

BEFORE THE ENVIRONMENTAL APPEALS BOARD
 U.S. ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

ORAL ARGUMENT

received
 8/13/10

 IN THE MATTER OF: :

SMITH FARM ENTERPRISES, LLC : CWA Appeal No.
 : 08-02

Docket No. :

CWA-03-2001-0022 :
 _____ :

Tuesday,
 July 20, 2010

Administrative Courtroom
 Room 1152
 EPA East Building
 1201 Constitution Avenue, NW
 Washington, DC

The above-entitled matter came on
 for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN,
 Environmental Appeals Judge
 THE HONORABLE ANNA I. WOLGAST,
 Environmental Appeals Judge
 THE HONORABLE CHARLES J. SHEEHAN,
 Environmental Appeals Judge

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APPEARANCES:

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ALSO PRESENT:

JAMES BOYD
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EURIKA DURR
KARYN WENDELOWSKI

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1 P-R-O-C-E-E-D-I-N-G-S

2 10:01 a.m.

3 MS. DURR: Environmental Appeals
4 Board of the United States Environmental
5 Protection Agency is now in session for oral
6 argument, in re Smith Farm Enterprises LLC,
7 docket number CWA-03-2001-0022, CWA appeal
8 number 08-02. The honorable judges Kathie
9 Stein, Anna Wolgast, Charles Sheehan,
10 presiding. Please turn off all cell phones and
11 no recording devices allowed. You may be
12 seated.

13 JUDGE WOLGAST: Good morning. We're
14 here today pursuant to the Board's order of
15 May 13th in Smith Farm Enterprises, and
16 pursuant to that order, each side will have
17 thirty minutes for argument, and Smith Farm
18 may reserve five minutes for a rebuttal, if
19 you choose. And, counsel, when you make your
20 argument, if you could state your name for the
21 record. And with that, I think we're ready to
22 proceed.

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1 MS. WILCHER: Thank you very much.
2 I'm LaJuana Wilcher with English, Lucas,
3 Priest and Owsley. We are also represented by
4 Hunter Sims of Kaufman and Canoles,
5 representing Smith Farm Enterprises LLC. Also
6 at the table is Jim Boyd, who is one of the
7 owners of Smith Farms. We would like to
8 reserve our five minutes for rebuttal, please,
9 and I would also ask the Board's indulgence,
10 since I'm relatively new to this very long
11 case, should I need to confer with Mr. Sims or
12 Mr. Boyd during the course of this discussion.
13 Thank you very much.

14 I'm here today because this is
15 actually a very, very important case. It's an
16 important case both to the -- the Boyd family,
17 both in terms of the emotional and financial
18 toll it has taken over the last eleven years,
19 but also because of the important policy
20 questions that are presented before this
21 board, especially in the light of the
22 jurisdictional determinations under Rapanos,

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1 which is clearly the subject of our
2 conversation today.

3 Toward that end, we would like to
4 just briefly call to the Board's attention a
5 short history of the case, going back to 1998
6 and 1999, when drainage ditches were
7 constructed on Smith Farms in some wooded
8 areas, draining that -- that land. The --
9 before the project began and was undertaken,
10 Mr. Boyd contacted and met with the Army Corps
11 of Engineers, asked for their opinion
12 concerning jurisdictional issues and other
13 issues concerning a permit. The Corps of
14 Engineers certainly never indicated in any
15 fashion that there was a problem at that time
16 jurisdictionally considering the work that was
17 anticipated to occur.

18 Of course we're here today largely
19 because the whole jurisdictional issue has
20 been turned up on its head by Rapanos in 2006,
21 and I can certainly say that we would be in a
22 very different situation were it back to 1989

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1 or '92 or '93, when I was at the Agency and
2 dealing with issues, when then, the only thing
3 that was necessary for the Agency to prove was
4 that there were waters of the United States,
5 including wetlands, that is, lands that were
6 inundated or saturated by surface or ground
7 water such that they could and ordinarily did
8 support a prevalence for vegetation typically
9 adapted to life in saturated soil conditions.
10 We always referred on the Riverside Bayview
11 case, and extended the adjacency of the
12 wetlands to a navigable water beyond that,
13 such that any time that there were wetlands
14 that they were considered to be
15 jurisdictional, and enforcement action would
16 have been considered proper.

17 In the Rapanos Case the court
18 talks about the expanding jurisdiction by the
19 Corps of Engineers and certainly, by
20 extension, to EPA, when in many of those
21 circumstances, EPA was pushing the Corps to
22 expand their jurisdiction. And the court

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1 points out that the Corps adopted increasingly
2 broad interpretations of its own regulations.
3 Talked about the migratory bird rule. It
4 talked about how the Corps had expanded its
5 own interpretations of the definition of
6 tributaries to include ephemeral streams and
7 those that ran through drainage ditches. And
8 then the plurality opinion goes on to clarify
9 that that type of regulation was never
10 intended to be covered by the Clean Water Act
11 as waters of the U.S. Some of the key --

12 JUDGE STEIN: Ms. Wilcher?

13 MS. WILCHER: Yes?

14 JUDGE STEIN: Has any court held
15 that the plurality test alone determines
16 jurisdiction?

17 MS. WILCHER: I do not believe
18 that any court has held that the plurality
19 test alone confers jurisdiction.

20 JUDGE STEIN: Okay.

21 MS. WILCHER: I assume that the
22 court wants to hear about that since it is an

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1 important part of the decision. And we can
2 talk about significant nexus next, if that's
3 okay, or if you want me to go to significant
4 nexus now, be happy to do that.

5 JUDGE STEIN: No, that's fine, you
6 can talk about the pluralities first, but let
7 me ask you if we were to find that the
8 evidence met, as Judge Moran found, the
9 significant nexus test, but for whatever
10 reason it didn't meet the pluralities test,
11 then what is the outcome?

12 MS. WILCHER: Now that's a very
13 good question, and, actually, no one knows,
14 and no one knows in the Fourth Circuit,
15 specifically, what the outcome of that -- what
16 the outcome would be. The Rapanos test --
17 unfortunately, in an effort to reign in
18 jurisdiction by the Corps and EPA, created
19 probably as many questions as it did answer,
20 and it's created a lot of additional
21 litigation. So we're here, sympathetic to
22 EPA's plight of having to try to figure out

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1 what that means, and the regulated community
2 also trying to figure out what it means
3 because it is simply not clear. The Marks case
4 that said that you would select the most
5 narrow of the interpretations in a case such
6 as this might be difficult to apply because
7 it's hard to figure out what the most narrow
8 definition or application of this case would
9 be. Obviously, from Smith Farm's standpoint,
10 we would be really delighted should this board
11 decide to follow the Marks opinion and decide
12 that the Scalia test would be the most
13 appropriate here, but we're perfectly prepared
14 to address both.

15 JUDGE WOLGAST: But that is -- but
16 you're assuming that the narrowest grounds
17 would then be the pluralities test as opposed
18 to, say, the narrowest ground simply being
19 that they rejected the Rapanos evidence and
20 remanded the case. In terms of what -- what
21 five justices could agree to. It was simply
22 remand.

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1 MS. WILCHER: That's right. That's
2 right. But it's presumed that the court's
3 reasoning and the four -- the opinion of the
4 four written by Scalia; the opinion of
5 Roberts; the opinion of Justice Kennedy, all
6 meant something, and that is what we are left
7 to work within, and --

8 JUDGE SHEEHAN: What do you think
9 of the government's argument that either test
10 can apply as the First and Eighth Circuits
11 have held?

12 MS. WILCHER: Well, clearly a
13 number of circuits have held that either test
14 would apply, and in this case, we -- we
15 believe that the evidence, despite what the
16 ALJs have found, we believe the evidence
17 clearly shows that under neither test would
18 this area considered to be jurisdictional
19 under the current interpretation of the Clean
20 Water Act under Rapanos.

21 And I -- I really do think that,
22 not wanting to lose the forest for the trees

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1 here, the forest -- the big picture is that
2 Rapanos is a dramatic shift in the way
3 business as usual has been done at these
4 agencies from 1972 until 2006. It is -- well,
5 in 2001 you had a little deviation here, but
6 it's a huge difference, and what we find in
7 the brief -- and what we find in the brief of
8 the government in this case, is not much of a
9 difference from how the law previously was
10 interpreted, and I'll -- I'll just go ahead
11 and address that issue, and that is that the
12 - - the strongest argument, it appears, that
13 the government makes in its brief, dealing
14 with the significant nexus test, is that
15 wetlands are important. Wetlands provide
16 valuable functions, and even Rapanos case
17 notes that the Clean Water Act has been very
18 important and serves an important public
19 interests, and Section 404 and the wetlands
20 laws in particular provide an important public
21 interest.

