incomplete and misleading. On cross-examination, Dr. Pierce *conceded that he had discovered instances of hydric soils on the Site, but failed to report those in his expert report or describe them in his testimony on direct examination:*

Q. Appendix C [of the expert report] does not identify a single point of hydric soil, does it?

A. Probably not.

Q. Did you find any hydric soils?

A. We did.

Q. You just didn't record them.

A. We didn't take points at it.

Q. And you didn't click on your GPS unit to record the point, did you?

A. That's correct.

Remand tr. 1620 (Pierce).

By recording and testifying *only* regarding samples showing non-hydric soils, and failing to record the number and location of hydric soil samples that he discovered, Dr. Pierce painted an incomplete and misleading picture. It was for this reason, as well as his demeanor, numerous instances of impeached testimony, as well as his history of criticism of the Corps that ALJ Moran appropriately gave no weight to the soils samples taken by Dr. Pierce.<sup>14</sup> Decision Upon Remand at 33, n. 57 & 35. Respondent's efforts to support Dr. Pierce's testimony with Mr.

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<sup>14</sup> By contrast, when Complainant's field investigators found non-hydric soils on the Site, the information was recorded (CX 310 at SF remand 946 (May 2007)) and presented to the Court on direct examination. See Remand tr. 424 (Martin) ("Q. You don't have hydric soil, do you? A. Not quite, no.").

Parker (Appeal Brief at 32-33) are equally misleading. Respondent's soils expert, Mr. Parker testified that, in contrast to the transects that he sampled in 2002, in 2007 Dr. Pierce had preceded him to the Site, had pre-identified areas underlain by non-hydric soils, and had directed Mr. Parker to take samples only in areas predetermined by Dr. Pierce to contain non-hydric soils. Remand tr. 1122 , 1169-70 (Parker). ALJ Moran appropriately rejected this evidence because it presented an incomplete and misleading picture of the soils at the Site.

Respondent's criticism that ALJ Moran accepted Complainants' use of a reference sample while rejecting the selective soils sampling conducted by Respondent's witnesses in 2007 (Appeal Brief at 35) compares apples with oranges. Complainants' use of a sample from an undisturbed reference location is consistent with the recognized method for establishing pre-disturbance site conditions described in the *1987 Corps Manual*. See Initial Decision by ALJ Charneski at 15-16. Complainants provided testimony describing their basis for selecting the reference location as representative of pre-disturbance conditions at the Site. Tr. I-118-19 (Lapp); Tr. II-165-66 (Stokely). By contrast as described in detail *supra*, pp. 17-19, it became clear during the course of testimony that Respondent's witnesses set out to identify *only* non-hydric soils that fit their agenda and did not even attempt to provide evidence that their 2007 sampling locations were representative of the Site as a whole. ALJ Charneski was present and heard Complainants' witnesses' explanation of their sampling methodology and observed their demeanor. ALJ Moran also observed several of the same Complainants' witnesses and afterward accepted ALJ Charneski's findings based on the testimony of those witnesses. ALJ Moran observed Respondent's witnesses' testimony regarding their soil sampling, including their admissions on cross-examination regarding their methodology and omissions, and his assessment of these witnesses and their methods should be given deference.



Respondent at best has identified pockets (technically termed "inclusions") of non-hydric soils within the broader wetland tract that includes the forested portions of the Smith Farm Site. This phenomenon, i.e., the presence of small non-hydric inclusions within a wetland, is common and expected. Remand tr. 1962-63 (Vasilas); Remand tr. 704-706 (Rhodes). The soils evidence does not support Respondent's assertion of small, fragmented wetlands areas. To the contrary, the overwhelming preponderance of credible evidence, including that of Mr. Parker, demonstrates that the Site was underlain primarily by hydric soils and that the locations where the discharges occurred were wetlands.

Respondent's assertion that the Site is "broken up by a series of nonwetland areas, roads, agricultural fields, and buildings" (Appeal Brief at 32) mischaracterizes the Site. While it is true that the southeast portion of the Site and part of the northeast portion of the Site consist of farm fields, those fields have never been at issue. The discharges occurred in the forested portion of the Site. A review of any of the innumerable maps and aerial photographs of the Site in the record show that the forested portions of the Site are unfragmented.

B. The wetlands on the Smith Farm Site are physically and hydrologically connected to waterbodies that convey flow from the Site to downstream traditionally navigable waters

ALJ Charneski noted that "[i]t is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm." Initial Decision of ALJ Charneski at 26. ALJ Charneski's view that this finding is undisputed would seem supported by Respondent's failure to present argument to the contrary to the Board as part of CWA App. 05-05. Accordingly, that should end the matter and after failing to present argument regarding ALJ Charneski's finding on this point, Respondent should not be permitted to challenge ALJ Charneski's finding as part of the remand. *See supra*, n. 13.

Regardless, ALJ Charneski's and ALJ Moran's finding that the Smith Farm wetlands were physically adjacent and contiguous to water bodies that flow from the Smith Farm Site (Initial Decision at 25-29; Decision on Remand at 5-7) is supported by the preponderance of the evidence. Contrary to Respondent's characterization, the record evidence on this point is not limited to the testimony of Mr. Stokely, but includes also the evidence of Mr. Martin<sup>15</sup> and Respondent's own expert, Mr. Wolfe.

During the October 2003 hearing, Respondent presented the testimony of Charles Wolfe as an expert in the "identification of wetlands and the connection of wetlands to other waters." Stipulations of the parties (filed Sept. 8, 2003). Respondent's expert Mr. Wolfe summarized the hydrologic connection between the wetlands on the Smith Farm Site and waterbodies flowing off the Site: "The wetlands derive water from precipitation events. The water strikes the surface and flows in a downhill direction off of the site .... And the analogy that we use could be as if this was a tabletop and these were the high elevation hydric soil flat wetlands up here .... The water would fall to the tabletop, and it would roll off the tabletop, down into those navigable waters, tidal waters, and bottom land hardwood swamps." Tr. V-11-12 (Wolfe); *see also* Tr. V-119-20 (Wolfe). Mr. Wolfe also testified that the wetlands on the Smith Farm Site were contiguous and adjacent to waterbodies flowing away from the Site. Tr. V-116-17 (Wolfe).

The testimony of Complainants' witnesses, Mr. Martin and Mr. Stokely, confirm Mr. Wolfe's observations. The Smith Farm Site sits on a "drainage divide," with surface water on the site flowing both east and west. Remand tr. 317 (Martin); Remand tr. 90 (Stokely). Prior to Respondent's construction of the 1998-1999 ditches, water from wetlands on the Site flowed to one of seven drainages that flowed ultimately to nearby traditionally navigable waters.

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<sup>15</sup> Mr. Martin testified before both ALJ Moran and ALJ Charneski on multiple days in both the October 2003 hearing and the May 2007 Remand hearing in this matter and in *Matter of Vico Construction Corp. and Amelia Venture Properties, LLC*, Dkt. No. CWA-3-2001-0021. Having had an opportunity to observe Mr. Martin's testimony and demeanor over the course of many days, ALJ Moran singled out Mr. Martin as an exceptionally credible witness.

For ease of description, Complainants' witnesses referred to the physical features on the Smith Farm Site in terms of four "quadrants," labeled the northwest quadrant, the southwest quadrant, the northeast quadrant and the southeast quadrant. Complainants' witnesses and exhibits referred to the waterbodies that conveyed water from the Site as numbered drainages (1 through 7) which appear on topographic maps as solid or broken blue lines. CX 56 (Oct. 2003) and CX 87, Figure 2 (Oct. 2003). *See* Remand tr. 66 (Stokely). Because water flows downhill, the direction of flow can be ascertained by reviewing the topographic relief, which is also depicted on the USGS topographic map. Tr. I-102-03 (Lapp); Remand tr. 68-69 (Stokely).

Several exhibits, including National Wetland Inventory (NWI) maps annotated by Respondent's expert Mr. Wolfe and aerial photographs analyzed by Mr. Stokely depict the location of wetlands on the Site and their relationship to the various waterbodies conveying flowing water from the Site. Wetlands in the western portion of the Site are physically adjacent to Drainage 6, which Respondent's witnesses referred to as the "main ditch," and which flows east-west across the Site. Mr. Wolfe's annotated NWI depicts the wetlands on the western side of the Smith Farm Site as physically abutting drainage 6, except for the area where that drainage flows west off the Site. *See* RX 34A (NWI map color coded by Mr. Wolfe (*see* Tr. V-8-10 (Wolfe))). Aerial photographic interpretation confirms that the wetlands on the western side of the Smith Farm Site physically abut drainage 6. CX 87 at EPA 1068 and Figures 2 & 3 (Oct. 2003).

