

## Affidavit of John Paul Woodley, Jr.

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My name is John Paul Woodley, Jr. I have been asked to provide this Affidavit regarding my review of the post remand record in the matter of Docket No.CW-03-2001-0022 (in the Matter of Smith Farm Enterprises, LLC) and based upon my personal knowledge and experience with administering the Clean Water Act responsibilities of the U.S. Army Corps of Engineers.

From August, 2003 until April, 2009, I served as Assistant Secretary of the Army for Civil Works. Pursuant to Title 10, United States Code, Section 3016, my duties in that position entailed the “overall supervision of the functions of the Department of the Army relating to programs for conservation and development of the national water resources, including flood control, navigation, shore protection, and related purposes.” This supervision encompassed the supervision of the responsibilities of the U. S. Army Corps of Engineers relating to permitting of dredge and fill activities in waters of the United States pursuant to the Clean Water Act.

In June 2006 the U. S. Supreme Court rendered a decision in the matter of *Rapanos v. U.S. Army Corps of Engineers*. That decision presented substantial concerns regarding its implementation, especially since no opinion of the Court was subscribed to by a majority of the Justices.

The Corps of Engineers shares responsibility for implementation of the Clean Water Act with the Environmental Protection Agency (EPA). Shortly after the decision was rendered, my counterpart at EPA, Assistant Administrator Benjamin Grumbles, and I decided to prepare a joint Army-EPA guidance document to provide direction to our subordinates in the field on how to implement the Rapanos decision in making jurisdictional determinations consistent with the law, as interpreted by the Supreme Court. The result of those efforts was an EPA and Corps issued guidance document, ultimately approved by me and Mr. Grumbles, entitled “Clean Water Act Jurisdiction following the U.S. Supreme Court Decision in *Rapanos v. United States* and *Carabell v. United States*”.

In formulating this set of guidelines, our process involved substantial consultations within our agencies and with other agencies and with outside stakeholders. That work was significant and resulted in a guidance document designed specifically to set forth the criteria and detail the necessary agency actions required to establish the existence of jurisdiction under the *Rapanos* decision. The document was designed to guide agency implementation post the Rapanos decision.

In June, 2007, Assistant Administrator Grumbles and I issued this detailed guidance document for implementation of the *Rapanos* decision by our agency subordinates. This guidance was re-issued with minor modifications in December, 2008.

I have reviewed the materials submitted in support of the finding of jurisdiction over “waters of the United States” in the matter of Smith Farm Enterprises, LLC. I have examined the transcript of testimony presented during the hearing on remand in this matter, and the briefs submitted by counsel on remand.



Based upon my review of the record in the Smith Farm case, I am concerned that the government, in this case, did not collect the necessary data to establish its assertion of jurisdiction over the Smith Farm site. The data required to be collected and upon which jurisdiction may be conferred upon the agencies is set forth in the detailed guidance issued jointly by the Army-EPA for implementation of the *Rapanos* decision. This guidance document, which was created expressly for the purpose of establishing a uniform standard by which the government should, on a site by site basis, establish its jurisdiction, is mentioned by the government in its case only once. That sole mention of this guidance is found merely in a footnote, and then only for the purpose of citing the provision of the document that reflects that it does not impose “legally binding requirements” on the EPA, the Corps, or the regulated community. While this statement is technically true of any guidance document, as compared to a notice-and-comment rulemaking, in context, this statement appears to be designed to distance the agency from the criteria stated in the guidance document because of the deficiencies in the agencies’ collection of data in support of its assertion of jurisdiction over the Smith Farm site. As the Assistant Secretary of the Army for Civil Works, I certainly expected and required that the officials implementing the program that I was statutorily responsible for supervising would consider the guidance document as authoritative and binding upon them. I have no doubt that Assistant Administrator Grumbles held the same view.