22 JUDGE SHEEHAN: Well, isn't the

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1 government's argument that these wetlands, in
2 particular, are important, and can you address
3 how these wetlands do or do not meet the
4 Kennedy significant nexus test?

5 MS. WILCHER: That would be the
6 government's argument, but in this case they
7 have failed to -- to introduce, by a
8 preponderance of the evidence, that that is
9 the case.

10 JUDGE WOLGAST: Could you describe
11 for us what you believe the government would
12 have to show at a minimum to meet Justice
13 Kennedy's significant nexus test in this
14 context?

15 MS. WILCHER: At a minimum, they
16 would have to show some measure of the effect
17 that would be had by this wetlands property
18 upon a navigable water of the United States,
19 and they have not done so in any regard.

20 JUDGE SHEEHAN: Wasn't there
21 abundant testimony, says the government, by
22 expert witness Martin and others that there

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1 was such a connection? You're speaking very
2 theoretically; I'd like, if you could, to get
3 specific about what you think the failures are
4 in the government's case on the Kennedy test.

5 MS. WILCHER: Yes, but if you --
6 fine, if you look at the government's
7 argument, one of their lengthy arguments is
8 about the impact of denitrification, that
9 wetlands provide an important denitrification
10 issue, pointing out that the Chesapeake Bay
11 has too much nitrogen and that it's important
12 to keep that out. They talk about the fact
13 that nitrogen comes from atmospheric
14 deposition. They talk about the fact that
15 microbes in the soil will break that nitrogen
16 down, and then they talk about that once the
17 nitrogen is broken down it'll be taken up by
18 the breeze, and it may even be given off again
19 into -- into the air.

20 JUDGE STEIN: Wasn't there
21 plentiful testimony by government witnesses
22 and the company's witnesses as to what was

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1 occurring specifically at this site? I mean,
2 I think the challenge for the company in this
3 appeal is that there were credibility findings
4 that were made by the ALJ as to some of the
5 testimony by respondents, by the company's
6 witnesses, and given the Board's standard for
7 credibility determinations, where the Board,
8 you know, historically over many many years
9 gives great weight to an ALJ's finding, how is
10 it that we can overlook the ALJ's credibility
11 determinations in the face of countervailing
12 evidence that the ALJ found to be credible?

13 MS. WILCHER: Judge Stein, if I
14 can finish Judge Sheehan's question, I'll get
15 right back to you on that. You were wanting
16 some specifics and an example of what the
17 government tried to prove in its case. By
18 going through this whole denitrification
19 process, they make no distinction between the
20 value that this particular wetland is making,
21 or any particular wetland is making, to the
22 denitrification of the Chesapeake Bay --

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1 JUDGE SHEEHAN: But the Kennedy
2 test says that if wetlands alone, or in
3 combination with other wetlands, have that
4 kind of effect --

5 MS. WILCHER: Wetlands alone or in
6 combination with other wetlands, or in
7 combination with the uplands, the arguments
8 that they are making would apply equally to
9 uplands, and as the court noted in the Rapanos
10 decision, applying some of these tests as the
11 government historically has applied them to
12 say that they are jurisdictional simply
13 because they have value, and may be somewhat
14 miles away but may have some connection or
15 some value, miles away, being speculative in
16 nature, does not cause it to be
17 jurisdictional, and it said if so the entire
18 United States would be considered regulated
19 under the Clean Water Act.

20 JUDGE SHEEHAN: There's -- there's
21 one, and not to get in the way of Judge
22 Stein's question, but one of the exhibits,

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1 Remand Exhibit 937, shows a very honeycombed
2 tissue through the Smith Farm wetlands, going
3 out to the two rivers and then to the bay. It
4 looks sure -- surely to me it looks from this
5 exhibit and others as if the wetlands are very
6 proximate to and affect directly the waters
7 below. Can you address that?

8 MS. WILCHER: I will. Those maps
9 do not show any actual measurable connection,
10 nor do they show a continuous surface
11 connection navigable waters.

12 JUDGE SHEEHAN: Why does it have to
13 be a surface connection? Why can't it be sub-
14 surface, if there's a hydrological link?

15 MS. WILCHER: But there's no
16 showing of a sub-surface hydrological link
17 either. There's a total lack of evidence, of
18 probative evidence, in this case to actually
19 tie that particular wetland to a navigable
20 water, which by the way, you would have to go
21 from that wetland to a drainage ditch, and I
22 went out there and traipsed down the site

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1 before I came here to talk to you about this,
2 but you'd have to go from that -- but this is
3 all on the record -- you'd have to go from
4 that area that might be-- that part of it that
5 might be considered a wetland, through
6 drainage ditches, that are only intermittent
7 in nature, and the evidence is clear that
8 they're only intermittent in nature, including
9 the USGS blue line dotted lines, and then they
10 would have to go from there to Bailey Creek,
11 non- navigable, to Drum Point Creek,
12 non-navigable, then to tributaries of the
13 western branch of the Elizabeth River, which
14 is the first time you'd hit a navigable water.

15 If you go in the opposite
16 direction they would have to go from drainage
17 ditches to Quaker Neck Creek to Deans Branch,
18 which are tributaries of the navigable water,
19 the Nansemond River. And so there -- there is
20 no proof that there is a connection.

21 Things could have been done. There
22 could have been dye tracings; there could have

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1 been all kinds of evidence. They could have
2 taken samples; they could have done
3 quantitative analysis. There is no chemical
4 evidence, there is no physical evidence, there
5 is no biological evidence that connects this
6 to a navigable water, and therein lies the
7 problem.

8 JUDGE WOLGAST: Just a -- if I
9 could follow up on that before we get back to
10 credibility issues.

11 MS. WILCHER: Okay.

12 JUDGE WOLGAST: Are you saying that
13 the fact they flow through ditches is a
14 jurisdictional problem?

15 MS. WILCHER: Not particularly.

16 JUDGE WOLGAST: And then getting
17 back to the testimony that Judge Sheehan was
18 referring to where Judge Moran was referring
19 to the testimony of Mr. Rhodes and Mr. Martin,
20 that the property provides flood storage, flow
21 moderation, carbon sequestration, water
22 purification, denitrification, what I want to

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1 understand about your argument is are these
2 aspects insufficient, or would they be
3 sufficient if, in your mind, there was more
4 evidence of the connection of these attributes
5 to the Nansemond or Elizabeth Rivers?

6 MS. WILCHER: EPA -- the government
7 can't simply say that wetlands are valuable
8 because they are-- help prevent flooding, and
9 not show that they would help prevent flooding
10 in this particular case and that it would
11 significantly help prevent flooding in this
12 particular case. What they have done in the
13 brief is to simply lay down the well-known
14 attributes and valuable functions and values
15 of wetlands, and said, therefore, this is
16 having a significant effect on navigable
17 rivers. There is not a connection; they have
18 not shown, by any credible evidence, cause and
19 effect, of any significant impact upon the
20 navigable rivers.

21 JUDGE SHEEHAN: But you make,
22 again, a very theoretical argument about the

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1 fact that the government just argues wetlands
2 generally, but weren't government witnesses
3 crawling all over this property multiple
4 times, testifying at great length, lots of
5 exhibits, aerials, historic maps, and
6 everything else to show in this case, for this
7 property, there was that link? It's hard to
8 believe with all that massive testimony and
9 getting to the credibility issue that the
10 government doesn't have a pretty solid case
11 that that nexus satisfying the Kennedy test
12 exists.

13 MS. WILCHER: It is hard to
14 believe. I totally agree. It is hard to
15 believe. The government has had unfettered
16 access to this property for over a decade and
17 have failed to develop flow drainage elements;
18 they can't show how much flows off the site;
19 they can't show what type of sediment runoff
20 might have occurred at the site; they can't
21 show what type of water retention is held by
22 the site; they have been unable to show any

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1 ecological connection with regard to wildlife;
2 there was a Woodcock seen on the site. There
3 is absolutely -- and it's amazing to me that
4 there is a void.

5 JUDGE STEIN: But isn't the test a
6 nexus, a significant nexus, not this
7 substantial impacts test that I hear woven
8 through some of your statements, and I don't
9 -- when I go back, and I look at the Kennedy
10 opinion, you know, and some of the things that
11 are cited, I don't necessarily see that that
12 test requires the level of proof that you're
13 suggesting is required by that test. So
14 perhaps you could explain to me, based on the
15 Kennedy opinion, how you get from there to the
16 level of proof that you're asking for, just to
17 establish jurisdiction.

