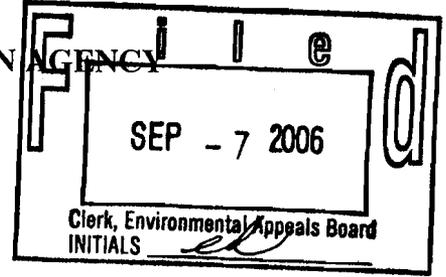


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER SCHEDULING HEARING

On September 29, 2005, the Environmental Appeals Board (the "Board") issued a Final Decision and Order in the above-captioned case upholding an Initial Decision issued by Administrative Law Judge Carl C. Charneski (the "ALJ") which found Vico Construction Corporation and Amelia Venture Properties, L.L.C., (collectively, "Vico and Amelia") liable for two violations of section 301(a) of the Clean Water Act (the "CWA"), 33 U.S.C. § 1311(a), and assessed a \$126,800 penalty pursuant to CWA section 309(g)(1), 33 U.S.C. § 1319(g)(1). Specifically, the Board upheld the ALJ's findings that Vico and Amelia had discharged fill material into wetlands that were waters of the United States without a permit under CWA section 404, 33 U.S.C. § 1344, and that they had discharged pollutants in storm water in connection with construction activities without first obtaining a National Pollutant Discharge Elimination System permit under CWA section 402, 33 U.S.C. § 1342.

Vico and Amelia filed a Petition for Review of the Board's Final Decision and Order with the United States Court of Appeals for the Fourth Circuit (the "Fourth Circuit") on October 27, 2005. On December 6, 2005, the Fourth Circuit, acting on Vico and Amelia's unopposed motion, placed the case in abeyance pending the United States Supreme Court's decision in the consolidated cases of *Rapanos v. United States*, No. 04-1034, and *Carabell v. United States Army Corps of Engineers*, No. 04-1384, which challenged the reach of the CWA's grant of jurisdiction over wetlands. On June 19, 2006, the United States Supreme Court decided the *Rapanos* and *Carabell* cases. See 2006 WL 1667087 (U.S. June 19, 2006), 547 U.S. ___. 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.

On July 18, 2006, Vico and Amelia, together with the U.S. Environmental Protection Agency, filed a Joint Motion for Voluntary Remand ("Remand Motion") with the Fourth Circuit. The Remand Motion requested that the Fourth Circuit remand the case to the Board to "allow the Board an opportunity to assess the impact, if any, of the Supreme Court's *Rapanos* decision on the issues" raised in the case. Remand Motion at 3. On August 14, 2006, the Fourth Circuit granted the Remand Motion, and issued its mandate remanding the case to the Board. A certified copy of the mandate was received by the Board on September 6, 2006.

To assist the Board in assessing the impact, if any, of the *Rapanos* decision on the Board's decision in this matter, including whether the Board should remand the present case to the ALJ for further consideration and/or proceedings with respect to jurisdiction, the Board

hereby orders Vico and Amelia, along with U.S. Environmental Protection Agency Region 3 (collectively, the "Parties"), each to submit a statement by September 15, 2006, explaining what next steps it believes the Board should take with respect to the jurisdictional issues in the present case in light of *Rapanos*. The Board also hereby orders the Parties to appear for a hearing on Tuesday, September 19, 2006. At the hearing the Board will grant each Party fifteen minutes to argue in favor of the position articulated in its statement due September 15, respond to the position articulated by the opposition, and assert its views on any motions that may be filed or argued by the Parties in this regard. This hearing will take place in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C., immediately following the status conference scheduled to begin at 11:00 a.m. in the case of *In re Smith Farm Enterprises, L.L.C.*, CWA Appeal No. 05-05. Counsel for either of the Parties who wish to participate in the hearing via the EPA video-conferencing equipment shall contact the Clerk of the Board, at (202) 233-0122, no later than Tuesday, September 12, 2006, to make arrangements for the use of such equipment.

So ordered.

Dated: Sept. 7, 2006

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER SCHEDULING HEARING in the matter of Vico Construction Corporation and Amelia Venture Properties, LLC, CWA Appeal No. 05-01, were sent to the following persons in the manner indicated.

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

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Dated: **SEP - 7 2006**


Annette Duncan
Secretary