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

**ORIGINAL**

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In re: :  
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Vico Construction Corporation and : CWA Appeal No. :  
: 05-01  
Amelia Venture Properties, L.L.C. :  
:  
Docket No. CWA-3-2001-0021 :  
:  
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ENVIR. APPEALS BOARD

Washington, D.C.

September 19, 2006

ACE-FEDERAL REPORTERS, INC.

1 The above-entitled matter came on for hearing at the  
2 EPA East Building, 1201 Constitution Avenue, NW, Room  
3 1152, Washington, D.C. on Tuesday, September 19,  
4 2006, at 11:43 a.m., via videoconference hookup.

5

6 Before:

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

9 Also present: Annette Duncan, Secretary

10

11 Appearances: (via videoconference hookup)

12

13 HUNTER W. SIMS, JR., Esq.

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16 Suite 2100

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1 APPEARANCES (Continued):

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3

STEFANIA D. SHAMET, Esq.

4

U.S. Environmental Protection Agency

5

Region III

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P R O C E E D I N G S

(Announcement by the Secretary.)

JUDGE STEIN: Counsel, before we get started, obviously we've heard some of what you have to say, although on a somewhat different set of facts; but why don't you begin, and if we need the full 15 minutes per side, we'll take it; and if we don't, we'll proceed that way.

Ms. Shamet?

MS. SHAMET: Thank you, Your Honor. I'd reserve five minutes for rebuttal, please.

As we've already noted, the question here is what to do with the Vico Construction case, and I apologize, I'm sure I'm going to accidentally call it Louis Farms. I mean the Vico Construction case.

In light of the Supreme Court's decision in Rapanos. The status of that case, meaning the Louis Farms case, was that the Board had rendered a decision I believe on September 29th, 2005. While the question of Clean Water Act jurisdiction had been raised and argued before the ALJ, it was not argued before the Board. Respondent conceded that under the

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1 prevailing case law, the record developed before the  
2 ALJ adequately established jurisdiction under the  
3 Clean Water Act.

4 So the question becomes, should the Board  
5 decide jurisdiction in light of Rapanos, based on the  
6 current record, or should the Board remand to the ALJ  
7 for further proceedings?

8 We would request that the Board remand to  
9 the ALJ for the limited purpose of reopening the  
10 record to take additional evidence to address the  
11 tests set forth by the Supreme Court in Rapanos.

12 As noted previously, we believe the Board  
13 has ample authority to grant this request, pursuant  
14 to 40 CFR 22.30 Subsection C. In fact, we would  
15 argue that this matter represents precisely the type  
16 of context that subsection was intended to address.

17 Respondent cannot have it both ways.  
18 Respondent's position is that the record in the case  
19 is sufficiently open to allow them to present  
20 arguments not made in their appellate briefs based  
21 upon tests that were not part of the case law at the  
22 time the record was developed.

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1                   At the same time, they argue that the  
2 record, which was developed before the Supreme Court-  
3 enunciated Rapanos tests, should be closed. This is  
4 not a case where the original record was deficient.  
5 Respondents so concede. In other words, this is not  
6 a case where the Region failed to establish an  
7 adequate record and wants to go back and fix the  
8 mistake. Rather, the record was developed to address  
9 tests that are applicable.

10                   Respondent's tests, which they advocated  
11 before the -- also did not anticipate Rapanos.  
12 Neither side anticipated what the Supreme Court did.  
13 And as I argued earlier in connection with the Smith  
14 case, both the plurality and Justice Kennedy note  
15 that.

16                   In light of the fact that the record was  
17 not shaped to address the Rapanos test, we believe  
18 that the Board would benefit from a limited reopening  
19 of the record; to reshape it and to provide evidence  
20 that addresses the Rapanos test.

21                   JUDGE STEIN: Ms. Shamet, I wanted to ask  
22 you the same question that I had asked during the

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1 status conference; which is, at this point do you  
2 have a feel for how much time a limited reopening of  
3 the record would entail on the Region's end?

4 MS. SHAMET: I believe the answer is the  
5 same; at this point the Region would anticipate no  
6 more than three witnesses, and approximately five to  
7 six hours for direct examination. And that's being  
8 conservative in case I'm getting held to it later.

9 JUDGE STEIN: No, I'm not intending to  
10 hold either party to it; I'm just trying to just get  
11 a feel for the, potentially the amount of time that  
12 we might be talking about.

13 MS. SHAMET: I think about a day.

14 JUDGE STEIN: Okay.

15 MS. SHAMET: I would just note that in  
16 their statement, the Respondent cited a number of  
17 cases that they would argue were precursors to  
18 Rapanos. The apparent purport of that portion of  
19 their statement is to represent that the test of  
20 Rapanos could have and should have been anticipated.  
21 We would note that the cases cited in Respondent's  
22 statement were not cited by either the plurality or

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1 Justice Kennedy. The only case cited by Respondent  
2 that was cited by the Supreme Court was the Fifth  
3 Circuit decision in Needham; it was cited by the  
4 dissent in a footnote which characterized it as the  
5 minority view.