18 MS. WILCHER: Certainly.

19 JUDGE STEIN: I mean, we're not
20 here to determine, you know, penalty or
21 anything else, we're here just to figure out
22 if you're even in the door.

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1 MS. WILCHER: Yes, I understand.
2 Well, what Justice Kennedy said was to talk
3 about the way the Corps had typically
4 regulated wetlands, and then to say, absent
5 more specific regulations, however, the Corps
6 must establish a significant nexus on a case
7 by case basis, when it seeks to regulate
8 wetlands based on adjacency to non-navigable
9 tributaries, and then it goes on to say, given
10 the potential over breath of the Corps's
11 regulations, this showing is necessary to
12 avoid unreasonable applications of the
13 statute.

14 The justice wrote, not just a
15 nexus, if the court had only said there has to
16 be a nexus, then one would have a different
17 burden of proof; in this case the court said
18 a significant nexus, and we have to assume
19 that a significant nexus is meaningful, that
20 those words mean something. So there's a -- at
21 least a two-step process. One to show that
22 there's a nexus, and the other is to show that

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1 it's significant, and that is what the record
2 is devoid of in this particular case.

3 JUDGE STEIN: But it's not a
4 significant impact; it's a significant nexus.

5 MS. WILCHER: That's right, a
6 significant nexus. And the significant nexus
7 must -- and if you read through the rest of
8 the case, it talks about how -- that in order
9 to regulate land as water, there must be some
10 type of impact on the water.

11 JUDGE SHEEHAN: Justice Kennedy
12 also uses a phrase that I think is pertinent
13 here; he says that the how -- how the proof is
14 determined has to be done in a practical way,
15 and it almost sounds as if what you're
16 requiring is that the government set up flow
17 meters or pour a vial of discharge into a
18 ditch and see if it eventually ends up in the
19 Chesapeake, or do something on a very
20 impractical scale, to prove the connection.

21 MS. WILCHER: You know, this is a
22 really important issue. The government has to

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1 do something other than to make allegations,
2 especially in a case where you're dealing with
3 constitutional issues such as private property
4 rights and how one can use his own property,
5 or hers, and in this case, there are lots of
6 things that EPA historically has done for
7 typical NPDES cases. But when you before the
8 Board on a NPDES case, there's at least some
9 measure. If they had had pictures that there
10 was a plume coming off of this wetland; if
11 they'd done any flow calculations; if they'd
12 had any physical, chemical, biological
13 evidence of a nexus and a significant nexus to
14 the navigable waters, which again, are not the
15 ditches, they are the ditches that flow to the
16 creek that flow to the creek that flow to the
17 navigable waters, then it would be a different
18 case, but that is not what has happened in
19 this case.

20 JUDGE WOLGAST: Well, as you say,
21 the government obviously has the burden of
22 proof in an enforcement case, but is this the

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1 same type of evidence that you think a
2 landowner should undertake? I mean, obviously
3 they have the burden to obtain a permit where
4 there is potential jurisdiction.

5 MS. WILCHER: But if the person
6 doesn't obtain a permit -- and the government
7 thinks that they're in error, again, the
8 government always has the burden of proof.

9 JUDGE WOLGAST: Right, but I'm
10 talking about getting a -- you know, standing
11 in the landowner's shoes before we've ever
12 gotten to an enforcement case, it -- it, I
13 mean, I think there's some issue with, getting
14 back to the Supreme Court case, that one of
15 the things that we're concerned about, at
16 least Justice Scalia pointed to, was how much
17 evidence, time, money, it takes to work
18 through this process, and it sounds like the,
19 you know, the advocacy here is that there
20 should be more, not less.

21 MS. WILCHER: There should be
22 something done by the government in this

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1 regard to actually prove a nexus and a
2 significant nexus, and in this case, I can
3 assure you, Judge Wolgast, that the landowner
4 has gone above and beyond the call of duty,
5 going to the Corps time after time, having the
6 Corps out to the site, and having spent, talk
7 about the time and money and investment having
8 this case, as I understand it, having spent
9 over \$800,000 in litigation costs to try to
10 protect what was legal at the time that it was
11 done, and so -- so there is a burden.

12 The government has the burden, and
13 in this case, in this particular case, they
14 failed to meet it. I don't know why, haven't
15 been involved that long; I would speculate
16 that by the time the Rapanos case came along,
17 it was just too hard to go back and find the
18 type of probative evidence that would carry
19 the day.

20 I do not necessarily think that
21 it's an impossible task. There have been other
22 cases that I've reviewed where the government

1 has introduced evidence of the flows; the
2 amount of drainage that has occurred; how much
3 water might be taken up by a wetland area, but
4 none of that was done in this particular case,
5 and, again, we can only speculated why that
6 was the case.

7 JUDGE STEIN: How does the Sixth
8 Circuit decision in the Cundiff matter bear on
9 your view that the -- you need some sort of
10 laboratory analysis to prove this?

11 MS. WILCHER: Well, in that
12 particular case, you don't have, as I recall,
13 the -- the distance from a navigable water
14 that we have here, and I think the farther you
15 are away from a navigable water, the harder it
16 is to prove that there's any impact on that
17 navigable water, and in this -- again, in this
18 case, they are far away from a navigable
19 water, and I think the reason that we don't
20 see the proof is because it's not there; it's
21 not developable, and that is why it is not
22 here. Did you want me to --

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1 JUDGE STEIN: I do want you to get
2 the credibility question.

3 MS. WILCHER: I didn't want to
4 forget your - -

5 JUDGE STEIN: No, while we were on
6 this topic, why don't you address the
7 credibility question.

8 MS. WILCHER: I think it's an
9 important question. It's a real important
10 question, and that is simply that, even though
11 the regulations do provide that typically when
12 the ALJ hears the witnesses and makes
13 determinations of their credibility, that
14 typically this Board will defer to that.
15 However, in this case, a careful review of the
16 record shows that the ALJs just got it wrong,
17 and it is within this Board's prerogative to
18 look at the -- look at the factors that --
19 that the ALJs used in making their
20 determination, and make a judgment about
21 whether those factors are sufficient.

22 A couple of examples. There was a

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1 man who had lived on the farm for thirty years
2 who testified that he'd walked over the farm
3 for thirty years and testified that in fact,
4 the streams, or the drainage ditches, were
5 intermittent in nature and did not carry water
6 all the time. Well, the judge in the decision
7 said, well, I think he's a nice man; I think
8 he's beholden to the Smiths, and he was just
9 out on a walk, so totally just discounted his
10 testimony, saying he was just out on a walk,
11 as if that meant that somebody wouldn't notice
12 --

13 JUDGE WOLGAST: Are you saying
14 though that it would have to carry water all
15 the time?

16 MS. WILCHER: No, no. But, but,
17 it's clearly -- is not a navigable water nor
18 it is adjacent, nor is the wetland adjacent to
19 a navigable water, in this case. It flows --
20 anything that flows off of that area that has
21 been considered to be wetland by the
22 government, flows through drainage ditches

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1 that are only intermittent in nature, and
2 therefore are not considered to be navigable
3 waters, clearly, under the Rapanos decision.

4 JUDGE SHEEHAN: But if the man
5 walking the land said that they were
6 intermittent, and you're saying intermittent
7 doesn't matter?

8 MS. WILCHER: We're saying that --
9 Judge Charneski, as I recall, said that there
10 was a continuous flow of some kind, isn't that
11 -- didn't Judge Charneski say that?

12 JUDGE WOLGAST: Well, Justice
13 Scalia said that even after that --

14 MS. WILCHER: Right, right.

15 JUDGE WOLGAST: That -- that
16 seasonal flow could establish jurisdiction
17 under the pluralities test.

18 MS. WILCHER: But there's not been
19 seasonal flow established in this case. You
20 have somebody going out there on particular
21 days, after these ditches have been dug, which
22 we all know alter the flow in drainage; after

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1 the ditches are dug, water goes to the lowest
2 level, and so there's going to be more water
3 draining out of there than there would have
4 been in 1998 and 1999, and that -- that is
5 clear that there is no evidence at the time
6 this was done they were -- they were anything
7 but intermittent and there's no jurisdictional
8 connection that they have proven to date.

9 JUDGE WOLGAST: And what do you
10 think they would have had to have shown to
11 show seasonal flow?

12 MS. WILCHER: Well, they could
13 have done something more than go out there
14 nine times over the course of a year. They
15 could have had aerial photographs taken. They
16 could have -- well, first you have the USGS --
17 you have the USGS maps as showing it's
18 intermittent, and there's literally no
19 testimony on the record right now to show that
20 they're anything but intermittent. Other than
21 to say that if somebody goes out there nine
22 times and looks at the flow and sees water

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1 then -- again, keeping in mind this was years
2 after the drainage ditches were dug, that were
3 channeling more water into the old one through
4 seven drainage areas; there's nothing to
5 establish what was there at the time in 1998
6 and 1999.