Prior to Respondent's construction of the 1998-1999 ditches, the wetlands in the northwest quadrant and some of the wetlands in the southwest quadrant of the Site drained directly to drainage 6. CX 87 at EPA 1068 and Figures 2 & 3 (Oct. 2003); Tr. II-27-30 (Martin); CX 342-343 & 382 (May 2007) & Remand tr. 473-74 (drainage pattern in wetlands caused by

water flowing from wooded wetland area furthest away from drainage 6 and flowing into drainage 6).

Other wetlands in the western portion of the Site physically abut and/or drain into Drainage 7, which flows from the southwest quadrant of the Site and into drainage 6. See CX 278 (May 2007) (photograph of juncture of drainages 6 and 7); Tr. II-27-30 (Martin). Some wetlands in the southwest quadrant of the Site drained to drainage 7. Tr. II-27-30 (Martin). See also CX 336 (May 2007) & Remand tr. 470 (photograph of a wet depressional area that drains to drainage 7).

Surface water from the remaining wetlands in the western portion of the Site flows to Drainages 1 and 2, which flow to Bailey Creek. Tr. II-27-30 & 60 (Martin); CX 56 (Oct. 2003); CX 87, Figure 2 (Oct. 2003); see also Tr. II-134-35 (Stokely). Surface water from a portion of the wetlands in the northeast quadrant flows to drainage 5, which flows to Bailey Creek.<sup>16</sup> Tr. II-30 (Martin). The remainder of the northeast quadrant is physically adjacent to the portion of drainage 6 that flows east from the confluence of the four quadrants and then south and into drainage 4, which ultimately flows to Bailey Creek. CX 87, Figure 2 (Oct. 2003). Drainages 1, 2, 3, 4 and 5 flow into and are tributaries to Bailey Creek. Tr. II-29 (Martin); CX 56 (Oct. 2003); CX 87, Figure 2 (Oct. 2003).

ALJ Moran correctly rejected Respondent's attempt to rebut the foregoing evidence. Respondent's assertion that "non-hydric non-wetland soils bordered the waterbodies (called drainages 1-7)" is unsupported. As set forth above, at most Respondent has established the

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<sup>16</sup> To the extent Respondent asserts that drainage 5 is not on the Smith Farm property, that is irrelevant. For that matter, Respondent's complaint that Mr. Stokely approximated the Site boundaries rather than using precise surveys of the ownership boundaries also is irrelevant. Nothing in the CWA or *Rapanos* suggests that CWA jurisdiction is dictated by the metes and bounds of property ownership. In this case, the evidence shows that the wetlands in the northeast quadrant of the site extended eastward beyond the property boundary and physically abut and drain to drainage 5. Remand tr. 255 (Stokely). Respondent's own witnesses agree that the analysis should consider the overall wetland complex and not be limited by property ownership boundaries. Remand tr. 1608-09 (Pierce); see also Remand tr. 999 (Straw) (wetlands and hydrology do not generally stop at property boundaries).

presence of small inclusions of non-hydric soils (no more than 25 feet from hydric soils) within a larger wetland area. Respondent has nowhere established that the non-hydric soils inclusions form a barrier between the wetlands and the receiving waters. To the contrary, a mapping of the non-hydric samples testified to by Dr. Pierce (orange dots on CX 444 (May 2007)) and those confirmed by Mr. Parker (white dots on CX 443 (May 2007)) show that their samples were concentrated in only a few locations and do not support Respondent's characterization of a "band of uplands" (Respondent's brief at 34) disrupting the continuous surface connection between the wetlands and the receiving waters. Respondent tries to mask its lack of proof with a series of statements that taken together mischaracterize the record in an effort to make the Board believe that there was a band of non-hydric soils between the Smith Farm wetlands and the drainages. *See* Appeal Brief at 32. As set forth above, when the location of the soils samples and other facts in the record (including Dr. Pierce's failure to describe the locations of the hydric soils he found) are reviewed, that is simply not the case.

Respondent's attempt to undermine Mr. Stokely's testimony is more mischaracterization and exaggeration. Respondent claims that ALJ Moran erred in accepting Mr. Stokely's evidence because, according to Respondent, Mr. Stokely "admittedly extended the wetlands on the Property past what the NWI showed without samples justifying his extension, R. Tr. At 144. This extension caused it to appear as if the wetlands were continuous to the waterbodies, which, was incorrect." Appeal Brief at 37. Reading the Appeal Brief, one would assume that the wetlands on the Smith Farm Site are nowhere near the drainages and that Mr. Stokely annotated an aerial photograph to make it look like there was physical adjacency between the Smith Farm wetlands and drainages. Reviewing the testimony and the exhibit, however, it is clear that is not what happened. A review of Respondent's expert Mr. Wolfe's annotation of the NWI shows that the wetlands are throughout the Site and physically adjacent to the drainages. Moreover, a

comparison of Mr. Stokely's wetlands boundary and Mr. Wolfe's (based on the NWI) shows that they are largely in agreement, with the exception of one very small area at the far west corner of the Site. Compare RX36A (Oct. 2003) (Wolfe Exhibit) & Tr. V-10-11 (Wolfe), with CX 45 at EPA 831-832 (Oct. 2003) (Stokely exhibit) & Tr. II-137-38 (Stokely). This was no "gotcha" by Respondent -- Mr. Stokely had explained *on direct examination in 2003* his reasoning for extending that wetland line based on his interpretation of aerial photographs. Tr. II-137-38 (Stokely). More importantly, a comparison of the exhibits demonstrates that Mr. Stokely's aerial photograph interpretation did not create the impression of an adjacency that otherwise did not exist. Accordingly, ALJ Moran was correct in noting the discrepancy between Mr. Stokely's interpretation and the NWI, but he correctly concluded that the discrepancy related only to a small portion of the Site and it did not affect the overall analysis of the relationship between the wetlands on the Site and the receiving waters.<sup>17</sup>

To the extent Respondent is arguing that there is no jurisdiction because a portion of drainage 6/7 flows through non-hydric soils as it leaves the Site, that assertion is both irrelevant and untrue. Nothing in either the Scalia opinion nor in Justice Kennedy's concurring opinion base CWA jurisdiction on whether a tributary flows through hydric soils. Moreover, Respondent is incorrect about drainage 6/7. At the risk of imposing some clarity on Respondent's argument, Respondent appears to base its argument on soil samples taken by Dr.

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<sup>17</sup> Respondent's other attempts to impugn Mr. Stokely's testimony (Appeal Brief at 37) are equally misleading. Mr. Stokely did not mislabel where land was in relation to water or move things around the Smith Farm property. The testimony cited by Respondent is merely that Mr. Stokely used an approximate area of analysis rather than precise metes and bounds of the property line. That he did so is irrelevant and does not change his analysis, as what should be considered is the wetlands complex, not artificial property boundaries. Remand tr. 1608-09 (Pierce); *see also* Remand tr. 999 (Straw) (wetlands and hydrology do not generally stop at property boundaries). Further, Mr. Stokely did not admit that his georeferencing generally was "flawed," but rather that it could have been done better on a particular map. Finally, Respondent's complaint that Mr. Stokely "marked" drainages on an exhibit as solid blue lines to indicate perennial streams completely misstates the record. When the cited transcript pages are reviewed, it is clear that Mr. Stokely testified that he utilized a digital exhibit generated by the USGS in which USGS (NOT Mr. Stokely) depicted certain waterbodies as solid rather than broken blue lines. A review of Mr. Stokely's testimony and exhibits, and indeed every part of the record offered by Complainants demonstrates that neither Complainants nor Mr. Stokely ever asserted that the drainages on the Smith Farm Site flow twelve months per year.

