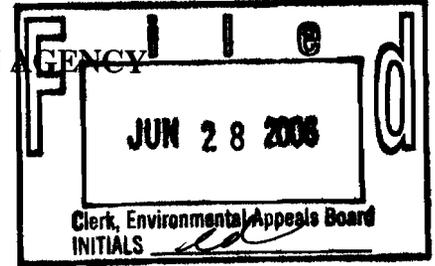


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER

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

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

July 1, 2005, and the Board held oral argument on liability on July 14, 2005.¹ The Region filed an Appellate Brief As To Issues Other Than Liability on July 22, 2005.

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

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

On appeal, Smith Farm does not reiterate its arguments with respect to jurisdiction, but instead “incorporates by reference its post-trial briefs and expressly reserves the issue in the event any subsequent decisions alter the applicable legal landscape.” Respondent’s Appeal Brief at 41.

The Board was nearing issuance of its final decision in *Smith Farm* when the U.S. Supreme Court issued *Rapanos v. United States*, Nos. 04-1034, 04-1384, 2006 WL 1667087 (U.S. June 19, 2006), 547 U.S. _____. *Rapanos* was consolidated with the Supreme Court’s grant of certiorari in *Carabell, supra*. 546 U.S. ____, 126 S.Ct. 415, 163 L.Ed.2d 316 (2005). In *Rapanos*, by a vote of 4-1-4, and a plurality, two concurring, and two dissenting opinions, the Court vacated and remanded the *Rapanos* and *Carabell* cases.

To assist the Board in determining what, if any, next steps to take with respect to the jurisdictional issue in *Smith Farm* in light of *Rapanos* and the procedural posture of Smith Farm, the Board seeks the views of the Parties. Specifically, the Parties shall advise the Board of what, if any, next steps they believe the Board should take with respect to the jurisdictional issues in the case, including whether to remand the case to the ALJ for further consideration or proceedings in light of *Rapanos*. The Board hereby orders Smith Farm and the Region (the “Parties”) to submit a statement to the Board explaining their views with respect to the foregoing no later than July 13, 2006.

The Board also recognizes that the Parties have already invested considerable effort in briefing the present case and may or may not welcome the possibility of a remand. Accordingly, if the Parties are now interested in attempting to resolve this case through alternate dispute resolution with a member of the Board who is not a member of the panel for this case, they shall also advise the Board as such by July 13, 2006 (simultaneous with the submission of their response to the foregoing paragraph of this order).

Each Party may submit a separate statement except, that if the Parties decide that alternate dispute resolution is appropriate, the Parties shall submit a joint motion in that regard.

So ordered.

Dated: June 28, 2006

ENVIRONMENTAL APPEALS BOARD

By: 
for Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

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

By First Class, U.S. Mail and facsimile:

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Dated:

JUN 28 2006



Annette Duncan

Secretary