6 With that, Your Honor, if you have any  
7 further questions.

8 JUDGE STEIN: I don't believe I have any  
9 further questions at this point. So perhaps if I  
10 could hear from -- does that conclude your remarks at  
11 this point, subject to what you want to reserve for  
12 rebuttal?

13 MS. SHAMET: Yes, Your Honor.

14 JUDGE STEIN: Okay.

15 Mr. Sims?

16 MR. SIMS: Thank you very much.

17 As we said in the Smith Farm case, we  
18 believe that the factual record was fully developed  
19 for the EAB to decide the legal issue presented by  
20 the Supreme Court's decision in Rapanos.

21 We note, for instance, that one of the  
22 proposed findings of law we made to Judge Charneski

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1 was that the EPA, in our view, had not proven a  
2 sufficient connection between the Louis Farms site  
3 and navigable waters, the waters of the United  
4 States. We believe this was an issue from the very  
5 beginning.

6 The parties change but the facts don't  
7 change; we're not aware of any new or different  
8 facts.

9 In addition to this jurisdictional issue,  
10 there was evidence taken in the penalty phase on  
11 allegations by Region III of environmental harm; and  
12 we believe that the facts have been fully vetted.  
13 We're not aware of any new or different facts, and we  
14 believe that after -- being the EAB can decide the  
15 jurisdictional issue in light of the Supreme Court's  
16 decision Rapanos.

17 As far as Ms. Shamet's estimate of five or  
18 six hours, I believe she said that was in direct  
19 examination? Not cross-examination. As I understood  
20 her statement, she was saying the five or six hours  
21 were direct examination. That, obviously you have to  
22 add cross-examination to that; so I think we're

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1 dealing two days, considering direct and cross for a  
2 day and a half. I ask if we could finish the factual  
3 evidence in one day when you consider three witnesses  
4 with five or six hours of direct examination.

5 I don't know who her witnesses are; I can  
6 guess, because she said I believe that they have  
7 already testified otherwise; that would obviously  
8 trigger some witnesses to be presented by our side,  
9 in that we disagreed with anything said.

10 But otherwise, I think the position is  
11 that all the facts have been presented, and we talked  
12 at length. You're familiar with the record; about  
13 intermittent streams and about other waterways,  
14 man-made ditches, culverts, and whether they  
15 continuously flowed or didn't, what the nexus was  
16 between this site and any navigable water. I believe  
17 the testimony is that the distance between this site  
18 and any tidal water -- not even navigable water, but  
19 tidal water -- is between a half a mile and a mile  
20 away.

21 So we again believe that the facts are in  
22 the record, and the case is ripe for decision on the

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1 legal issue presented by Rapanos by the EAB after  
2 briefing by the parties.

3 JUDGE STEIN: Mr. Sims, in looking at the  
4 ALJ's findings, I noticed that he observed that there  
5 was intermittent flow; but did the ALJ in his  
6 findings go into the nature of the intermittency?  
7 You know, how often; those kinds of things?

8 MR. SIMS: I don't know that he went into  
9 it in the kind of detail that you've posed in your  
10 question. To tell you the truth, I'm not really -- I  
11 don't think he did, but I'm not familiar enough with  
12 the entire record because it's so voluminous at this  
13 time to specifically answer your question; and I  
14 would not want to guess and tell you something that  
15 was wrong.

16 I do believe that there was no  
17 disagreement from Region III that the connections  
18 were intermittent. I believe that they agreed that  
19 they were intermittent. Their position was the fact  
20 that they were intermittent didn't matter, from a  
21 legal point of view. And I believe at the time of  
22 the hearing, all those water bodies were dry. And

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1 they were shown on the Coast and Geodetic Survey, I  
2 think, as being intermittent streams. If you recall,  
3 they were shown by a dash and a dot or some sort of  
4 Morse code type of a signal.

5 So I don't think there's any question but  
6 that the connections were only through intermittent  
7 water bodies of some type. No continuous flowing  
8 bodies of water, or standing bodies of water.

9 JUDGE STEIN: Anything else that you would  
10 like to argue to the Board?

11 MR. SIMS: No, Your Honor.

12 JUDGE STEIN: I don't think at this point  
13 that I have any additional questions. We'll  
14 obviously give Ms. Shamet a chance for any rebuttal  
15 and you a chance for any rebuttal, and then I can  
16 make some closing remarks.

