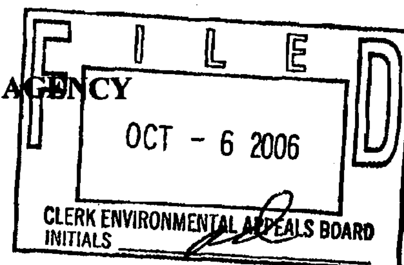
ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:	)	
Smith Farm Enterprises, L.L.C.	)	CWA Appeal No. 05-05
Docket No. CWA-3-2001-0022	)	

REMAND ORDER

On May 5, 2005, Administrative Law Judge Carl C. Charneski (the "ALJ") issued an Initial Decision finding Smith Farm Enterprises, L.L.C. ("Smith Farm") liable for two violations of section 301(a) of the Clean Water Act (the "CWA"), 33 U.S.C. § 1311(a). Specifically, the ALJ found (1) that Smith Farm discharged fill material, in the form of wood chips, into wetlands that were waters of the United States, without a permit under CWA section 404, and (2) that Smith Farm discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System permit under CWA section 402.

On June 3, 2005, Smith Farm appealed the Initial Decision to the Environmental Appeals Board (the "Board") and filed an appellate brief in support thereof. U.S. Environmental Protection Agency ("EPA") Region 3 (the "Region") filed an Appellate Brief As To Liability on

July 1, 2005, and the Board held oral argument on liability on July 14, 2005.[1] The Region filed an Appellate Brief As To Issues Other Than Liability on July 22, 2005.

With respect to the section 404 allegations, Smith Farm argued before the ALJ that EPA did not have jurisdiction over the wetlands on its property because the site "'contains isolated wetlands not adjacent or with significant nexus to navigable waters or tributaries to navigable waters.'" Init. Dec. at 22 (quoting Respondent's Post-Trial Brief at 33-34). In doing so, Smith Farm relied heavily on *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"). Notwithstanding Smith Farm's arguments, the ALJ found that the wetlands on the Smith Farm property were in fact jurisdictional wetlands, relying in part on *SWANCC*; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Carabell v. United States Army Corps of Engineers*, 391 F.3d 704 (6th Cir. 2004); and various other federal court and Board decisions. Among other matters, the ALJ stated 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 at 26. Concluding that a significant hydrological connection exists between the waters adjacent to the Smith Farm wetlands and navigable waters, the ALJ concluded that the Smith Farm wetlands are jurisdictional wetlands. *Id. See also id.* at 21-29.

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[1] Pursuant to the Board's order of June 13, 2005, the July 14 oral argument included liability issues related to both this case and the case of *In re Vico Construction Corp.*, CWA Appeal No. 05-01, slip. op. (EAB Sept. 29, 2005), 12 E.A.D. ___.

On appeal, Smith Farm did not reiterate its arguments with respect to jurisdiction, but instead "incorporate[d] by reference its post-trial briefs and expressly reserve[d] the issue in the event any subsequent decisions alter the applicable legal landscape." Respondent's Appeal Brief at 41.

The Board was nearing issuance of its final decision in this matter when the U.S. Supreme Court decided *Rapanos v. United States*, Nos. 04-1034, 04-1384, 2006 WL 1667087 (U.S. June 19, 2006), 547 U.S. ___. *Rapanos* was consolidated with the Supreme Court's grant of certiorari in *Carabell, supra*. 546 U.S. ___, 126 S.Ct. 415, 163 L.Ed.2d 316 (2005). In *Rapanos*, by a vote of 4-1-4, and a plurality, two concurring, and two dissenting opinions, the Court vacated and remanded two Sixth Circuit judgments that had upheld federal authority over wetlands.

On June 28, 2006, the Board directed the Region and Smith Farm (the "Parties") to submit a statement by July 13, 2006, explaining what, if any, next steps they believe the Board should take with respect to the jurisdictional issue in this matter, in light of *Rapanos* and the Smith Farm appeal's procedural posture ("June 28 Order").[2] On July 13, 2006, the Board ordered the parties to appear for a status conference to discuss their positions on September 19,

[2] The Board also invited the Parties to indicate if they were interested in attempting to resolve their case through alternative dispute resolution.