Pierce. As previously noted, however, Dr. Pierce's soil sampling is misleading because he neither recorded the number of, nor identified the location of, samples points where he found hydric soils. Remand tr. 1620 (Pierce). Moreover, while Dr. Pierce allegedly found non-hydric soils near the drainage 6/7 tributary to Quaker Neck Creek, his samples do not support his assertion that the tributary flows through non-hydric soils. Mr. Martin sampled slightly closer to the tributary and found hydric soils. Remand tr. 464-65 (Martin); CX 330 (May 2007) (depicting the soil sample); Remand tr. 1894-95 (Martin). While Respondent attempts to discredit Mr. Martin's sampling (Appeal Brief at 8, n. 4), Respondent's own expert, Mr. Needham, testified that the tributary formed by drainages 6/7 flowed through wetlands -- not uplands -- as it exited the Site, i.e., precisely where Dr. Pierce says that it flows through non-hydric soils, providing yet another unreconciled conflict among Respondent's experts. Tr. V-227 (Needham).<sup>18</sup>

Respondent's proposed findings of fact include findings that bear no obvious relationship to the arguments in the narrative portion of Respondent's brief. To the extent Respondent seeks through its proposed findings of fact, however, to persuade the Board that a band of drained hydric soils separated the wetlands from the waterbodies (*See* Appeal Brief at 13-14, Respondent's proposed findings of fact HHH and JJJ), that assertion also is unsupported.<sup>19</sup>

Respondent infers solely from the existence of Drainage 6/7 that Drainage 6/7 must have drained the adjacent wetlands on either side of it. Respondent's proposed finding that there were drained

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<sup>18</sup> In 2001, Mr. Needham prepared a wetland delineation of the Site, which was admitted in October 2003 as RX 36. Most of RX 36 generally is not helpful in locating wetlands on the Site prior to the discharges at issue because the exhibit is largely based on hydrology data taken from wells installed to monitor post-ditching hydrology. Tr. V-228 (Needham). RX 36, however, does incorporate soil samples taken by Mr. Needham in the western portion of the Site. RX 36 specifically depicts where Mr. Needham identified the line separating non-hydric soils from hydric soils in the western portion of the Site in the area of drainage 6/7. (The non-hydric soils are outlined in green and labeled with a "U" (for "upland").) Dr. Pierce's non-hydric soil samples coincide with the area of non-hydric soils identified by Mr. Needham. Mr. Needham's samples, as reflected on RX 36, demonstrate that the tributary itself, however, actually flowed in a narrow band of wetlands -- an area not sampled by Dr. Pierce, but where Mr. Martin sampled. RX 36 (Oct. 2003); Tr. V-226-27 (Needham) (the wetland/upland line drawn in green on RX 36 represents the divide between hydric and non-hydric soils). So, Dr. Pierce's soil samples, even if accurate (which is questionable) do not demonstrate that the tributary formed by drainages 6/7 flowed through non-hydric soils.

<sup>19</sup> In contrast to the testimony of Dr. Pierce and respondent's other argument, this position concedes the presence of hydric soils.

hydric soils suffers other fatal flaws. First, the *Corps' 1987 Manual* states explicitly and in italics that “*NOTE: the mere presence of drainage structures in an area is not sufficient basis for concluding that a hydric soil has been drained; such areas may continue to have wetland hydrology.*” CX 29 at page EPA 0567 (Oct. 2003) (emphasis in original); see also Remand tr. 1645 (Pierce). Neither the Scalia opinion in *Rapanos*, nor Justice Kennedy’s concurring opinion purports to strike or overturn the regulatory definition of “wetlands” or to address or modify the method for identifying wetlands described in the *Corps' 1987 Manual*. See 547 U.S. at 761-62 (Kennedy, J. concurring in the judgment). Thus, the *1987 Corps Manual* precludes Respondent’s reliance merely upon the presence of tributary 6/7 itself to establish a “break” between the wetlands and tributary 6/7.

Respondent’s witnesses testified that they relied upon a Draft Regional Guide Book for Applying the Hydrogeomorphic Approach to Wet Hardwood Flats on Mineral Soils in the Coastal Plain of Virginia (“Draft Guide Book”) prepared by Dr. Kirk Havens of the Virginia Institute for Marine Sciences. Respondent, however, did not enter the draft Guide Book into evidence. The testimony makes clear that the Draft Guide Book supports only the proposition that a drainage feature such as a ditch may alter adjacent hydrology; it does not support Respondent’s assertion that the drainage feature would remove adjacent hydrology, and the Draft Guide Book also specifically states that further calibration and refinement of the drainage variable (not performed by Respondent) is necessary before drawing conclusions. Remand tr. 1081 (Straw) (quoting Draft Guide Book). Respondent did not perform this further calibration. The available monitoring well data for the Smith Farm Site undermines Respondent’s drained hydric soils theory. There is no baseline monitoring well data showing Site conditions prior to Respondent’s construction of the 1998-1999 ditches designed to drain the Site. While, it is impossible to separate the effect on Site hydrology of the 1998-1999 ditches from baseline



conditions, Remand tr. 1947 (Martin), Respondent's well data taken after its construction of the 1998-1999 ditches shows no uniform effect on hydrology. That is, even *after* Respondent installed the ditches in 1998-1999, a number of wells closest to tributary 6/7 continued to demonstrate wetland hydrology. CX 439 (May 2007); CX 445 (May 2007). Tr. V-228-29 (Needham).<sup>20</sup> Thus, the well data undermines Respondent's assertion that tributary 6/7 acting *by itself* had removed wetland hydrology from the adjacent wetlands. Physical observations of the surface also show that tributary 6/7 was not removing wetland hydrology. Dr. Whigham observed ponded water near the 6/7 drainage and drew the logical conclusion that if tributary 6/7 were truly removing adjacent wetland hydrology, one would not expect to see pooled or standing water at the surface immediately next to tributary 6/7. Remand tr. 1710, 1762-63 (Whigham).<sup>21</sup>

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<sup>20</sup> Respondent's proposed findings that wetland hydrology can be established only when there is saturation to the soil surface (as opposed to within twelve inches of the surface) and that the growing season begins only when the trees are bearing leaves (Appeal Brief 9-10) also should be rejected. Longstanding Corps guidance states that wetland hydrology can be established where there is water to within twelve inches of the soil surface for at least 12.5% of the growing season. CX 29 at EPA 0364 (Oct. 2003); Remand tr. 631 (Martin). The Corps' guidance incorporated into the Corps 1987 Manual (which was *not* questioned in *Rapanos*), is consistent with the regulatory definition of a wetlands as "those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions." 40 C.F.R. § 232.2. The twelve inches in the Corps guidance approximates the root zone, and therefore is consistent with the plant-based regulatory definition of wetlands; the part of the plant most likely to be affected by soil saturation is the root. CX 29 at EPA 0364 (Oct. 2003); Remand tr. 631 (Martin). Respondent's insistence that the growing season does not start until leaf-out is equally specious. As Mr. Martin explained, growing season is calculated based on Corps guidance using a 28 degree Fahrenheit killing frost free period. Remand tr. 1901-04 (Martin). The growing season is based on microbial activity in the soil, and the presumption is that microbes are active so long as the temperature at a depth is five degrees Centigrade or higher. The 28 degree Fahrenheit temperature serves as a proxy for soil temperature data. The microbe activity reflects whether growth is actually taking place. Remand tr. 1934 (Martin). Thus, it is appropriate to start the growing season before full leaf out. Regardless, any challenge to the manner by which the Corps identifies wetlands is beyond the scope of this hearing. The remand was limited to the effect of *Rapanos*. Nothing in *Rapanos* raised any question regarding the 1987 Corps Manual or its associated guidance.

<sup>21</sup> Respondent tries to draw conclusions from the presence of a tulip poplar at a particular location as indicative of draining. Respondent cannot extrapolate from a single or even several tulip poplars to conclude that drainage 6 removed wetland hydrology from adjacent soils along its length. The presence of a particular tulip poplar speaks only to that tree's location. Similarly, Respondent's root ball analogy is, at best, inconclusive. Respondent measured tipped up trees in one area. By contrast, Complainants' witnesses uniformly stated that the roots of tipped trees they observed throughout the Site were flat, or pancaked, indicating the presence of wetland hydrology. *See, e.g.*, Remand tr. 641-42 (Martin); Remand tr. 1708-09 (Whigham). Complainants' witnesses also noted shallow-rooted living trees. CX 26 & 28 (Oct. 2003); CX 314 (May 2007); Remand tr. 360-61, 535 (Martin)

C. Drainages 1-7 are tributaries to traditionally navigable waters

There is no real dispute that ALJ Moran correctly held that the waterbodies that convey flow from the Smith Farm Site are tributaries to traditionally navigable waters.<sup>22</sup> ALJ Moran described the connection as "overall, the affected Site is that of wetlands connected via drainage systems and eventually to navigable waters." Decision Upon Remand at 21. In addition to Complainants' evidence ALJ Moran also noted numerous instances in which Respondent's experts at the remand hearing made statements that support the proposition that surface water from the Site finds its way to traditionally navigable waters. *E.g.*, Decision on Remand at 29; 41, n. 67.