I see nowhere in the transcript and filings that I have reviewed that the detailed instructions for determining federal jurisdiction over waters of the United States, consistent with the understanding of the *Rapanos* decision, have been followed. Notably, as stated in the guidance document: “Principal considerations when evaluating significant nexus include the volume, duration and frequency of the flow of water in the tributary and the proximity of the tributary to a traditional navigable water.” The memorandum goes on to set forth the various ways in which volume, duration and frequency of flow should be documented to substantiate and confer jurisdiction. While the guidance document contemplates consideration of other physical indicators of flow, it specifies that these indicators should only be considered *in addition to* and not *in lieu of* specific hydrologic data of flow volume, duration and frequency. There simply is no substitute for hydrologic data of flow volume, duration and frequency in arriving at a significant nexus determination.

While the proximity of the tributaries to traditional navigable waters is discussed in the Smith Farm Enterprises case, apart from observations of episodic flow, I see no data having been compiled by the government to measure the volume of flow within the conveyances under scrutiny nor that the volume, duration and frequency of flow of tributaries thought to be waters of the United States has been considered, substantiated or documented. Those data are rudimentary to establishing the government’s jurisdiction. Without such basic information, a determination that federal jurisdiction exists over the wetlands on the Smith Farm site cannot have been adequately documented.

According to the testimony of Mr. Martin, neither the Corps of Engineers nor the EPA made any effort to chronicle in a systematic way the flow of water on the Smith Farm property (Remand Transcript, p. 555). The record is clear that the only water entering the site comes from precipitation, and the transcript indicates that several of the observations of flow took place after heavy local rainfall (Remand Transcript, pp. 908-909, 1680). It is also clear that the wetlands in

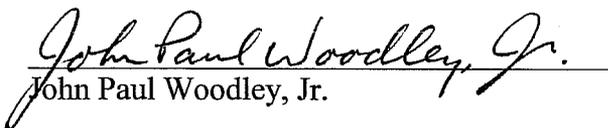
question are located at the top of a drainage divide, at the upper end of its watersheds (Remand Transcript, p. 215).

Testimony at the remand hearing indicated that the flows from the property were neither continuous nor seasonal (Remand Transcript pp. 344-345, 1860-1861). Also, the record indicates that some of the observed flows were actually seen some distance downstream from the wetlands under consideration, and downstream of the confluence of streams to which the Smith Farm wetlands may have been contiguous (Remand Transcript, pp. 338, 342-342, 346, 523-524, 1729-1730, 1978-1979).

Under these circumstances, the rules applicable to the adjacent wetlands of non-navigable tributaries that are not relatively permanent should be applied. The guidance is very specific on how wetlands are to be considered for cumulative impacts analysis. This was a special concern because of the potential for cumulative impacts analysis to be used to extend federal jurisdiction to almost any wetland with a connection to navigable waters, however slight. This concern is actually illustrated by the argument of the EPA counsel at the remand hearing, in which she analogized these small and remote wetlands to bricks in a building (Remand Transcript, p. 27). If you take out one or two bricks, the building might stand, she said, but if you take out enough bricks, the building will fall. Therefore, the argument goes, every brick must be preserved. Under this argument, there is no wetland that would not be jurisdictional, which is clearly contrary to the Rapanos decision.

The proper analysis would have required the description of each of the five drainage areas identified to be mapped and measured above the point that it reached confluence with another drainage. Instead of this, the government's testimony presented opinions on the importance of wetlands generally, and on the question of whether the wetlands on the Smith Farm site contributed any ecological functions to downstream navigable waters (Remand Transcript pp. 674, 708). No effort was expended in quantifying the specific impact of the Smith Farm wetlands (Remand Transcript pp. 555-558, 756, 760). The guidance document requires that the agencies conclude that the impacts on navigable waters from the wetlands under consideration are more than speculative (Guidance, p. 11). The record on remand offers a great deal of informed speculation, but no analysis based on data of flow volume, frequency or duration.

Because it appears that the necessary data were not collected and analyzed, one cannot tell whether jurisdiction exists. Based on the dismissive reference to the applicable guidance document in the Complainant's Initial Post Remand Hearing Brief submitted before the Environmental Appeals Board in this matter (see page 7, footnote No. 5), I can only conclude that no meaningful and certainly no effective attempt was made by the government to meet its burden of proof to establish jurisdiction in the case involving the Smith Farm site.

  
John Paul Woodley, Jr.