7 JUDGE WOLGAST: And I think --
8 isn't this what courts are struggling with in
9 the sense that it's -- it's one thing to say
10 it's intermittent, but is that good enough? I
11 mean, don't you have to figure out just how
12 much flow in, you know, what period of time,
13 or, the idea that -- I don't -- if someone
14 says that it's intermittent, I'm not sure that
15 means it's in or out without further evidence.

16 MS. WILCHER: Right. Well, that
17 shows really the -- that shows arguably a
18 connection. But how much flow is going through
19 there, whether sediment loading is going
20 through there, whether there's an ecological
21 connection through there, all these whethers
22 lead to whether there is a significant nexus

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1 to a navigable water, and if you look at some
2 of the other cases there has been that kind of
3 information introduced, and in this case there
4 is none.

5 JUDGE WOLGAST: What case are you
6 thinking of?

7 MS. WILCHER: I'm thinking maybe
8 it was the Precon case in -- in the Eastern
9 District of Virginia. It's on appeal in the
10 Fourth Circuit. It may have been that. But
11 I'll be happy to provide some cases -- a case
12 or cases later on that show the type of
13 evidence that has been introduced because I
14 remember reading about them and can't think of
15 the name right now.

16 JUDGE SHEEHAN: I want to go back
17 for a moment to Judge Stein's question about
18 credibility.

19 MS. WILCHER: Yes.

20 JUDGE SHEEHAN: So ALJ Moran sat
21 through days and days of testimony, on the
22 bench, a lot of people in that witness chair.

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1 He's there, he's on the scene, he's
2 interpreting the way the witnesses speak and
3 their basic credibility, which you can only do
4 face to face in that way. What is it about
5 what happened there that causes you to think
6 there's some way, or some reason for us not to
7 credit the typical deference we would extend.
8 There must be some exception here that we need
9 to know about for that to happen.

10 MS. WILCHER: Well, and there are
11 a few facts that I think would be relevant to
12 your consideration in that case. In the first
13 instance, some of these witnesses that the ALJ
14 determined were not credible were stipulated
15 as being expert witnesses, and that shows at
16 least some level of credibility in the mind of
17 the government with regard to whether they
18 were experts in the field.

19 Second, some of the criticisms --
20 in one case a criticism that an ALJ made of an
21 expert witness was that he had not been to the
22 site often enough, yet with one of the

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1 governor's -- government's expert witnesses,
2 that person had been to the site less times
3 than the Smith Farm's expert witness. And so
4 there is a confounding sense that in this
5 particular case for whatever reason, if the
6 experts agreed with the government, they were
7 credible, and that if they didn't, they were
8 not.

9 It just seems highly unlikely that
10 every single witness introduced by Smith
11 Farms, and I've had the pleasure of working
12 with Mr. Boyd, and it is just, I think,
13 statistically unlikely that one could find
14 that many un-credible witnesses, and in this
15 case I do not believe that they were not
16 credible. I believe they were as credible, and
17 as I mentioned, in some cases were stipulated
18 in being expert witnesses --

19 JUDGE SHEEHAN: So you didn't
20 believe they were --

21 MS. WILCHER: I did not believe
22 they were not credible, so I believed that

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1 they were credible. And -- and it is somewhat
2 confounding, other than to say that the
3 closest thing that I could figure out was that
4 if they supported the government's view they
5 were credible, and if they did not support the
6 government's view, they were not.

7 JUDGE WOLGAST: But didn't Judge
8 Moran find that -- and to generalize -- that
9 the witnesses failed to establish that to the
10 extent there were wetlands, they were isolated
11 by non-hydric soil? Wasn't that a central part
12 of his credibility determination?

13 MS. WILCHER: Well, that's one of
14 the findings that Judge Moran made, but in
15 this particular case, keep in mind, it's not
16 Smith Farms that has to show that there is a
17 break or a barrier -- it's the government who
18 has to show that there is a connection.

19 JUDGE WOLGAST: Of course, I
20 understand. Right.

21 MS. WILCHER: So there's certainly
22 pockets of non-hydric soil in the area, and

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1 for some reason EPA -- and again, this is just
2 kind of amazing to me -- in a case that we've
3 spent this long on, that EPA did not go out
4 there and do a typical delineation of the
5 site, and this is something that is typically
6 done. It's amazing that EPA did not issue a
7 cease and desist order as soon as they knew
8 about it. There are many things that, to me,
9 are amazing about this case, that, quite
10 frankly, are the reason that I came here to
11 argue it. Because I'm a strong believer in
12 protecting the Clean Water Act and in
13 protecting wetlands, and you may or may not
14 know from my history, I bear a lot of scars
15 from having thrown myself in the body of
16 wetlands protection back in the days, and I
17 still believe it's an important thing to do.
18 But I also believe it's important to follow
19 the rule of law, and in this case, Mr. Boyd
20 made every effort to follow the rule of law,
21 and I believe he did, and when it did not work
22 out the way that EPA wanted the law to be,

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1 this enforcement action came forward, at a
2 time -- and had they intervened early on in
3 this case, they could have stopped. They knew
4 months before the work was completed -- they
5 knew months before the work was completed that
6 there was ditching and draining going on
7 there, and they did not move in quickly to try
8 to resolve that case, and they could have --
9 they could have stopped most of the so-called
10 harm that they are now alleging, but chose not
11 to do so. They did not do a delineation, they
12 did not introduce proof that this particular
13 part of property has a significant nexus to
14 jurisdictional waters of the United States, to
15 a navigable water of the United States, and
16 that's the reason I'm here.

17 JUDGE WOLGAST: I see your time is
18 expired, if there's no other questions?

19 MS. WILCHER: Thank you.

20 MS. SHAMET: Good morning, Your
21 Honors. My name is Stefania Shamat, and I
22 represent Region III in this matter,

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1 specifically the complainants, who are the
2 division directors for the Environmental
3 Assessment and Innovation Division, and the
4 Water Protection Division, at EPA, Region III.
5 With me at counsel table, I'd like to
6 introduce Donna Camer-Tal, who is regulatory
7 counsel for the Norfolk District Army Corps of
8 Engineers, and Karen Wendelowski, who is with
9 the office of general counsel, and also we
10 have a distinguished guest I'd like to
11 introduce -- sitting behind me is Dr. Dennis
12 Whigham, with the Smithsonian Environmental
13 Research Center. Your Honors, responders have
14 done -- if I can get in a couple points -- a
15 good job of obfuscating what are really very,
16 very simple facts here. The simple facts are
17 that these are wetlands, performing documented
18 functions that are delivered to tributaries.
19 These wetlands are adjacent, physically
20 abutting those tributaries, and those
21 tributaries flow to traditionally navigable
22 waters to the West, 2600 feet away; to the

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1 East, 4200 feet away. In other words, the are
2 wetlands adjacent to tributaries that flow
3 walking distance to traditionally navigable
4 waters. These wetlands were jurisdictional
5 under SWANCC, as respondent conceded, in Clean
6 Water Act Appeal number 05-05, when respondent
7 reserved argument on jurisdiction, but chose
8 not to raise it until there was a change in
9 case law. They continue to be jurisdictional
10 under any standard enunciated by the Supreme
11 Court in Rapanos. The quantum of proof offered
12 by the complainants in this matter not only
13 exceeds preponderance of the evidence, it
14 exceeds any quantum of proof required by
15 Rapanos. In fact, it far exceeds it. Another
16 thing that is obscured in the argument here by
17 the respondents is that up until 2007,
18 respondents had a different set of expert
19 witnesses. It was those expert witnesses that
20 complainants stipulated. Their expertise was
21 in wetlands identification, and the connection
22 of wetlands to waters of the United States.

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1 Those witnesses largely agree with
2 complainant's version of the facts on the
3 ground, and it wasn't until 2007, when
4 respondents hired a new set of expert
5 witnesses, that any real dispute arose about
6 what exactly was going on in the site. There
7 was dispute about what that meant, but not
8 exactly what the physical characteristics of
9 the site were.

10 JUDGE WOLGAST: Counsel, could you
11 address Ms. Wilcher's points that while there
12 may be flow moderation, carbon sequestration,
13 there may be some evidence that the government
14 hasn't shown a nexus between those
15 characteristics and the navigable waters?