This finding (made by ALJ Charneski as well as ALJ Moran) is supported by the testimony of Respondent's expert, Mr. Wolfe, Complainants' witnesses Messrs. Stokely and Martin, and numerous maps and aerial photographs. Respondent's expert Mr. Wolfe testified that the waterbodies flowing away from the Smith Farm Site (drainages 1-7) flow to downstream navigable-in-fact waters. Tr. V-11-12 (Wolfe). Respondent agrees that "[t]he Smith Farms Property does contain a network of ditches that connect eventually, during times of flow, to Drum Point Creek [sic] and Bailey Creek." Respondent's initial post-remand hearing brief at 7.

Drainages 6 and 7 are tributaries to traditionally navigable waters. Drainage 7 flows into drainage 6 (CX 279 (May 2007) (juncture of drainages 6 and 7) and they then collectively flow to a pond, which then discharges to a stream that flows through a culvert under Shoulder's Hill Road at the northwest portion of the property, and forms a tributary to Quaker Neck Creek (hereafter "drainage 6/7 tributary to Quaker Neck Creek").<sup>23</sup> Tr. 464 (Martin); CX 308 (May

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<sup>22</sup> A "tributary" is "a stream feeding a larger stream or lake." *Webster's Third New International Dictionary* 2441. A "stream" is "a body of running water flowing in a channel on the surface of the ground." *Id.* at 2258.

<sup>23</sup> Dr. Cahoon, one of Respondents' expert witnesses, photographed water flowing through a "stream" (Dr. Cahoon's term) off the Site to tributaries to Quaker Neck Creek and Bailey Creek. RX 28 (Oct. 2003); 29 (Oct. 2003).

2007); CX 328 (May 2007). After the drainage 6/7 tributary to Quaker Neck Creek flows approximately 2600 feet from the Smith Farm Site, it joins with other tributaries to form Quaker Neck Creek. At that location (approximately 2600 feet or one-half a mile from the Smith Farm Site), Quaker Neck Creek is influenced by tides and thus meets the definition of a traditionally navigable water.<sup>24</sup> Tr. II-30-31 (Martin); CX 56; CX 102Y, 102Z, 102AA. Quaker Neck Creek flows to Bennett's Creek, which then flows to the Nansemond River, which in turn flows to the James River and the Chesapeake Bay. Tr. II-24-26 (Martin). There is no dispute that the tidal portions of Quaker Neck Creek (located 2600 feet downstream from the Smith Farm Site ) and Bailey Creek (located 4200 feet downstream from the Smith Farm Site) are traditionally navigable waters. Tr. V-78-79 & 82-83 (Wolfe). Accordingly, Quaker Neck Creek is a tributary to Bennett's Creek, the Nansemond River, and the Chesapeake Bay. The Corps maintains navigation channels in the Nansemond River. Tr. II-24 (Martin). It is undisputed that the Chesapeake Bay, the James River, the Nansemond River, Bennett's Creek and the tidal portions of Quaker Neck Creek are traditionally navigable waters. Tr. V-78-79 (Wolfe).

Drainages 1, 2, 3, 4 and 5 contribute flow to and are tributaries to Bailey Creek.

Drainages 1-5 are depicted on the 1994 USGS topographic map as broken blue lines (indicating intermittent flow) on and near the Smith Farm Site. CX 87, Figure 20 (Oct. 2003). Drainages 1-5 join with other tributaries approximately 4,200 feet downstream from the Smith Farm Site to form Baily Creek. At this juncture, Baily Creek is influenced by tides and is thus a traditionally navigable water. Tr. II-32 (Martin); CX 56; CX 102o. Bailey Creek flows to the Western Branch of the Elizabeth River, which in turn flows into the James River and the Chesapeake Bay. The Corps has issued permits for docks or marinas on portions of Bailey Creek and maintains a navigation channel in the Western Branch of the Elizabeth River. Tr. II-25 (Martin). It is

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<sup>24</sup> See 33 C.F.R. § 328.3(a)(1) & Part 329. Respondent's witnesses concede that waters influenced by tides are traditionally navigable waters. Remand tr. 1587 (Pierce).

undisputed that the Chesapeake Bay, the James River, the Western Branch of the Elizabeth River and the tidal portions of Bailey Creek are navigable waters. Tr. V-82-83 (Wolfe).

D. Drainages 1-7 are Relatively Permanent Waters Forming Geographic Features

ALJ Moran's finding (Decision Upon Remand at 43) that the drainages that flow from the Smith Farm Site form tributaries to traditionally navigable waters and are relatively permanent waters forming geographic features is well supported and easily satisfies the preponderant evidence standard. Most of the Smith Farm drainages were present, visible in historic aerial photographs, and mapped as flowing waterbodies by the U.S. Geological Service (USGS) for decades prior to the activities at issue. In addition, the evidence shows that these drainages convey flow at least part of every non-drought year.

Drainages 6 and 7 have been present and mapped as geographic features conveying flowing water for at least half a century. Respondents agree that the "channel alignment [in the western portion of the Site, including Drainages 6 and 7] that exists as of 2007 (absent the sediment retention pond) is the same as was excavated prior to April 9, 1949." RX 74 at page 46 (May 2007). A portion of drainage 6 flowing west from the Smith Farm Site under a railroad track (that still exists today) to the drainage 6/7 tributary to Quaker Neck Creek is visible in an aerial photograph from 1937 (CX 125, Figure 3 (May 2007)) and depicted as a flowing waterbody on a USGS map derived from surveys published in 1920 (CX 125, Figure 2 (May 2007)). Remand tr. 87-90. It also is depicted as a flowing waterbody on the 1955 USGS topographic map and on aerial photographs dating back to 1949. CX 125, Figures 4-6 (May 2007); Remand tr. 81-87 (Stokely). The configuration of waterbodies, including drainages 6 and 7, conveying flow from the western portion of the Smith Farm Site has been depicted on historic USGS maps since at least 1965 and is visible on aerial photographs dating back to 1963. CX 125, Figures 7-8 (May 2007); Remand tr. 76- 81 (Stokely).

The waterbodies conveying flow east from the eastern portion of the Smith Farm Site, including drainages 1, 2, 3, 4, 5, and the eastern portion of drainage 6, have been depicted on historic USGS maps since at least 1965 and are visible on aerial photographs dating back to 1963. CX 125, Figures 7-8 (May 2007); Remand tr. 76- 81 (Stokely). Drainages 3, 4 and 5 are depicted on the 1955 USGS map. CX 125, Figures 5-6; Remand tr. 83-84 (Stokely). Although not depicted on the 1955 map, drainage 1 is visible on a 1953 aerial photograph. CX 125. Figure 5 (May 2007); Remand tr. 85 (Stokely). Drainages 1, 2 and 4 are visible in a 1937 aerial photograph, and Drainage 5 appears on the 1920 USGS topographic map. CX 125, Figures 2-3 (May 2007); Remand tr. 89-91 (Stokely).

Respondent has offered no evidence to rebut the historic presence in aerial photographs and as geographic features mapped by U.S.G.S. of waterbodies from the Smith Farm Site conveying water to traditionally navigable waters.

The preponderance of the evidence in this case also demonstrates that the tributaries to Quaker Neck Creek and Bailey Creek that flow from the Smith Farm Site (i.e., drainages 1-7) flow at least part of every non-drought year. While Respondent places much emphasis on characterization of those waters as "intermittent," Respondent never points to any legal definition of that term (and indeed cannot do so, as Justice Kennedy found the point irrelevant (547 U.S. at 770 (Kennedy, J. concurring in the judgment)) and Justice Scalia, while using the term, specifically declined to define it. (547 U.S. at 732-33, n. 5 (Scalia, J.))). The evidence shows that these waterbodies convey flow for some portion of every year.

This characterization of water flowing through drainages 1-7 for part of each year, was accepted by Respondent's expert Mr. Wolfe, who testified in the October 2003:

Q: Now, when you talk about intermittent water bodies, I think you talked about them being dry at some point in the year?

A: Yes, ma'm.

Q: By definition, doesn't that also mean they are wet at some point in the year?

A. Yes, ma'am.

Tr. V-103-04 (Wolfe).

