

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

In re Smith Farm Enterprises, LLC,

Appellant

CWA App. 08-02

ENVIRONMENTAL APPEALS BOARD

SEP 21 10 53 AM '09

COMPLAINANTS' SURREPLY BRIEF

Complainants, through counsel, respectfully submit this Surreply Brief pursuant to the Board's Order dated June 18, 2009.

1. Complainants' Response Brief Properly Applied Justice Kennedy's Concurring Opinion in *Rapanos*

Complainants' Response Brief properly interpreted and applied Justice Kennedy's concurring opinion in *Rapanos v. United States*, 547 U.S. 715, 759-787 (2006). Justice Kennedy opined that wetlands fall within the jurisdictional scope of the Clean Water Act ("CWA") when there is a "significant nexus" between the wetlands and waters that are navigable in the traditional sense. *E.g., id.* at 779 (Kennedy, J., concurring in the judgment). Thus, under Justice Kennedy's standard, Complainants must demonstrate both that there is a "nexus" and that it is "significant."

Justice Kennedy described the nexus component repeatedly in terms of the functions that wetlands perform, i.e., their contribution to or affect upon traditionally navigable waters. For example:

- "With respect to wetlands, the rationale for Clean Water Act regulation is, ... that wetlands can perform critical functions related to the integrity of other waters -- functions such as pollutant trapping, flood control, and runoff storage." *Id.* (citation omitted).

- "[T]he Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR § 320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§ 320.4(b)(2)(iv) and (v).' 474 U.S. at 134. Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands." *Id.* at 775 (Kennedy, J., concurring in the judgment) (citation omitted).

Respondent's emphasis on the word "and" in the phrase "physical, chemical, and biological integrity" (Reply Brief at p. 3) appears to be an attempt to persuade the Board that the nexus must be to all three parameters -- the physical, chemical and biological integrity of traditionally navigable water. Respondent's argument amounts to a nonsequitur, given Justice Kennedy's opinion and the evidence in the record. As quoted above, Justice Kennedy provided specific examples of the types of functions that establish a nexus to the "physical, chemical and biological integrity" of traditionally navigable waters. ALJ Moran correctly found and the record demonstrates (and Respondent's Reply does not even attempt to rebut) that the functions performed and delivered by the wetlands and other waters on the Smith Farm Site to nearby downstream traditionally navigable waters -- flood storage, pollutant filtering -- are the very functions identified by Justice Kennedy as forming a nexus between wetlands and traditionally navigable waters. *See* Complainants' Response Brief at 40-48. *See also United States v. Lucas*, 516 F.3d 316, 327 (5th Cir.), *cert. denied*, 129 S. Ct. 116 (2008) (evidence that wetlands performed flood control and pollution trapping functions sufficient to establish significant nexus).

The second component of Justice Kennedy's standard is that the nexus between the wetlands and traditionally navigable waters must be "significant." Whatever meaning Respondent apparently assigned to the term "significant" by underlining it on page 4 of its Reply Brief, Justice Kennedy's meaning was clear. With regard to whether a nexus is "significant,"

Justice Kennedy stated only: "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term 'navigable waters.'" Thus, Justice Kennedy considers the nexus "significant" when it is something more than speculative or insubstantial. ALJ Moran found and the record in this case amply demonstrates that the functions being performed by the wetlands on the Smith Farm Site, i.e., their nexus, is neither speculative nor insubstantial. Complainants' Response Brief at 40-48.

It is not clear whether, by its use of the term "measure," (Reply Brief at 4) Respondent is trying to argue for a quantification requirement. What is clear, however, is that Justice Kennedy did not require a precise quantification or measurement of the nexus. *See United States v. Cundiff*, 555 F.3d 200, 211 (6th Cir. 2009), *petition for certiorari filed* (May 5, 2009) (No. 08-1376) (Nothing in any of the *Rapanos* opinions requires use of laboratory analysis or water samples to establish significant nexus).