16 MS. SHAMET: Sure. First of all,
17 the evidence of the functions being performed
18 on this site is not speculative. There are
19 photo after photo and testimony after
20 testimony, the government's evidence is based
21 on established scientific literature that
22 identifies something called field indicators

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1 -- physical characteristics on the ground --
2 that, when identified, correlate to a specific
3 function being formed by the wetland. In this
4 case there are three. The first was flow
5 moderation, and one of the physical
6 characteristics there would be such things as
7 ponding -- you see a lot of water being
8 captured in low levels, depressional levels,
9 within the wetland. The record contains dozens
10 of photos of that. The second is
11 denitrification, and that is the microbes
12 uptaking nitrogen in the soil. That indicator
13 is something called modeling in the soil. It's
14 a red splotch. Essentially it means that iron
15 is there. That evidence comes not only from
16 the complainants, but if one were to review
17 the soils expert from respondent, Dr. Parker's
18 -- or Mr. Parker's first expert report in
19 2003, he describes modeling in his soils. The
20 third is primary production. That is, the
21 contribution of a food source. Taking --
22 transforming organics that are in the -- in

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1 nature into a food source in water that then
2 transports that food source downstream to
3 higher trophic organisms. The best evidence of
4 that actually comes from one of respondent's
5 experts, Dr. Cahoon, who photographed it,
6 leaving the site. I can't find the photo at
7 the moment, but I'll describe what he says:
8 "Foaming at the confluence of the ditch,
9 leaving the property, with ditches along the
10 property boundary near the railroad. This foam
11 was also sampled and examined microscopically
12 -- it contained primary plant debris, some
13 pollen and numerous small oil droplets. These
14 oil droplets, in my opinion, were probably
15 plant oils derived from decomposition of the
16 organic matter in this area." That description
17 correlates perfectly with the description in
18 the testimony in the remand hearing about what
19 primary production is -- the transport of
20 particulate and dissolved organics downstream
21 as a food source. So the use of the -- the
22 functions in this case are not speculative;

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1 they're clearly being performed, they're
2 clearly being documented as being performed on
3 this wetland. There's also evidence of the
4 hydrologic connection between this wetland,
5 the tributaries, and the downstream
6 traditionally navigable waters. Again, that
7 comes both from complainant's experts as well
8 as some of respondent's experts; one of
9 respondent's experts described that hydrologic
10 connection as such. He described the wetland
11 as a table top on which somebody pours water;
12 the water comes off of that table top, into
13 the ditches, and then transports down to the
14 traditionally navigable waters. The same
15 expert, Mr. Wolf, also agreed that the
16 wetlands on the site were in fact
17 hydrologically connected to the ditches, which
18 form tributaries, and were in fact adjacent to
19 them. So we also have function and we have
20 transport. Now with respect to Ms. Wilcher's
21 comment --

22 JUDGE WOLGAST: What is your

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1 position on the type of evidence that you
2 would need to show nexus of the
3 characteristics you see on site, to the
4 navigable waters?

5 MS. SHAMET: My position is that we
6 met it exactly and I would refer you to
7 Justice Kennedy's opinion. Justice Kennedy
8 identified the type of functions that he would
9 consider to form a significant nexus
10 traditional navigable waters, and those are
11 precisely the functions that were identified
12 on this site. Specifically, Justice Kennedy
13 refers to slowing down of surface runoff,
14 filtration and purification -- that would be
15 in on 547 US 773 to 75. He states with respect
16 to wetlands, the rationale for the Clean Water
17 Act regulation is, as the Corps as recognized,
18 that wetlands can perform critical functions
19 related to the integrity of other waters;
20 functions such as pollutant trapping -- in
21 other words, denitrification -- flood control,
22 flow moderation, and runoff storage.

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1 Therefore, the types of functions that we
2 documented as being performed on this site are
3 precisely the types of functions that Justice
4 Kennedy identified, in his opinion, as the
5 type of functions that form a significant
6 nexus.

7 JUDGE SHEEHAN: In -- in your
8 brief, on page 46, you say that the Kennedy
9 Test requires wetlands contributions to the
10 physical, chemical or biological integrity of
11 downstream waters -- is it "or" or "and"? Your
12 brief says "or."

13 MS. SHAMET: The brief says "or" --

14 JUDGE SHEEHAN: Because if it can
15 be just one of those --

16 MS. SHAMET: I believe Justice
17 Kennedy did use "and"; however, it is clear
18 that he does not require a function to
19 contribute to all three factors, and that's
20 clear from the function he identifies.

21 JUDGE SHEEHAN: Then why did he say
22 "and"?

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1 MS. SHAMET: I think he said "and,"
2 but he had a "comma and," and he was referring
3 to a list of examples, rather than a standard.
4 With respect to Ms. Wilcher's comment that we
5 don't have any photographs of plumes, as I
6 indicated, if one were to turn to R Ex 28,
7 which unfortunately I can't find right now,
8 which is Respondent's Exhibit 28, from the
9 first hearing in 2003, Dr. Cahoon provides a
10 picture of that plume himself. I would also
11 point out that, with respect to
12 denitrification, one wouldn't expect to see a
13 plume -- that's the exact point; it's to hold
14 the nitrogen on the wetland, not send it
15 downstream.

16 JUDGE STEIN: How is the Rapanos
17 significant nexus test different, if at all,
18 from the nexus in Riverview -- Riverside
19 Bayview?

20 MS. SHAMET: Riverside Bayview
21 assumed a nexus based upon adjacency; in this
22 case, Justice Kennedy has asked that we

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1 actually go forward and establish that the
2 nexus exists, rather than simply assuming it
3 based on adjacency.

4 JUDGE SHEEHAN: On page 41 of your
5 brief you quote some of the testimony of the
6 first ALJ hearing, which sounds a little more
7 tentative to me than you're sounding today
8 about the substantial nexus test being met.
9 The brief, at page 41, reads that these
10 wetlands are "more likely to perform
11 denitrification, more likely to allow for
12 suspended settlements -- sediments to settle
13 out, more likely to support a different suite
14 of wildlife species" -- that, to me, is
15 language that's not quite as powerful as
16 saying there is a substantial nexus met here,
17 that just sounds -- can you address what seems
18 to be more diffident language in your brief
19 than what you're articulating today?

20 MS. SHAMET: Well, as Your Honor
21 pointed out, the language that you pointed to
22 in the brief is from the 2003 hearing, before

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1 the Rapanos case. As the Board is aware, the
2 EPA agreed and argued that the evidence to
3 satisfy Rapanos had not been fully developed
4 as of 2003, and this precisely why we
5 requested a remand.

6 JUDGE SHEEHAN: But you're citing
7 it here, filed long after Rapanos, as if it's
8 still your position.

9 MS. SHAMET: I cited a lot of other
10 evidence as well, Your Honor, including the
11 testimony of Mr. Rhodes, the testimony of Dr.
12 Whigham, and the testimony -- the further
13 testimony of Mr. Martin. So, while that is a
14 piece of evidence, it is certainly not the
15 only evidence cited in our brief.

16 JUDGE WOLGAST: To go back to the
17 point you were making earlier about how the --
18 in essence, the three-part test is the same
19 type of evidence you would look to to
20 establish significant nexus, and Justice
21 Kennedy did seem to speak to that, saying much
22 the same evidence, referring to the Corps's

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1 delineation manual type evidence, should
2 permit the establishment of a significant
3 nexus with navigable, in fact, waters,
4 particularly if supplemented by further
5 evidence about the significance of the
6 tributaries to which the wetlands are
7 connected. How does the government interpret
8 the latter part of that quote?

9 MS. SHAMET: I think that the
10 government needs to show, and has shown in
11 this case, that there is an ability of those
12 tributaries to connect the wetlands to a
13 traditionally navigable water in such a way
14 that the functions are delivered. In this case
15 we have certainly shown the hydrologic
16 connection; some of respondent's experts have
17 agreed with us that that connection exists and
18 that there is sufficient -- that there is
19 water exchange there, and we've also shown
20 that there's proximity here; again, these are
21 walking distance to traditionally navigable
22 waters; this is not the Rapanos case, where it

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1 traveled 32 miles. So we think we have met
2 that burden here by showing the hydrologic
3 connection and showing that these tributaries
4 are capable of delivering the function. With
5 respect to credibility, and the points that
6 Your Honors asked of Ms. Wilcher, I would just
7 point out that Judge Moran's credibility
8 determination was based on demeanor and also
9 on the facts of this case. An important fact
10 to note, for instance, is, in the first
11 hearing in 2003, respondent's soils expert,
12 who laid a grid, found 53 out of 55 samples
13 hydric. The only two that were non-hydric had
14 --

15 JUDGE STEIN: I couldn't hear you.

16 MS. SHAMET: Had 53 out of 55 soil
17 samples he identified as hydric, in the site.
18 The only two that were non-hydric, had hydric
19 soils on either side. In the second hearing,
20 Dr. Pierce testified that there was
21 essentially non-hydric soils everywhere. And
22 on cross-examination, he was asked, didn't you

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1 find any hydric soils, and he said, oh yeah,
2 I found them -- I just didn't click on my GPS
3 locator and identify where they were and I
4 just didn't report them. He only reported the
5 non-hydric soils. That is the kind of thing
6 that happened that caused Judge Moran to find
7 a lack of credibility. With respect to Dr.
8 Straw, Dr. Straw's expert report discussed
9 undulations in the landscape that he
10 interpreted to mean there were no wetlands
11 there. On the stand, he conceded that there
12 were no undulations on the landscape -- he had
13 misinterpreted the aerial photo. More
14 importantly, he conceded that he knew about
15 that error before the hearing, and never
16 corrected it, until cross-examination. Judge
17 Moran had ample basis for finding no
18 credibility on those witnesses.