Mr. Martin from the Corps testified from personal observation. Because he is the project manager for numerous permit applications in the area, as well as for the Smith Farm Site itself, Mr. Martin has had numerous opportunities over the years to observe the tributaries flowing from the Smith Farm Site to Quaker Neck Creek and Bailey Creek. Remand tr. 328-29 (Martin). During the May 2007 hearing, Mr. Martin testified to his observations regarding flow in the tributaries to Quaker Neck Creek and Bailey Creek that flow from the Smith Farm Site. Mr. Martin observed positive flow in the drainage 6/7 tributary to Quaker Neck Creek on January 6, 1999, March 16, 1999, March 31, 1999, April 5, 1999, April 19, 1999, September 10, 1999, March 19, 2003, December 18, 2006, January 24, 2007, and April 18, 2007. Remand tr. 330 (Martin). Mr. Martin did not observe flow on May 29, 2002. Remand tr. 331 (Martin).

On the east side of the Smith Farm Site, Mr. Martin also testified that he saw flow in drainages 1, 2 and 3 on August 3, 1999, February 8, 2000, December 18, 2006, January 24, 2007, and April 18, 2007. He did not observe flow in those drainages on July 15, 1999. Remand tr. 340-41 (Martin). Mr. Martin took photographs of the area south of the Smith Farm site south of the junction of drainages 2 and 3 demonstrating flow. Remand tr. 341-43 (Martin); CX 324 (May 2007); CX 325 (May 2007).

Mr. Martin observed flow in drainages 4 and 5 on March 17, 1998, August 3, 1999, November 18, 1999, August 22, 2005, June 2, 2006, August 23, 2006, December 18, 2006, January 24, 2007, and April 18, 2007. He observed no flow in those drainages on May 29, 2002.

Complainants' exhibits 322 (May 2007) and 323 (May 2007) depict positive flow in a tributary formed by drainages 4 and 5. Remand tr. 345-48 (Martin).

As ALJ Moran observed, the record is replete with photographs of the various drainages. The scores of photographs in the record demonstrate that the size and flow of the waterbodies conveying water from the Smith Farm Site are far more substantial than a "wash," a "transitory puddle," or "ephemeral flows," and document flow in each calendar quarter. *E.g.*, Decision on Remand at 20, n. 31, 22-23, 44.

In addition, Mr. Martin walked along the drainage 6/7 tributary to Quaker Neck Creek from a point less than one hundred yards from where it it departs the Smith Farm Site and followed its flow to the tidal portion of Quaker Neck Creek. Mr. Martin photographed this tributary at various points, and he observed the presence of an ordinary high water mark from the point where the stream flows out of the pond on the Smith Farm Site to the point in which it flows to the tidal portion of Quaker Neck Creek. Tr. II-48-53, 56-58 (Martin); CX 102I, 102J, 102K, 102L, 102M, 102N, 102W, 102X, 102BB (Oct. 2003); *see also* Remand tr. 515-16 (Martin).<sup>25</sup> The presence of a continuous ordinary high water mark is one means for identifying regular flow. *See, infra*, pp. 39-40 & n. 31. Mr. Martin also photographed drainages 1-5 at various points downstream of the Site and observed the presence of a continuous ordinary high water mark to the point where Bailey Creek becomes influenced by tides. Tr. II-40-48, 53-56 (Martin); CX 102A, 102B, 102C, 102D, 102E, 102F, 102G, 102H, 102P, 102Q, 102R, 102S (Oct. 2003

Mr. Martin's testimony is supported by other evidence. Drainages 1-7 have been depicted as intermittently flowing geographic features by the U.S.G.S. since at least 1965 (and many are depicted before then). For purposes of UGSG mapping, "intermittent" streams are streams that

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<sup>25</sup> ALJ Charneski specifically credited Mr. Martin's testimony as to the presence of an ordinary high water mark. Initial Decision at 29.

flow part of the year. Remand tr. 67 (Stokely). In addition, local transportation authorities have constructed culverts to accommodate these flows. Culverts under nearby roads have been constructed to accommodate flows from the drainages departing the Smith Farm Site. *See* Remand tr. 341-42 (Martin) & CX 324-325 (May 2007) (culvert under Portsmouth Blvd. accommodating flows from drainages 2 and 3); CX 102A (Oct. 2003) & Tr. II-39-40 (Martin) (same); Remand tr. 347-48 (Martin) & CX 322-23 (culvert under roadway accommodating flows from drainages 4 & 5); CX 102B (Oct. 2003); CX 102C (Oct. 2003); Tr. II-40-42 (Martin) (same); Tr. V-44-46 (Wolfe) & photograph 331 from RX 34 (Oct. 2003) (culvert under railroad tracks accommodates flow from drainages 6/7). *See also* Tr. V-51-52 (Wolfe) (referencing various culverts through which drainages from the Site flow). *See also* CX 88 (Oct. 2003) & Tr. II-36-37 (Martin) (City of Chesapeake Drainage Study shows portions of Smith Farm draining to Bailey Creek).

Respondent offers virtually no evidence to rebut Complainants' showing that the waterbodies conveying flow from the Smith Farm Site flow at least some portion of every year. To the extent Respondent relies on the testimony of Mr. Wolfe that he had observed each waterway dry (Appeal Brief at 28), Respondent fails to disclose that Mr. Wolfe's observations were made at the end of a drought. Tr. V-103-05 (Wolfe); Tr. V-141-42 (Martin). Of course, the Scalia opinion specifically stated that it did not exclude waters that dry up in times of drought. *See Rapanos*, 547 U.S. at 732-33, n. 5.

That leaves Respondent arguing the testimony of Mr. Carl Duncan. ALJ Moran correctly gave little weight to Mr. Duncan's claims regarding flow in the drainages. Mr. Duncan testified only very generally that he had seen drainages dry at various times of the year. By his own account, Mr. Duncan's purpose in visiting the Smith Farm Site over the years was *not* to observe whether or not the waterbodies leaving the Site conveyed flow, but rather to hunt and because he



has "been sort of the caretaker, security provider, and just checking the fields for damage; again, part of my job is some amount of maintenance, road maintenance, that sort of thing, and it's a good place to take a walk." Remand tr. 1866-68 (Duncan). Until he was asked for purposes of this hearing, there was simply no reason for Mr. Duncan during his ambles through the woods to take note of whether or not the channels were conveying flow. The same flows apparently unobserved by Mr. Duncan (as well as by Mr. Boyd, whom ALJ Moran specifically found to lack credibility<sup>26</sup>), were sufficiently substantial to be identified by USGS since at least 1965, CX 125 (May 2007) and sufficiently substantial that culverts were constructed to accommodate the flow. *See, supra*, pp. 34-35. ALJ Moran correctly took judicial notice of the fact that culverts cost money to build and are built to accommodate flow. Decision Upon Remand at 23.

**VI. THE WETLANDS AND WATERS ON THE SMITH FARM SITE SATISFY THE STANDARD DESCRIBED IN THE SCALIA OPINION**

ALJ Moran correctly held that the above-summarized preponderant evidence satisfies the standard described in the Scalia opinion. The wetlands on the Smith Farm Site have a "continuous surface connection" (547 U.S. at 740-42 (Scalia, J.)) to waters on the Site that are themselves "waters of the United States" because they are "relatively permanent, standing or continuously flowing bodies of water" that form geographic features (*id.* at 739 (Scalia, J.)), and that are connected to traditional navigable waters (*id.* at 742 (Scalia, J.)).

Respondent tries to rebut this conclusion by (1) repeating the word "intermittent" in hopes that the word will ward off jurisdiction; (2) creating standards of proof that are nowhere found in the Scalia opinion; and (3) cherrypicking the record to conjure a break between the wetlands on the Smith Farm Site and the adjacent waterbodies.<sup>27</sup>

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<sup>26</sup>Decision Upon Remand at 38-39.

<sup>27</sup> Respondent also resorts to attacks on ALJ Moran's neutrality. Nothing in ALJ Moran's opinion, however, is indicative of any "harsh" criticism of the Scalia opinion or a conclusion that ALJ Moran "unilaterally" decided that the Scalia opinion is incorrect. ALJ Moran's summary of the Scalia opinion consists largely of quotations from the

Respondent tries to make something of the fact that the waters on the Smith Farm Site do not flow twelve months per year.<sup>28</sup> That these waters do not flow twelve months per year, however, does not mean that they do not satisfy Justice Scalia's standard. Justice Scalia recognized that waters that do not flow continuously are within CWA jurisdiction:

By describing "waters" as "relatively permanent," we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months--such as the 290-day, continuously flowing stream postulated by Justice Stevens' dissent (hereinafter the dissent), *post*, at 800. Common sense and common usage distinguish between a wash and seasonal river.