2006.[3] Smith Farm filed a statement explaining its views on jurisdiction on July 12, 2006. In it, Smith Farm expressed its view that the jurisdictional issue in this matter is now ripe for decision based on the Supreme Court's opinion in *Rapanos*. According to Smith Farm, the factual considerations potentially relevant under *Rapanos* were developed fully during the trial before the ALJ and in the Initial Decision. Accordingly, Smith Farm requested that the Board apply *Rapanos* to the facts already established in the case, and asked the Board to establish a briefing schedule to address the jurisdictional issue in light of *Rapanos*. The Region filed its statement in response to the Board's June 28 Order on September 12, 2006.[4] In it, the Region recommended that the Board remand this matter to the ALJ for the limited purpose of reopening the record to take additional evidence as to CWA jurisdiction in light of *Rapanos*. The Region explained that "[t]he Supreme Court's decision in *Rapanos* is fractured and introduced new tests for CWA jurisdiction, which were not anticipated by either party during the initial hearing. Accordingly, [the Region] believe[s] that the Board may benefit from further development of the record to address the tests introduced by the *Rapanos* decision." Complainants' Statement Pursuant to the Board's Orders Dated June 28, 2006 and July 13, 2006 at 5. Pursuant to the June 30 and July 13, 2006 Board Orders, the Parties appeared for a status conference to discuss their positions.[5]

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[3] This status conference originally was scheduled to take place on July 19, 2006, but was rescheduled pursuant to the Board's July 13, 2006 Order Granting Extension of Time.

[4] The Region was required to submit its statement by September 12, 2006, pursuant to the Board's July 13, 2006 Order Granting Extension of Time.

[5] The option of alternate dispute resolution was discussed at the status conference. While the Parties indicated that they are interested in exploring the possibility of a global settlement, which may encompass parties beyond those to the present case, they did not choose to engage in Board-sponsored alternate dispute resolution at this time.

Having heard the Parties' arguments and having considered the Court's opinion in *Rapanos*, the Board finds 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. Therefore, the Board finds that it is appropriate to remand this matter to the ALJ to hear additional evidence as to CWA jurisdiction in light of *Rapanos* and to thereafter rule on the jurisdictional question. This approach is consistent with the recent decision of the Court of Appeals for the Seventh Circuit to remand a wetlands case with similar jurisdictional issues to the district court, explaining that "Justice Kennedy's proposed standard, which we conclude must govern the further stages of this litigation, requires fact finding not yet undertaken by the district court."[6] *United States v. Gerke Excavating, Inc.*, No. 04-3941, slip op. at 4 (7th Cir. Sept. 22, 2006). Accordingly, the Board hereby remands the above matter to the ALJ to take additional evidence, conduct further proceedings as necessary, and to rule on the CWA jurisdictional question, consistent with this Order and the Court's opinions in *Rapanos*. The ALJ

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[6] The Board makes no findings at this time as to what jurisdictional test or tests should govern on remand. The Board will consider such issues if the matter is appealed to the Board following remand.

shall thereafter render a new initial decision, which shall have the effect described in 40 C.F.R. § 22.27. Either party may appeal from the new initial decision as prescribed in 40 C.F.R. § 22.30.[7]

So ordered.[8]

Dated: Oct. 6, 2006

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

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[7] All documents filed in the current appeal to the Board will be deemed a part of the record of any new appeal. Consistent with the scope of this remand, a new appeal may not raise any new issues except as they relate directly to the issue of jurisdiction.

[8] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

ADDITIONAL CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing REMAND ORDER in the matter of Smith Farm Enterprises, L.L.C., CWA Appeal No. 05-05, were sent to the following persons in the manner indicated.

By Inter-Office Mail:

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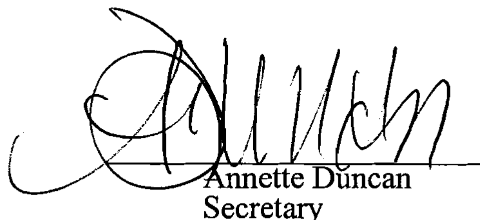
Dated: NOV 14 2006



Annette Duncan
Secretary