2. Complainants' Response Brief Properly Applied Justice Scalia's Opinion

Complainants also did not misapply Justice Scalia's opinion. Respondent's argument that Justice Scalia defined the term "intermittent" ignores Justice Scalia's own words: "Though scientifically precise distinctions between 'perennial' and 'intermittent' flows are no doubt available, we have no occasion in this litigation to decide exactly when the drying-up of a streambed is continuous and frequent enough to disqualify the channel as a 'wate[r] of the United States.'" 547 U.S. at 732-33, n. 5 (Scalia, J.) (citation omitted). Even taking Respondent's suggested definition (Reply Brief at p. 5), ALJ Moran correctly held and the record establishes that the flowing waters on the Smith Farm Site contain flows that are greater than "[b]roken, fitful," "existing only, or no longer than a day." Complainants Response Brief at 31-35.

It is *Respondent* who misapplies Justice Scalia's opinion when, in its Reply Brief, Respondent states: "Complainant did not meet its burden of proof ... that the *wetlands* on Smith

Farm were relatively permanent bodies of water that the Scalia test requires for jurisdiction to exist." Reply Brief at 5 (emphasis added). Justice Scalia's reference to "relatively permanent, standing or continuously flowing bodies of water" that form geographic features applies to flowing waterbodies, not wetlands. *See, e.g.*, 547 U.S. at 739 (Scalia, J.). With respect to wetlands, the Scalia opinion would extend CWA jurisdiction to "those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right" *Id.* at 741-42 (Scalia, J.). As set forth in Complainants' Response Brief at 29-35, ALJ Moran correctly found and the record establishes that the flowing waterbodies on the Smith Farm Site are relatively permanent bodies of water forming geographic features and connected to traditionally navigable waters and that the wetlands on the Smith Farm Site have a continuous surface connection to those flowing waters.

3. Complainants' Response Brief Correctly Notes that Mr. Wolfe's Photographs were taken at the end of a drought

Respondent's reliance on photographs taken by Mr. Wolfe (apparently intended to demonstrate that the waterbodies flowing from the Smith Farm Site sometimes contain no flow) is misplaced because those photographs were taken at the end of a drought. Tr. V-103-05 (Wolfe); Tr. V-141-42 (Martin). Justice Scalia specifically did not exclude waters that dry up in times of drought. *See* 547 U.S. at 732, n. 5 (Scalia, J.).

Respondent protests too much the statement in Complainants' Response Brief that Respondent did not disclose that Mr. Wolfe's photographs were taken at the end of a drought. First, Respondent's Appeal Brief in fact does *not* inform the Board of that fact. Respondent's Appeal Brief at 28. Second, even in the testimony quoted by the Reply Brief, Mr. Wolfe concedes that his photographs *were* taken at the end of a drought as defined by the Virginia State Climatologist. *See also* Tr. V-103-05 (Wolfe). Third, while Mr. Wolfe testified that he did not observe "vegetation changes" consistent with drought-like conditions, that is not the same thing

as not observing *flow* changes that might reflect a drought. Plants, especially seasonal ones, might well demonstrate recovery from a long-term drought before pre-drought flow conditions return. As set forth in Complainants' Response Brief at pages 29-36, the waters leaving the Smith Farm Site form relatively permanent geographic features with sufficient flowing water to have been mapped as such by the U.S. Geological Survey for decades flowing to traditionally navigable waters and easily satisfy Justice Scalia's standard.

4. Respondent has not rebutted the preponderant evidence presented by Complainant that the wetlands on the Smith Farm Site have a continuous surface connection to jurisdictional waters

Respondent's argument that there is no continuous connection between the wetlands on the Smith Farm Site and the waters that flow from the Smith Farm Site to traditionally navigable waters continues to fail for exactly the same reason that it failed in Respondent's Appeal Brief:

(1) the record demonstrates and *two* ALJs correctly found a physical surface connection; and (2) Respondent's much-touted evidence of non-hydric soils does not undermine this finding. ALJ Charneski found: "It is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm." *Matter of Smith Farm Enterprises, LLC*, Dkt. No. CWA-2001-03-0022, Initial Decision, slip op. at 26 (May 4, 2005) (Charneski, ALJ). ALJ Moran adopted ALJ Charneski's finding, Decision Upon Remand at 7, and also found that the preponderance of evidence presented at the remand hearing established a physical connection between the wetlands on the Smith Farm Site and waters flowing from the Site. *See, e.g., Id.* at 21, 25, 29, 44. As set forth in Complainants' Response Brief at 20-28, the record amply supports the findings of both ALJs.