547 U.S. at 732, n.5.

Respondent keeps repeating the term "intermittent," as though the word by itself will somehow exclude CWA regulatory jurisdiction. Respondent, however, overreaches because Justice Scalia made amply clear that the term "intermittent," insofar as application of his standard is concerned, has no regulatory import:

Though scientifically precise distinctions between "perennial" and "intermittent" flows are no doubt available, see, e.g., Dept. of Interior, U. S. Geological Survey, E. Hedman & W. Osterkamp, Streamflow Characteristics Related to Channel Geometry of Streams in Western United States 15 (1982) (Water-Supply Paper 2193), we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.'

*Id.*; see also 547 U.S. at 770 (Kennedy, J., concurring in the judgment) (rejecting any requirement that limits jurisdiction to waters with continuous flow).

Footnote 5 does not represent an exception to the Scalia opinion's standard, but rather a clarification of it. In footnote 5, the Scalia opinion clarifies that the term "relatively permanent" does not require year-round flow, but is intended to distinguish a "wash" from a "seasonal

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opinion itself and a foray to the dictionary which is certainly appropriate in light of Justice Scalia's reliance on the dictionary as well. Indeed, while casting these aspersions, Respondent's brief fails to point to any specific language in ALJ Moran's Decision Upon Remand to support its criticism.

<sup>28</sup> Complainants have never disputed this point.

river.”<sup>29</sup> By stating that it had “no occasion in this litigation to decide exactly when the drying up of a stream bed is continuous and frequent enough to disqualify the channel as a ‘wate[r] of the United States,’” the Scalia opinion clarifies that “channels” or “stream beds” that dry up for some period of time (“continuous ... enough”) with some degree of regularity (“frequent enough”) may be waters of the United States. See *United States v. Moses*, 496 F.3d 984, 990-91 (9<sup>th</sup> Cir. 2007), *cert. denied*, 128 S. Ct. 2963 (2008) (A seasonally intermittent stream that empties into a river that is a water of the United States is itself a water of the United States. Justice Scalia's opinion must be read in context of “prefatory definitional statement” in footnote 5; in *Rapanos*, Justices unanimously agreed that streams that flow seasonally can be waters of the United States).

Respondent's reliance on footnote 6 of Justice Scalia's opinion is equally unavailing. That footnote, combined with the accompanying text, distinguishes from the term “stream” only “transitory puddles” and “ephemeral flows.” 547 U.S. at 733 (Scalia, J.).

Perhaps recognizing that intermittency does not exclude a water from CWA jurisdiction, Respondent argues that Complainant must establish continuous, positive flow either through direct observation or stream gauges each day for a period of 90-290 days. Such a standard of proof is not found in Justice Scalia's opinion, which relies simply on “common sense” and “common usage” to distinguish between a “wash” (which is not jurisdictional) and a seasonal river (which is). 547 U.S. at 732-33, n. 5. The Scalia opinion does not define the term

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<sup>29</sup> Indeed, this is the only interpretation that makes sense. The Scalia opinion refers to “relatively permanent, standing or continuously flowing” bodies of water. 126 S. Ct. at 2225. Respondents apparently interpret this phrase as requiring “relatively permanent standing water” or “relatively permanent continuously flowing water.” Respondents' interpretation results in a tautology, as the terms “relatively permanent” and “continuously flowing” are redundant. Indeed, it is difficult to imagine the converse, *i.e.*, a continuously flowing body of water that is somehow not relatively permanent. Thus, the term “relatively permanent” does not modify the term “continuously flowing” and must have some independent meaning.

"seasonal," assigns no specific number of days of flow, and does not limit proof to daily direct observations or stream gauges.<sup>30</sup>

ALJ Moran correctly relied on the preponderant evidence. Mr. Martin's observations of flow are consistent with that of Respondent's expert, Mr. Wolfe, who works in the local area as a wetlands consultant testified that they flow part of the year and contribute flow to traditionally navigable waters. Tr. V-103-104 (Wolfe). As ALJ Moran noted, in addition to Mr. Martin's observations of positive flow, the scores of photographs in the record demonstrate that the size and flow of the waterbodies conveying water from the Smith Farm Site are far more substantial than a "wash," a "transitory puddle," or "ephemeral flows." *E.g.*, Decision on Remand at 20, n. 31, 22-23, 44. Indeed, one of Respondent's expert witnesses referred to drainage 6/7 as a "stream." RX 28 & RX 29 (Oct. 2003) (expert reports of Dr. Cahoon). In addition to observing flow, Mr. Martin documented the presence of an ordinary high water mark. *See, supra*, p. 34. While Justice Scalia expressed doubt that the presence of an ordinary high water mark by itself is sufficient to establish CWA jurisdiction, it remains that an ordinary high water mark is a physical characteristic that provides evidence of regular flow. *See* 33 C.F.R. § 329.11(a)(1) ("The 'ordinary high water mark' on non-tidal rivers is the line on the shore established by the fluctuations of water and indicated by physical characteristics such as a clear, natural line impressed on the bank; shelving; changes in the character of soil; destruction of terrestrial vegetation; the presence of litter and debris; ....); *id.* § 328.3(e).<sup>31,32</sup>

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<sup>30</sup> Nor is Respondent's efforts to characterize the guidance to the field issued by EPA and the Corps availing. That guidance did *not* interpret Justice Scalia's opinion to require at least three months of flow, but rather noted that Justice Scalia referred to seasonal flow and that a season is "typically" three months. *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* (Dec. 2, 2008) (avail. [www.epa.gov/owow/wetlands/guidance/CWAwater.html](http://www.epa.gov/owow/wetlands/guidance/CWAwater.html)). *See also Moses*, 496 F.3d at 985 (flow during spring run-off that typically occurs two months per year is sufficient).

<sup>31</sup> *Cf. Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 583 (Ct. Cl. 1975) ("Judicial decisions indicate that the ordinary high-water mark can be variously defined -- *e.g.*, as the line where the water stands sufficiently long to destroy vegetation below it (*Kelley's Creek and Northwestern R.R. v. United States*, 100 Ct. Cl. 396, 406 (1943)); or as the line below which the soil is so usually covered by [\*332] water that it is wrested from

Mr. Martin's observations are consistent with the aerial photographs showing these waterbodies are sufficiently substantial to be viewed from an airplane. It is also consistent with the evidence that these waterbodies have been visible on aerial photographs for decades and with the USGS mapping, which has depicted these flowing waterbodies on the Smith Farm Site as geographic features flowing to downstream traditionally navigable waters for more than three decades prior to the activities at issue. While nothing in the Scalia opinion requires depiction on USGS maps, it is difficult to imagine a better example of a relatively permanent geographic feature than one that has been identified by USGS as conveying flow for decades. The evidence is more than sufficient to establish drainages 1-7 as relatively permanent waterbodies forming geographic features and conveying flow to downstream traditionally navigable waters for part of every non-drought year.

Respondent's argument that there is no continuous surface connection between the Smith Farm wetlands and the flowing waters on the Site is equally unavailing. To the extent Respondent argues there is a "band" of non-hydric soils or drained hydric soils separating the wetlands from the receiving waters, those arguments are debunked *supra*, pp. 23-28.

#### **VII. THE WETLANDS ON THE SMITH FARM SITE SATISFY JUSTICE KENNEDY'S "SIGNIFICANT NEXUS" STANDARD**

Because the record demonstrates that the wetlands and tributaries on the Smith Farm Site perform and deliver functions that contribute to the physical, chemical and biological integrity of downstream traditionally navigable waters, ALJ Moran correctly held that these wetlands and

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vegetation and its value for agricultural purposes destroyed (*Harrison v. Fite*, 148 Fed. 781, 783 (8th Cir. 1906)); or as the line below which the waters have so visibly asserted their dominion that terrestrial plant life ceases to grow and, therefore, the value for agricultural purposes is destroyed (*Borough of Ford City v. United States*, 345 F. 2d 645, 648 (3rd Cir. 1965), *cert. denied*, 382 U.S. 902); or as the line below which the soil is kept practically bare of vegetation by the wash of the [\*\*\*19] waters of the river from year to year in their onward course (*State of Oklahoma v. State of Texas*, 260 U.S. 606, 632 (1923))).