17 Ms. Shamet?

18 MS. SHAMET: Your Honor, Mr. Sims made my  
19 point for me. As I stated in my initial argument,  
20 the concern with the record is that it was developed  
21 for two different tests than the Rapanos test.  
22 Taking the intermittency question as an example, it

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1 was the region's position, and later upheld, I  
2 believe, by the Fourth Circuit, the Sixth Circuit,  
3 the Seventh Circuit, the Ninth Circuit, that  
4 intermittent streams could be jurisdictional and  
5 wetlands adjacent to intermittent streams could be  
6 jurisdictional. And there was not part of that test,  
7 how intermittent? One month, two months, seven  
8 months, ten months, out of every year.

9 Respondent took a different position; that  
10 the intermittent nature of the stream cut off  
11 jurisdiction. Consequently, the issue at hearing was  
12 limited to whether a stream was intermittent. And  
13 Your Honor, we agree that the stream to which these  
14 wetlands is adjacent is in fact intermittent.

15 What's missing from the record is the  
16 detail that now appears to be required under Rapanos.  
17 For example, Footnote 5 in the plurality decision.  
18 That is precisely the type of evidence that we would  
19 request remand to introduce to the record.

20 I have nothing further, Your Honor.

21 JUDGE STEIN: Mr. Sims, do you have  
22 anything in rebuttal?

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1 MR. SIMS: No, I do not.

2 JUDGE STEIN: Well, I again want to thank  
3 both of your counsel for appearing here. We will  
4 take this matter under advisement. A transcript is  
5 being prepared, and the Board will rule in the near  
6 term on next steps in both the Vico matter and Smith  
7 Farm.

8 Am I correct in understanding that the  
9 settlement discussions between the parties are going  
10 to include the Vico case as well as Smith Farm? Am I  
11 correct in understanding that?

12 MR. SIMS: Judge Stein, that would be my  
13 intent and the client's intent.

14 MS. SHAMET: The Region's as well, Your  
15 Honor.

16 JUDGE STEIN: Well, this is very helpful.  
17 I appreciate your appearing here today and apologize  
18 for any of the technical difficulties, and hopefully  
19 we can get those rectified so that doesn't occur  
20 again.

21 Thank you very much, counsel.

22 (Announcement by the Secretary.)

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(Whereupon, at 12 o'clock noon, the  
hearing concluded.)

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1 CERTIFICATE OF SHORTHAND REPORTER

2 I, Daniel W. Hawkins, shorthand reporter,  
3 do hereby certify that the record of proceedings  
4 appearing in the foregoing pages was taken by me in  
5 shorthand and this transcript typed under my  
6 direction; that said transcript is a true record of  
7 the proceedings; that I am neither counsel for,  
8 related to, nor employed by any of the parties to the  
9 action in which these proceedings were held; and,  
10 further, that I am not a relative or employee of any  
11 attorney or counsel retained by the parties hereto,  
12 nor financially or otherwise interested in the  
13 outcome of the action.

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Daniel W. Hawkins (hj)

Shorthand Reporter



<p><b>A</b></p> <p>above-entitled 2:1                  accidentally 4:14                  Act 4:20 5:3                  action 16:9,13                  add 9:22                  addition 9:9                  additional 5:10                  12:13                  address 5:10,16 6:8                  6:17                  addresses 6:20                  adequate 6:7                  adequately 5:2                  adjacent 13:5,14                  advisement 14:4                  advocated 6:10                  Agency 1:2 3:4                  agree 13:13                  agreed 11:18                  ALJ 4:21 5:2,6,9                  11:5                  ALJ's 11:4                  allegations 9:11                  allow 5:19                  Amelia 1:11                  amount 7:11                  ample 5:13                  Annette 2:9                  Announcement 4:2                  14:22                  answer 7:4 11:13                  anticipate 6:11 7:5                  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further 5:7 8:7,9                  13:20 16:10</p> <hr/> <p><b>G</b></p> <p>G 4:1                  Geodetic 12:1                  getting 7:8                  give 12:14                  go 6:7 11:6                  going 4:14 14:9                  grant 5:13                  guess 10:6 11:14</p> <hr/> <p><b>H</b></p> <p>half 10:2,19                  harm 9:11                  Hawkins 16:2                  hear 8:10                  heard 4:4                  hearing 2:1 11:22                  13:11 15:2                  held 7:8 16:9                  helpful 14:16                  hereto 16:11                  hold 7:10                  HON 2:7                  Honor 4:10 8:6,13                  12:11,18 13:13                  13:20 14:15                  hookup 2:4,11                  hopefully 14:18                  hours 7:7 9:18,20                  10:4                  HUNTER 2:13</p> <hr/> <p><b>I</b></p> <p>III 3:5 9:11 11:17                  include 14:10                  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