19 JUDGE STEIN: Is it your view that
20 the Board has no authority to overrule an
21 ALJ's credibility determination?

22 MS. SHAMET: No, Your Honor, the

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1 Board reviews the case de novo. While the
2 Board certainly defer to the ALJ's credibility
3 determination, what I am saying that in this
4 case, there is no basis for overturning it.

5 JUDGE STEIN: If we were to
6 overturn it -- a credibility determination,
7 what kinds of factors, in your view, should we
8 be taking into account?

9 MS. SHAMET: I would think you
10 would be looking to see whether or not the ALJ
11 has a rational basis -- oh gosh, I hate to use
12 legal standards like that -- but, some sort of
13 basis on which he based his credibility
14 determination; that he explained why there was
15 a lack of credibility, and I think in this
16 case he did so amply.

17 JUDGE SHEEHAN: If Ms. Wilcher's
18 correct in characterizing the way testimony
19 credibility went, it sounded almost like a
20 hundred percent credit to government
21 witnesses, and practically zero to
22 respondent's witnesses. If that's accurate --

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1 just stipulating to that assumption - - if
2 that's accurate, would that be a basis for not
3 allowing deference to Judge Moran's
4 credibility determinations -- if it's so
5 lopsided?

6 MS. SHAMET: In this case I would
7 say no, just simply because in this case we
8 have a classic battle of the experts, but
9 oddly enough, the battling experts are all on
10 respondent's side. And what we have are
11 experts who testified in 2007, who flat
12 disagreed with the testimony of respondent's
13 experts in 2003 without any attempt by the
14 2007 experts, or respondents, to reconcile
15 that testimony. Given that circumstance, it's
16 not surprising that the experts in 2007's
17 testimony were given very little weight. One
18 of the things that Ms. Wilcher referred to was
19 unfettered access to the site. If anyone had
20 unfettered access to the site, it was
21 respondent, and yet there are no photos in the
22 record showing the streams leaving the site

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1 dry except during a drought.

2 JUDGE WOLGAST: But her point was
3 that the government has the burden here.

4 MS. SHAMET: And the burden -- the
5 government has met the burden. In fact, in
6 this case, the preponderance of the evidence,
7 literally, the only evidence, other than
8 testimony by the site owner, testimony by
9 someone who walks around a three-hundred-acre
10 site hunting and looking for damage in the
11 fields, which is what he testified he was
12 doing there, and photographs taken during a
13 drought. The overwhelming evidence is that the
14 waters do flow on a regular basis. First of
15 all, these waters have been mapped -- the
16 waters leaving the site -- as flowing water by
17 USGS for half a century.

18 JUDGE WOLGAST: You mentioned that
19 the waters flow on a regular basis. Is that a
20 continuous basis?

21 MS. SHAMET: We would say it would
22 be part of every year, Your Honor.

1 JUDGE SHEEHAN: Then why is that
2 necessarily continual? The Scalia Test, now
3 that we've gone to continual flow, is just
4 that -- there has to be continual flow. He
5 says even the least significant of the lake,
6 river, oceans, or streams, the four water
7 bodies, the least significant streams has to
8 have continual flow. Your brief, you
9 repeatedly say -- make other instances that
10 are to me a lot less confident than what
11 Scalia seems to demand. You say, page 31, the
12 drains flow at least part of every year; page
13 35, at least some portion of every year, at
14 least, at least, at least -- it comes up
15 repeatedly in your brief, which could be just
16 one rain event. So there's one rain, at least
17 it flows one or two days after the rain, and
18 that's certainly a far cry, I would argue,
19 from continual. So can you address the seeming
20 gap between your statements and what Scalia
21 seems to demand as far as continual flow?

22 MS. SHAMET: We would state that

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1 Justice Scalia described relatively permanent
2 waters. He made pretty clear what those were.
3 He didn't require any specific number of days
4 of flow -- what he did say was common sense
5 and common usage distinguished between a wash
6 and a seasonal river, and that's in footnote
7 five; respondent likes to use the term
8 intermittent a lot but the one thing it is
9 clear from footnote 5 is that Justice Scalia
10 does not give the term intermittent any
11 regulatory import. Why? Because he
12 specifically declined to define it.

13 JUDGE SHEEHAN: Why doesn't he give
14 it regulatory import, when at least seven
15 times, by my count, in his opinion he says
16 intermittent waters do not qualify as
17 jurisdictional -- he even calls it an oxymoron
18 at one point.

19 MS. SHAMET: Even though he does
20 not -- he declines to define it. He says that
21 there are definitions of intermittent, but he
22 sees no reason to identify what those are

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1 here, and then he specifically says, "We have
2 no occasion in this litigation to decide
3 exactly when the drying up of a streambed is
4 continuous and frequent enough to disqualify
5 the channel as a water of the United States."

6 JUDGE SHEEHAN: I know we can't --
7 nobody knows what intermittent means with
8 absolute rigor; that's obviously subject to
9 interpretation. But the fact is, he
10 continually rejects intermittent waters,
11 whatever that means, as jurisdictional, and
12 you say intermittent doesn't matter. I don't
13 know how you can say that in the face of all
14 his statements that intermittent does matter.

15 MS. SHAMET: I think the evidence
16 demonstrates pretty clearly that there is
17 regular flow on a regular basis in these
18 waters. A good example --

19 JUDGE SHEEHAN: I'm not talking
20 about the evidence, I'm talking about the
21 standard.

22 MS. SHAMET: The standard is that

1 there has to be a relatively permanent water.
2 It can't be a wash, it can't be something that
3 flows only occasionally, only in response to
4 a very strong rainfall, it can't be a gutter.
5 It has to be a geographic feature. And in this
6 case we have USGS mapping these as geographic
7 features containing water for over fifty
8 years, which, if that's not relatively
9 permanent, I'm not quite sure what would be.

10 JUDGE SHEEHAN: Then how else --
11 why else -- why is it that you cannot muster
12 more behind your argument that these are
13 flowing drains than just saying at least part
14 of the year continually? You never say it's
15 continual, you never say it's relatively
16 permanent and not intermittent -- you seem to
17 stay away from saying that, and it seems
18 purposeful, because it happens so frequently.

19 MS. SHAMET: We don't
20 over-exaggerate our evidence, we say what it
21 is. And in this case what we're saying is we
22 agree. These streams dry up for part of the

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1 year. We've never argued that these were
2 perennial streams, because they're not. They
3 are streams that only flow for part of the
4 year. But part of the year is good enough,
5 under Justice Scalia's test. These are not
6 washes, they're not trickles. When they flow,
7 they flow. As Judge Moran pointed out, the
8 record is replete with photos of these streams
9 flowing, and flowing with a good amount of
10 water in them. Now for example --

11 JUDGE SHEEHAN: Flowing at least
12 part of the year, right?

13 MS. SHAMET: Flowing at least part
14 of the year. If I could get the photo up? An
15 example is this series of photos, if we can
16 get it up. If not, I'll just give the exhibit
17 numbers. Not a perfect picture. This photo was
18 taken in December 2006. As you can see,
19 there's visible flow in the stream. And this
20 is Complainant's Exhibit 328. Complainant's
21 Exhibit 308 -- same stream, same location; you
22 can tell by the cross. January '07, still

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1 flowing.

2 JUDGE SHEEHAN: What does that
3 really prove? You could go out right after a
4 rain as apparently happened; apparently Dr.
5 Whigham went out after rain in '07 and Judge
6 Moran noted that he was out two days after a
7 big rain, so naturally, the drains were full,
8 but showing us occasional --

9 MS. SHAMET: If you can show four
10 straight months of flow, I think you're
11 probably doing pretty good. This is one of
12 respondent's exhibits. This is Dr. Straw's
13 photo, taken in February 2007. This is
14 Respondent's Exhibit 57pp.