<sup>32</sup> *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States and Carabell v. United States* 10-11 (Dec. 2, 2008) (avail. [www.epa.gov/owow/wetlands/guidance/CWAwater.html](http://www.epa.gov/owow/wetlands/guidance/CWAwater.html)).

waters satisfy Justice Kennedy's "significant nexus" standard. Decision Upon Remand at 46-54. Indeed, it is a measure of Respondent's lack of confidence in its position on this point that Respondent immediately follows this section of its Appeal Brief by urging the Board to adopt solely the Scalia standard and ignore Justice Kennedy's standard entirely (Appeal Brief at 49-51).

Complainants proved that the wetlands and tributaries on the Site perform and deliver the functions of flood storage (desynchronization), denitrification, and primary production through observation and documentation of field indicators of those functions. ALJ Charneski credited Mr. Martin's summary of these functions in the 2003 hearing:

What we're dealing with is a continuum. The wetlands on the Smith Farm site are seasonally saturated, inundated, high up in the landscape. They perform certain water quality related functions that bottom land hardwood swamps do [not], and vice versa.

For instance, the wetlands on Smith Farms, because of the seasonal wetting and drying, the periodic wetting and drying out are more likely to perform nitrification. The more inundated hardwood swamps might be more likely to allow for suspended sediments to settle out and absorb the metals and phosphorous.

From a habitat standpoint, which is an important function of a lot of wetlands, a bottom land hardwood swamp is more likely to support a different suite of wildlife species than a mineral flat forested wetland such as Smith Farms. A bottom land hardwood swamp might be more inclined to support beaver, mink, species of the nature; whereas, property like the Smith Farms might be more likely to support less aquatic species, certain salamanders, amphibians, some reptiles. And in terms of geotropical migratory birds, for instance, a place like Smith Farms would support a lot of ground nesting birds others might not. There's differences in terms of habitat types provided by the two different systems.

In addition, something like the Smith Farms is likely to prove valuable in terms of flood storage. Storing precipitation and then releasing it more slowly into the receiving streams, it may help contribute to base flow of those streams. I would view all of those as being important functions.

Initial Decision of ALJ Charneski at 42-43 (quoting Tr. V-138-40 (Martin). *See also id.* at 41 (quoting Tr. I-76-77 (Lapp)).

These are the very types of functions explicitly recognized by Justice Kennedy as comprising a significant nexus. Justice Kennedy recognized that hydrologic or ecologic

functions performed by wetlands create a significant nexus because these functions affect the integrity of other waters. In describing the types of hydrologic and ecologic functions that would create a significant nexus, Justice Kennedy specifically included slowing down the flow of surface runoff (flood storage or flow moderation) and filtration and purification. *See, e.g.*, 547 U.S. at 773-75. *See also id.* at 779 (Kennedy, J., concurring in the judgment) (“With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters – functions such as pollutant trapping, flood control, and runoff storage”); *id.* at 786 (Kennedy, J., concurring in the judgment) (“Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system.”).

The preponderance of the evidence demonstrates that the wetlands on the Smith Farm Site are performing the function of “flood storage” and “flow moderation.” The terms “flood storage” and “flow moderation” (also referred to as “desynchronization” (*see* Remand tr. 674 (Rhodes))) describe how the Smith Farm wetlands affect the flow (i.e., the physical integrity) in downstream traditionally navigable waters. As precipitation falls on the wetlands, the wetlands act like a sponge, absorbing and holding water and then releasing it slowly into receiving waters. Remand tr. 675 (Rhodes). This affects receiving waters by moderating the volume and velocity of flood peaks. Remand tr. 675-76 (Rhodes). *See also* Remand tr. 498 (Martin). This function also affects the base flow of the receiving waters. Remand tr. 678-79 (Rhodes). By moderating flood flow, the wetland reduces the energy of higher peak flows and prevents erosion or scouring of channels. *See* Remand tr. 679-80 (Rhodes).

Complainants' witnesses testified to and documented in photographs numerous field indicators<sup>33</sup> that the wetlands on the Smith Farm Site are performing flood storage and desynchronization, including forest structure, hummocky microtopography, and a scattering of small and large depressions holding ponded water. Remand tr. 419; 496-97; 648 (Martin); Remand tr. 676-78, 685-86 (Rhodes). *See, e.g.*, CX 280-283 (May 2007) & Remand tr. 400-405 (Martin) (photograph in southwest quadrant of Smith Farm Site south of southernmost ditch depicting extensive area of shallow ponding); CX 291 (May 2007) & Remand tr. 418-19 (Martin); (photograph near EPA plot point 1 showing small depression filled with water and woody matter representing temporary storage of water); CX 303, 305, 307 (May 2007) & Remand tr. 436 & 438-39 (Martin) (photographs of areas of standing water near EPA Plot Point 4); CX 348 & Remand tr. 479 (Martin) (ponded water in southwest quadrant of Site); CX 357 (May 2007) & Remand tr. 483 (Martin) (ponded water in the northeast quadrant of Site). Complainants' witnesses also measured microtopography at each sample location (CX 310 (May 2007)), and noted the Site's hummocky microtopography in 1999 (Tr. I-122 (Lapp); CX 24).

Complainants' witnesses also observed and documented evidence that the wetlands to which Respondent discharged on the Smith Farm Site perform denitrification, a type of water purification process that impacts the chemical integrity of downstream navigable waters. Denitrification occurs when microbes convert nitrates to nitrous oxide or atmospheric nitrogen. The source of nitrates at the Smith Farm Site is wet and dry atmospheric deposition, *i.e.*, airborne nitrogen particles that are deposited on the surface through rain or sometimes as dry deposition. Remand tr. 681-82 (Rhodes). It is well-established that areas within the Chesapeake Bay watershed, including the area around the Smith Farm Site, receive significant nitrogen through

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<sup>33</sup> There is a significant body of peer-reviewed research (referred to by some witnesses as "the literature") identifying functions performed by various classes of wetlands. *See* Remand tr. 490-92 (Martin); Remand tr. 664-67 (Rhodes). The literature correlates particular functions to "field indicators" that allow a site investigator to identify whether a wetland is performing certain functions based on the physical characteristics observed in the field. Remand tr. 491-92 (Martin); Remand tr. 666-67 (Rhodes); Remand tr. 669 & 672 (Rhodes).



atmospheric deposition and that nitrogen is a significant pollutant contributing to impairment of the Chesapeake Bay. Remand tr. 641 (Martin); Remand tr. 682-83 (Rhodes). When wetlands perform denitrification, that nitrogen is not transported downstream to traditionally navigable waters. Remand tr. 681 (Rhodes). By performing denitrification, the wetlands on the Smith Farm Site reduce the amount of nitrogen that otherwise would be transported downstream to the Chesapeake Bay and its tributaries.

One field indicator of denitrification is a "mottling" or splash of contrasting color (usually reddish or orange) in the soil. This field indicator was documented by Complainants' witnesses both in 2007 and in 1999. Remand tr. 411, 428-30, 498-500 (Martin); Remand tr. 681, 684-87 (Rhodes); CX 310 (May 2007) (soils descriptions noting mottles in soils); CX 26 at EPA 0317 & 0319 (Oct. 2003); CX 28 at EPA 356 & 358 (Oct. 2003). Complainants' conclusions are not based solely upon their own observations. Respondent's soils expert, Mr. Parker, also documented numerous instance of mottled soils, particularly during his initial site visits. RX 32 (Oct. 2003). Many of the hydric soil samples described by Mr. Parker in 2002 included descriptions of mottling. RX 32 (Oct. 2003); Remand tr. 1162-63 (Parker).

The preponderance of the evidence also indicates that the wetlands on the Smith Farm Site to which Respondent discharged perform the function of "primary production," which is the conversion of atmospheric carbon dioxide to organic plant matter that is transported by the tributaries to Quaker Neck Creek and Bailey Creek to traditionally navigable waters. Remand tr. 686 (Rhodes); Remand tr. 687-90 (Rhodes). Organic carbon is one of the lower rungs on the food chain and is used by lower trophic aquatic organisms which, in turn, are a food source for higher trophic organisms further downstream. Remand tr. 501 (Martin); Remand tr. 611-12 (Martin); Remand tr. 689 (Rhodes). Thus production and delivery of organic carbon support the ecologic integrity of downstream traditionally navigable waters.