Respondent's argument regarding soils remains unpersuasive for the simple reason that the soils data taken by Dr. Pierce and Mr. Parker and relied upon by Dr. Pierce do not establish a physical break between the Smith Farm wetlands and the waters that flow from the Smith Farm

Site to traditionally navigable waters. When the latitude and longitude of Respondent's samples is plotted on an aerial photograph of the Site, it becomes clear that there is no barrier of non-hydric soils breaking the physical connection between the wetlands and the flowing waters. At most the samples taken by Dr. Pierce and Mr. Parker represent inclusions of non-hydric soils within a larger wetlands complex. CX 444 (May 2007) (aerial photograph of the western portion of Smith Farm Site depicting with orange dots locations of Dr. Pierce's soil probes based on latitude and longitude provided in Respondent's expert report); CX 443 (May 2007) (aerial photograph of the entire Smith Farm Site depicting with white dots the locations of the samples described by Mr. Parker at Dr. Pierce's direction); Remand tr. 1887-93 (Martin) (describing preparation of CX 443 and 444). This phenomenon, i.e., the presence of small non-hydric inclusions within a wetland, is common and expected and does not provide evidence sufficient to overcome the preponderant evidence in the record that the work at issue occurred in wetlands and that the wetlands have a physical surface connection to waters flowing from the Site to traditionally navigable waters. Remand tr. 1962-63 (Vasilas); Remand tr. 704-706 (Rhodes).

The Reply Brief misstates the import of Dr. Pierce's failure to identify the locations of hydric soils that he observed. Reply Brief at pp. 8-9. Complainant is not arguing that Respondent is under an obligation "to take and put on evidence of hydric soils." (Reply Brief at 9). Dr. Pierce's omission is relevant because Respondent's briefs (relying on Dr. Pierce) present an impression that non-hydric soils formed a band physically separating the wetlands from waters flowing from the Site and that most of the soils on the Smith Farm Site were non-hydric (*see, e.g.*, Reply Brief at pp. 7-08), an impression that is unsupported and incorrect. A comparison with Mr. Parker's 2002 sampling is enlightening. In 2002, Mr. Parker sampled along transects (or straight lines spaced approximately every 50 feet) described two to three soil samples along each transect. RX 32 (Oct. 2003); Tr. III-166 (Parker); Remand tr. 1161-62

(Parker). Mr. Parker described 55 soil samples in the areas at or near where the discharges occurred. RX 32 (Oct. 2003). Of those 55 soil samples at the Smith Farm Site, Mr. Parker described 53 as hydric soils. RX 32 (Oct. 2003); Remand tr. 1162-63 (Parker). The only two non-hydric samples described by Mr. Parker in 2002 had hydric soils on either side. Remand tr. 1162-63 (Parker); RX 32 (Oct. 2003). Mr. Parker's evidence shows that, when all sampling points are included, no extensive bands of non-hydric soils disrupt the physical connection between the wetlands and the flowing waters and that the Site consists of predominantly hydric soils (exactly what Respondent stipulated prior to Dr. Pierce's involvement).