15 JUDGE WOLGAST: I'm sorry, whose
16 testimony was this?

17 MS. SHAMET: Dr. Straw's. The other
18 thing that is documented -- I'm just going to
19 go ahead and give you April. April 2007, still
20 flow. This is Complainant's Exhibit 391, and
21 just in case we're worried about March, we
22 don't have March 2007, we have March 2003.

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1 JUDGE SHEEHAN: What drain is that?

2 MS. SHAMET: This is Complainant's
3 Exhibit 102L.

4 JUDGE SHEEHAN: What drain?

5 MS. SHAMET: This is the portion of
6 drain six- seven as it leaves the site,
7 crosses underneath the railroad tracks to the
8 west and leaves the site. We would also note
9 that in the 2003 hearing, it was established
10 and Judge Charneski accepted ordinary high
11 watermark for the duration of the streams
12 leaving the site, from the time they leave the
13 site until the time they, walking distance
14 away, hit traditionally navigable waters. Now
15 while Justice Scalia said that existence of an
16 ordinary high watermark in and of itself does
17 not establish jurisdiction, it does remain a
18 fact on the ground that shows the presence of
19 flow. Our brief did cite in a footnote a
20 number of cases that describe what an ordinary
21 high water mark means and what it basically
22 means is that there's water there, on enough

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1 of a regular basis, that there's no
2 vegetation, and Dr. Straw, in pointing at that
3 photo, 57pp, pointed out that there was an
4 ordinary high watermark there. We believe that
5 we have shown through that evidence as well is
6 that there's a regularity of flow through
7 these water bodies. With respect to Ms.
8 Wilcher's surprise that EPA did not issue a
9 cease and desist order, we in fact did. We
10 issued an administrative order in 2000. I
11 don't have the record citation with me but I
12 believe it was testified to in the 2003
13 hearing. In addition, with respect to Ms.
14 Wilcher's comment that EPA knew about the
15 operation before it was completed, and didn't
16 intervene, that is also not correct. In July
17 of 1999, EPA contacted respondent and
18 requested a site visit. At that time the work
19 was not done. The site visit was scheduled in
20 -- they did the scheduling in July and the
21 visit was scheduled in September, and in
22 August respondent brought equipment to the

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1 site and finished it up to present EPA with a
2 fait accompli. Couple other points. There's
3 been a number of debates in the brief about --
4 briefs about whether or not there are, in
5 fact, wetlands on the site and whether or not
6 they extend all the way to the tributaries.
7 First of all, nothing in Rapanos altered the
8 Energy and Water Development Appropriations
9 Act of 1993, Public Law 102377, 106 Statutory
10 at Large 1315, in which Congress directed the
11 Corps of Engineers to use the 1987 wetlands
12 delineation manual until a replacement manual
13 was established. And the courts have
14 recognized deference to the Corps's 1987
15 manual as the agency's interpretation of its
16 own regulations. That manual was applied in
17 this case. That manual, when applied in this
18 case, identifies wetlands throughout the site.

19 JUDGE SHEEHAN: Are these -- are
20 these wetlands, these drains, are they fed by
21 any other source than rain?

22 MS. SHAMET: No, Your Honor. These

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1 wetlands are what are called the top of the
2 watershed, and this is why water flows in two
3 directions, off of this site -- it flows both
4 west and east because it's at the top of the
5 watershed.

6 JUDGE SHEEHAN: So any water on the
7 site, it's all rain-fed?

8 MS. SHAMET: Yes. The seasonality
9 of it, however, can be established through
10 testimony regarding how the plants on this
11 site interact with that precipitation. And
12 that testimony discusses the relationship
13 between what's called leaf out and
14 transpiration. In other words, when the leaves
15 are on the trees, the trees are uptaking water
16 from the ground -- from the groundwater table,
17 and the groundwater table decreases, and
18 that's why you see lower levels of water in
19 the summer. During the winter, when the leaves
20 are off the trees -- the trees are not
21 transpiring yet -- the water table rises, and
22 that's why these are seasonally flowing

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1 streams and seasonal systems.

2 JUDGE SHEEHAN: Is there any
3 testimony in the record about the frequency of
4 the rain? If rain is it, is the source, is
5 rain something on this property that occurs
6 fifty times a year, a hundred times a year,
7 two times a year?

8 MS. SHAMET: Your Honor, in the
9 2003 record, I believe there was an exhibit,
10 and I apologize that I can't name the exhibit
11 number for you right now, that identifies what
12 a one year storm is, what a three year storm
13 is, and what a five year storm is, in that
14 county, and I apologize that I can't come up
15 with the exhibit number for you right now.

16 JUDGE SHEEHAN: Well, what's your
17 recollection about it what it says, even if we
18 don't know the exhibit right now? I'm just
19 trying to get a bead on how -- whether it's
20 typically dry or typically wet there. With
21 rain.

22 MS. SHAMET: Your Honor, I can't

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1 recall. I believe it's under an inch -- around
2 an inch, but I can't say for sure; I look at
3 a lot of these for a lot of different areas
4 and I don't want to get one mixed up with the
5 other.

6 JUDGE WOLGAST: Whose testimony
7 were you referring to when you were discussing
8 seasonality?

9 MS. SHAMET: That was testimony of
10 Mr. Martin. It is at Remand Transcript 1912,
11 and Remand Transcript 354.

12 JUDGE STEIN: If the Board were to
13 conclude that the evidence in this case meets
14 the Kennedy Test, is it necessary for the
15 Board to consider whether the evidence meets
16 the plurality test?

17 MS. SHAMET: It's the position of
18 EPA that satisfying either test will establish
19 geographic jurisdiction under the Clean Water
20 Act. As the Board noted, all courts that have
21 so held have held that if one meets the
22 Kennedy Tests, then that's satisfied. In

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1 answer, actually, to one of your questions, I
2 think, Judge Stein, there is one case. It's an
3 unreported case out of the District of Hawaii
4 that has held that the Kennedy Test is limited
5 to isolated waters, and that you otherwise
6 apply to Scalia Test, and that is Sierra vs.
7 County of Honolulu, 2008 U.S. District LEXIS
8 64262, and we would just note that that case
9 is inconsistent with the governing circuit
10 law; it's the 9th Circuit, and we believe it's
11 inconsistent with Headlesburg and Moses, but
12 you did ask whether there was any case that
13 discussed the Scalia test, and that is the
14 only one, at least I'm aware of. To answer
15 your question, we believe that satisfying the
16 Kennedy Test would be sufficient and it would
17 not be necessary to reach the Scalia Test;
18 however, we do believe that we've satisfied
19 both in this case and that either test will do
20 it. All through.

21 JUDGE SHEEHAN: Can you point us in
22 the record to what may not be a gap, but it

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1 looks like a bit of a gap, at least from the
2 briefs. There's a lot of testimony -- a lot of
3 discussion in your brief about the history --
4 the history on the site, water on the site;
5 for example, a 1953 photo shows ditch one had
6 water, a 1937 photo, one, two and four had
7 water, 1920, USGS map had five -- ditch five
8 had water. And then so we leap from sixty,
9 seventy years ago to the present decade
10 beginning in 1999 when a bunch of inspections
11 occurred, mainly in '99, and there was some
12 hopscotching, and then they ended in 2007. So
13 there -- at least from the briefs there's a
14 fairly big gap between the very, very historic
15 maps and photos, and then the 1999-on
16 inspections and what they showed. What about
17 the intervening?

18 MS. SHAMET: I believe that we also
19 discussed the USGS maps in 1994, which were
20 the most recent maps prior to activity. As
21 Your Honor's aware from the Board's decision
22 in Bricks, it's incumbent upon us to show what

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1 the waters were like before the activity, not
2 after the activity.

3 JUDGE SHEEHAN: Right, but the
4 before here is well before. That's my
5 question. I don't see much except for that '94
6 map.

7 MS. SHAMET: And we also used
8 aerial photography from 1994 and 1995 to
9 supplement. There's been no evidence in the
10 record that anything changed between 1994 and
11 1995 and the activity in question, which
12 started in, I believe, December of '98 or
13 January of 1999. And I believe respondents
14 agreed on the western side of the site, in
15 their expert report, that the configuration
16 has been consistent since 1949, up until the
17 time of the activity. If there are any further
18 questions, I would just summarize again by
19 pointing out that the facts in this case are
20 very, very simple. These are wetlands, they're
21 clearly documented as wetlands, the
22 preponderance of the evidence established them

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1 as wetlands. The preponderance of evidence --
2 the overwhelming preponderance of the evidence
3 -- established that these wetlands are
4 performing actual, documented functions. The
5 very significant nexus that Justice Kennedy
6 described in his opinion. The evidence in this
7 case shows that these wetlands are physically
8 adjacent to tributaries. These are ditches,
9 they are manmade, but I would just note that
10 in Rapanos itself, the ditches were manmade
11 and no justices voted about that. They flow
12 walking distance to traditionally navigable
13 waters, and they are jurisdictional. Thank
14 you.