Complainants' witnesses observed and documented field indicators of the primary production function, including tannic or tea color in the water, Remand tr. 690-91 (Rhodes), and the presence of foam in the water, Remand tr. 691 (Rhodes). *See* CX 278 (May 2007) & Remand tr. 397-98 (Martin) (photograph depicting foam in water flowing from the juncture of drainages 6 and 7 at Smith Farm Site); CX 355 (May 2007) & Remand tr. 481 (Martin) (tributary to Bailey Creek on Site conveying tea colored water); CX 356 (May 2007) & Remand tr. 482 (Martin) (water in the portion of drainage 6 on the east side of the Site that flows east toward Bailey Creek was tea colored); Remand tr. 690-91 (Rhodes); Remand tr. 726 (Rhodes). Respondent's water quality expert in the October 2003 hearing, Dr. Cahoon, also observed tannic or tea colored water and foam flowing from the wetlands on the Smith Farm Site and attributed the tea colored water and foam to performance of wetland functions. Tr. IV-17 & 20 & 22 (Cahoon); *see also* RX 28 (Oct. 2003) (Dr. Cahoon's report). *See also* Remand tr. 693-94 (Rhodes) ("light brown color" water identified by Dr. Cahoon is the same type of tannic or tea colored water observed by Mr. Rhodes).<sup>34</sup>

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<sup>34</sup> In order to assess the functions performed by the Smith Farm wetland prior to the disturbance caused by Respondent's activities in 1998 and 1999, Complainants identified a nearby reference wetland. Use of a relatively undisturbed reference wetland is consistent with the established methodology in the field of wetland assessment, specifically the hydrogeomorphic or "HGM" approach. Remand tr. 440-41 (Martin); Remand tr. 671-72 (Rhodes). In order to select a relatively undisturbed reference wetland, Complainants utilized geographic information system ("GIS") tools and the National Wetlands Inventory ("NWI"). Complainants determined that the reference wetland should be in the same or similar landscape position as the Smith Farm Site and should be part of the same watersheds (i.e., the Nansemond River and/or Western Branch of the Elizabeth River) and limited their search to the peninsula between the Nansemond and Western Branch of the Elizabeth Rivers. Remand tr. 91-93 (Stokely); CX 125, Figures 11 & 12 (May 2007). Complainants also determined that the reference wetland should have the same water regime and vegetative cover as the Smith Farm Site. Remand tr. 91-92 (Stokely). Since the Smith Farm Site actually includes three different water regimes, the search was limited to wetlands on the peninsula between the Nansemond and Western Branch of the Elizabeth Rivers with the same water regimes as classified by the National Wetlands Inventory. Remand tr. 91-92 (Stokely). The Shoulders Hill Site was selected because it met the search criteria and Complainants were able to obtain access to it. Remand tr. 96-97 (Stokely). Complainants' field investigators visited the Shoulder's Hill Site. Complainants' observed the same types of field indicators at the Shoulders Hill Site as were identified at the Smith Farm Site. *See* Remand tr. 452 (Martin); CX 170 & 174 (May 2007) & Remand tr. 452-54 (Martin) (photographs of depressional water storage and blackened leaves at Shoulder Hill Site); CX 311 (describing mottles at various soil depths). From that, Complainants' site investigators concluded that the Shoulders Hill Site was performing and contributing to the Nansemond River and Western Branch of the Elizabeth River the same types of functions as the Smith Farm Site. Remand tr. 752 (Rhodes). Respondent's attempts to discredit use of the Shoulders Hill Site as a comparable reference site border on the ridiculous. Complainants' witnesses repeatedly explained that they were looking for a "comparable" site, not an "identical" site.

Respondent offers virtually nothing to rebut the foregoing evidence of the performance and delivery of these functions. Rather than try to rebut Complainants' evidence (which it cannot), Respondent tries to minimize it with an argument that uplands also can perform some of these functions. That argument is specious. The Corps has found that wetlands perform functions integral to the overall aquatic ecosystem. That finding has been accepted by the Supreme Court in *Riverside Bayview Homes*, 474 U.S. at 134-35, and by Justice Kennedy in *Rapanos*. 547 U.S. at 773-75, 779, 786 (Kennedy, J., concurring in the judgment). Moreover, Justice Kennedy did not require that 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 nor insubstantial. 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

As it did with the Scalia standard, Respondent also attempts to create a standard of proof that simply is not found in Justice Kennedy's opinion. Respondent primarily hangs its argument on the term "significant" and argues that the functions performed and delivered by the Smith Farm wetlands did not "significantly" impact the receiving water. The problem with Respondent's argument is that Respondent's conception of "significance" is unrelated to anything in Justice Kennedy's opinion. Nothing in Justice Kennedy's opinion requires quantification or documentation of the "significance" of the contribution of each individual wetland. *See Cundiff*, 555 F.3d at 211 (Nothing in any of the *Rapanos* opinions requires use of laboratory analysis or water samples to establish significant nexus). Justice Kennedy simply states: "Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase "navigable

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The fact that there may be more or fewer oak stems at one of the sites is not relevant so long as the suite of vegetation is similar. Similarly, Respondent's criticism that the Shoulders Hill Site lacks farmfields is ridiculous. The Smith Farm farmfields have never been at issue in this matter; the point was to look for a comparable wetlands complex.

waters," 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.' When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" 547 U.S. at 780 (Kennedy, J., concurring in the judgment).

Quantification of these wetlands' precise contributions to the physical, chemical and biological integrity of traditionally navigable waters located less than a mile downstream of the Site is not relevant. What is relevant is that the evidence in the record (virtually unrefuted by Respondent) establishes beyond speculation that the Smith Farm waters are performing the very functions that Justice Kennedy envisioned and doing so in a way that is not insubstantial. See *Lucas*, 516 F.3d at 327 (evidence that wetlands performed flood control and pollution trapping functions sufficient to establish significant nexus). Respondent's argument reduces the concept of significance to a question of (undefined) quantification and urges the Board to consider the Smith Farm wetlands in a vacuum, akin to saying that only stealing 1,000 dollars from a millionaire is not really "significant" because the millionaire still has \$ 999,000.

Nothing in Justice Kennedy's opinion requires that wetlands must be performing uniquely wetland functions. Nor does Justice Kennedy require that the wetlands individually have a significant impact on receiving waters. To the contrary, Justice Kennedy's reference to "wetlands, either alone or in combination with similarly situated lands in the region" demonstrates his recognition that multiple wetlands tracts contribute to the integrity of receiving waters. There is, for example, no one wetland that is responsible or even capable of preventing too much nitrogen from reaching the Chesapeake Bay. It is, however, clear that the Smith Farm wetlands are doing their part. Mr. Rhodes' testimony, accepted by ALJ Moran, summarized it best:

There are two ultimate receiving water bodies, the Nansemond and the Western Branch of the Elizabeth. Each wetland tract contributes to the ecology and the well being of the downstream receiving waters. It's almost like each one is a piling on a pier and if you remove one piling, the pier might stand, but the integrity is compromised. And if you keep removing piling after piling, eventually the pier is going to collapse. By the same token, I've taken training in the use of cumulative environmental impacts and basically what we have here is each individual wetland contributes in total to the overall health of the ecology of the downstream receiving waters.

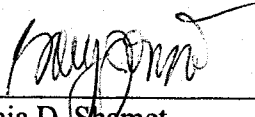
Remand tr. 708 (Rhodes).

### VIII. CONCLUSION

The overwhelming evidence establishes that the discharges at issue occurred in wetlands and other waters on the Smith Farm Site; that the wetlands are physically adjacent to flowing waterbodies that are themselves relatively permanent waters conveying flow to very nearby traditionally navigable waters. The evidence also establishes that the Smith Farm wetlands and waterbodies were performing and delivering significant functions that contribute to the physical, chemical and biological integrity of traditionally navigable waters downstream. ALJ Moran correctly held that the facts in the record establish CWA regulatory jurisdiction regardless which *Rapanos* standard is applied. For that reason as set forth herein and for the reasons stated in Complainants' briefs filed in CWA 05-05, Complainants respectfully request that the Board affirm the decision of ALJ Moran in this matter.

Respectfully submitted,

Dated: 6/2/09

  
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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused the foregoing Complainants' Response Brief in *In re Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 to be served in the following manner:

BY HAND DELIVERY (Original and five copies):

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
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Washington, D.C. 20005

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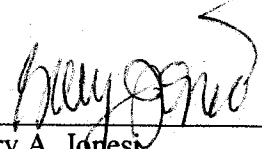
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