5. Respondent should not be permitted to challenge on remand ALJ Charneski's finding that the wetlands on the Smith Farm Site are adjacent and contiguous to water bodies which flow from the Smith Farm Site because Respondent failed to challenge that finding in CWA Appeal No. 05-05

Respondent devotes parts of pages 9-10 of its Reply attempting to rebut Complainants' assertion at page 20 of Complainants' Response Brief that Respondent should not be permitted to challenge ALJ Charneski's finding that "[i]t is undisputed that the wetlands involved in this case are adjacent and contiguous to water bodies which flow from Smith Farm." *Matter of Smith Farm Enterprises, LLC*, Dkt. No. CWA-2001-03-0022, Initial Decision, slip op. at 26 (May 4, 2005) (Charneski, ALJ). ALJ Charneski characterized this as a factual finding. His decision goes on to note that it is the legal question, not the factual question, that is at issue: "What is in dispute, however, is the jurisdictional significance of these water bodies." *Id.*

Respondent's Reply Brief actually supports Complainants' view that, in CWA Appeal No. 05-05, Respondent waived any appeal of ALJ Charneski's factual finding and cannot revisit it on remand. Respondent concedes: "The question of whether 'the wetlands were adjacent and contiguous to water bodies which flow from Smith Farm' was a part of the determination of whether or not any wetlands at Smith Farm were under the jurisdiction of the CWA at the time ALJ Charneski issued his Initial Decision." Reply Brief at 9. Accordingly, if Respondent

disputed ALJ Charneski's factual finding on this point, it was incumbent upon Respondent to raise that fact question in CWA Appeal No. 05-05. In almost precisely the same circumstance in *Matter of Vico Construction Corp. and Amelia Venture Properties, LLC*, the Board interpreted the same reservation language used by Respondent in CWA App. No. 05-05 (and cited by Respondent on page 9 of its Reply Brief) to mean that Respondent did not contest facts related to CWA jurisdiction: "Second, although Appellants purport to "reserve argument" on the question of whether the wetlands at issue are "waters of the United States" under the CWA, they have not challenged as a factual matter the connectedness of wetlands directly to the adjoining tributary to Drum Point Creek, or indirectly to other down stream navigable-in-fact water bodies." 12 E.A.D. 298, 314 (EAB 2005).

Indeed, as Respondent notes in its Reply Brief (at p. 10) and the Board noted in its Remand Order in this case, Respondent's position was that ALJ Charneski's decision established sufficient facts to apply *Rapanos*.

Smith Farm expressed its view that the jurisdictional issue in this matter is now ripe for decision based on the Supreme Court's opinion in *Rapanos*. According to Smith Farm, the factual considerations potentially relevant under *Rapanos* were developed fully during the trial before the ALJ and in the Initial Decision. Accordingly, Smith Farm requested that the Board apply *Rapanos* to the facts already established in the case, and asked the Board to establish briefing schedule to address the jurisdictional issue in light of *Rapanos*.

Remand Order in CWA App. No. 05-05 at p. 4 (EAB Oct. 6, 2006).

Respondent failed to challenge ALJ Charneski's factual findings regarding the connection between the wetlands and the waters, and, as set forth on pages 14 & n. 13 and 20 of Complainants' Appeal Brief and the cases cited therein, Respondent should not be permitted to resurrect that issue due to the fortuity of a remand.

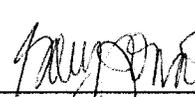
6. **To the extent Respondent argues that the Board may find CWA jurisdiction is present whenever the record satisfies either the standard described by Justice Scalia or that described in Justice Kennedy's concurrence, Complainants agree**

Finally, Respondent argues on page 8 of the Reply Brief that Complainants misinterpreted Respondent's Appeal Brief (at pages 49-51) characterization of holdings in *United States v. Johnson*, 467 F.3d 56 (1st Cir. 2006), *cert. denied*, 128 S. Ct. 375 (2007), and *Cundiff*. Respondent's Appeal Brief speaks for itself. Regardless, to the extent that on page 8 of its Reply Brief Respondent is now arguing that the Board may find jurisdiction whenever it finds that the record satisfies *either* the Scalia opinion or Justice Kennedy's concurrence, then Complainants would agree with that interpretation.

For the reasons set forth herein and for the reasons stated in Complainants' Response Brief, Complainants respectfully request that the Board affirm the Decision Upon Remand of ALJ Moran in this matter.

Respectfully submitted,

Dated: 7/20/09



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CERTIFICATE OF SERVICE

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

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