15 MS. WILCHER: May it please the
16 court. I want to thank counsel for raising the
17 tabletop analogy because I forgot to. This is
18 at a divide. It is twenty feet above sea
19 level. It is a watershed divide like the
20 continental divide, such that water is flowing
21 away, it is not at the bottom of anything. It
22 is no a marsh, it is not a bog, it is not a

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1 swamp. This is an area where there is no
2 ability for the wetland to capture and keep
3 pollutants out of a navigable water because it
4 itself is at the very head of the watershed.
5 And so trying to -- if you were able to be
6 there and see that, you would understand that
7 it's not got the same type of functions and
8 values as some area adjacent to, below,
9 catching, preventing pollution coming from a
10 lot of upstream areas. While that's not
11 particularly significant --

12 JUDGE SHEEHAN: Haven't you just
13 helped make the argument that with gravity,
14 working as it does, any discharge of a
15 pollutant up high would have made its way down
16 low, to a navigable water?

17 MS. WILCHER: Yes, so this is not
18 a mountainous area. This is a very slight
19 slope. In fact, to the naked eye it's almost
20 hard to see a slope.

21 JUDGE SHEEHAN: Why does flow
22 matter as significant nexus goes?

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1 MS. WILCHER: Well, the amount of
2 runoff, quite frankly, that would occur, can
3 matter with regard to that. I do want to
4 address a few absolutely incorrect things that
5 were stated and a couple misconceptions. Let
6 me start with the mischaracterization of the
7 expert witnesses that were hired in 2007.
8 There seems to be some attempt to imply that
9 hiring different expert witnesses to deal with
10 whether this is jurisdictional under Rapanos
11 is the same as having expert witnesses to
12 testify whether or not this area met the
13 former -- the actual definition of a wetland.
14 They're two different things. You can have a
15 wetland and it can still not be
16 jurisdictional. So it's our hope that the
17 Board doesn't misconstrue that to say that by
18 hiring different experts you were trying to
19 get a different result, which was not the case
20 -- it's simply that, if you're looking at how
21 much flow, what the functions of values are,
22 it's a very different thing from someone who

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1 can go out and do the soil samples to
2 determine what's hydric and what's not.
3 Second, just as -- with regard to the
4 credibility of the witnesses, just as there
5 were some -- a case, perhaps, where an expert
6 witness misstated something or changed its
7 mind, so did some of the government's expert
8 witnesses misstate something that then had to
9 be corrected. So did the brief that said --
10 that took the word and "and" changed it to
11 "or," with regard to what Justice Kennedy had
12 written. So I don't think that that in and of
13 itself has any significance with regard to the
14 credibility of a witness. When we are talking
15 about how far this land is from a navigable
16 water, counsel has mentioned that it's 2600
17 feet, which is about half a mile, or 4200
18 feet, which is close to a mile -- that's not
19 to reach a navigable water. Let us be clear.
20 That is to reach something that is not
21 necessarily an intermittent area. EPA
22 stipulated, in the stipulations dated

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1 September 8th, '03, that the water body
2 depicted, and this is numbers 37 and 38, that
3 the water bodies depicted as these drainage
4 ditches on the site are depicted by the USGS
5 topo map at the Ballary Hill (Phonetic)
6 quadrangle as a broken blue line and that a
7 broken blue line denotes an intermittent
8 stream. These are intermittent streams, and as
9 Justice Sheehan has correctly noted, Judge
10 Scalia says in many circumstances that
11 intermittent streams are not jurisdictional
12 waters of the U.S. However, if we turn to what
13 Justice Kennedy says, that's where we kind of
14 get into the either/or, what we also find
15 there is a great discussion by Justice Kennedy
16 himself on the Corps definition of a
17 tributary. Counsel was referring to the
18 drainage ditches as tributaries, and Justice
19 Kennedy makes it clear that the Corps
20 definition of tributary, that was in effect at
21 the time this decision was written, using the
22 high watermark, was not appropriate, and would

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1 lead in fact to too broad a definition of what
2 was jurisdictional in and of itself, under the
3 Clean Water Act. And there's -- we don't have
4 time to read it all, but I'm sure you've
5 probably read it more times than I have
6 anyway. We'd also just like to mention that,
7 quite frankly, the evidence that has been
8 introduced in this case is the type of
9 evidence the Court was hoping would not be
10 used to prove jurisdiction on such an
11 important issue, and that is it's speculative.
12 It's not -- we're not arguing that wetlands
13 aren't important, we aren't arguing that
14 wetlands aren't valuable, and, you know, in
15 1990, we'd say regulate, because we had the
16 legal authority to do so. This, again, is one
17 of these cases that simply wishing that the
18 Supreme Court had said something differently
19 does not make it so. This is what the Court
20 said -- that's the final word on the matter,
21 whatever we decide it is, but it's the final
22 word, and we can't change that, regardless of

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1 how important or how wrong someone may think
2 that it would be. Two other quick points to
3 mention, and that is, EPA knew about this work
4 that was going on in February of 1999, and
5 that is in Jeff Lapp's testimony in Volume 1,
6 page 167 through 169, so EPA did know. Most of
7 the work was completed by April or May of that
8 year, before EPA every came out to the site
9 and it wasn't until 2000 that a notice of
10 violation was issued.

11 JUDGE SHEEHAN: So why does that
12 matter? That's an enforcement choice EPA makes
13 every day of the week, and it's not part of
14 the record, it has nothing to do with whether
15 or not the Kennedy or Scalia or any other test
16 was met. It really doesn't seem to bear on the
17 legal issues here.

18 MS. WILCHER: Fair enough. For
19 purpose of this argument, for the purpose of
20 today, you're probably right, Judge. But it
21 does matter if we're talking about typical
22 practice of EPA, and while I'm well aware that

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1 there's no requirement to take an enforcement
2 action in anything less than this period of
3 statute of limitations, if in fact this was as
4 egregious and as violative and as problematic
5 as counsel appears to make it seem, then EPA
6 did have every opportunity to stop that, and
7 in many, many cases, when EPA sees a clear
8 violation of the law, they simply issues a
9 cease and desist order, and in a case like
10 Rapanos, in the Rapanos case, you have people
11 who are going out and taking action and
12 violating the wetlands law, after they've
13 received many state and federal cease and
14 desist orders, so the facts of this case are
15 so different from the facts of that case. Here
16 we have someone who was trying to comply with
17 the law as it was written at the time; in my
18 view he was complying with the law as it was
19 written at that time, and the fact that EPA
20 didn't like the way the law was written and
21 what it said and what the courts were
22 deciding, does not give them authority to come

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1 in and regulate after the fact.

2 JUDGE WOLGAST: Counsel, thank you,
3 you're out of time, if you could make your
4 final point in just the next thirty seconds,
5 I think you said you had two; I may be
6 mistaken.

7 MS. WILCHER: Thank you. Well, we
8 are talking about jurisdiction. I do think
9 that the overall issue of equity comes into
10 play. And knowing -- even knowing what the
11 jurisdiction was at the time of the activities
12 undertaken, is really kind of an unclear
13 matter. We're still struggling with what
14 jurisdiction is. Regrettably, that's always
15 been the problem with this program. The
16 problem with this program is that Congress did
17 not give us clear direction and clear guidance
18 to either EPA or to the Boyds or to anyone
19 else in the regulative community, and I think
20 that's a factor certainly that the court will
21 consider, and should consider, when making a
22 decision on issues of liability and in this

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1 case we would ask that you do so. Thank you.

2 JUDGE WOLGAST: Thank you. Counsel,
3 thank you for your argument, and the case is
4 now submitted.

5 MS. DURR: All rise. Session of the
6 Environmental Appeals Board now stands
7 adjourned.

8 (Whereupon, the above-entitled
9 matter was concluded at 11:16 a.m.)

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CERTIFICATE

This is to certify that the foregoing transcript
in the matter of: Smith Farm Enterprises, LLC

Before: Hon. Anna I. Wolgast
Environmental Appeals Judge

Date: July 20, 2010

Place: Washington, D.C.

represents the full and complete proceedings of the
aforementioned matter, as reported and reduced to
typewriting.

Sam Wojack

Sam Wojack