

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)	
)	
Vico Construction Corporation and Smith Farm Enterprises, LLC,)	Docket No. CWA-03-2001-0022
)	
Respondents)	

**ORDER DENYING RESPONDENT SMITH FARM'S
MOTION TO CONTINUE HEARING**

On September 29, 2003, respondent Smith Farm Enterprises, LLC (“Smith Farm”), filed a motion to continue the hearing scheduled in this matter for October 6-9, 2003, in Norfolk, Virginia.¹ The hearing set to begin on October 6 is the second hearing to be held in this case and it is referred to as “Smith Farm II.” Respondent seeks a continuance of Smith Farm II in order to obtain the not as yet produced transcript from the first hearing, “Smith Farm I.” Smith Farm I was held more than one year ago. If a transcript were to be obtained from the Smith Farm I proceeding, there would be no need to convene Smith Farm II. Complainant United States Environmental Protection Agency (“EPA”) opposes this motion for continuance. For the reasons set forth below, Smith Farm’s motion is *denied*.

I. Background

A. The Hearing In Smith Farm I

EPA filed a complaint initiating this matter on May 21, 2001. Following the respondents’ answer, the parties entered into Alternative Dispute Resolution (“ADR”). The ADR process continued until an unsuccessful conclusion on October 29, 2001. This case was then placed on the undersigned’s docket on October 30, 2001.

After fairly routine prehearing filings, this matter went to hearing on June 18 through June 21, 2002, and was continued on June 26 and 27, 2002. The hearing was held in Virginia Beach, Virginia. At the conclusion of the hearing, the parties were informed that a briefing order would issue following the receipt of a transcript from the court reporter. No such transcript, however, was ever received.

¹ Respondent Vico Construction Company (“Vico”) did not join in this motion. Although no formal request has been made to dismiss Vico as a party, it appears that Vico may have settled this matter with EPA.

B. The Transcript Problem in Smith Farm I

The first sign of trouble regarding the production of a transcript in Smith Farm I emerged in late July of 2002. About this time, inquiries by the undersigned to the EPA Region 3 Regional Hearing Clerk regarding the status of the transcript in Smith Farm I eventually led to a series of conference calls and correspondences between the undersigned and counsel for both parties.

The initial conference call took place on August 2, 2002. During this call, the parties were informed that the production of the transcript could take as much as four more weeks. Unfortunately, the extension of this four-week waiting period was soon to become commonplace.

Because of a growing concern over the transcript delay, during a conference call on September 26, 2002, this Tribunal directed EPA to come up with a “game plan” for obtaining the transcript or face a possible dismissal of the case. Inasmuch as it was the complainant who contracted for the services of the court reporter, the complainant was viewed as the candidate in the best position to enforce the terms of its contract – *i.e.*, to get the transcript produced. Counsel for EPA willingly took the lead role in seeking a possible solution. Counsel for Vico and Smith Farm had no objection to this arrangement. Moreover, EPA was directed to keep respondents and this Tribunal fully informed as to what it was doing in its attempt to gain the transcript.

Thereafter, EPA made numerous attempts to get the transcript. All attempts, however, were for the most part unsuccessful. EPA was able to obtain from the court reporter 168 transcript pages comprising the first day of the hearing and 28 pages comprising part of the second day, but no more. As a result of this impasse, an order was issued on December 19, 2002, soliciting the parties’ views regarding the transcript problem. In response, both EPA and respondents suggested that the reporting firm of Yost Associates may be able to produce an accurate transcript using the materials compiled by the original court reporter.

Accordingly, Yost Associates was contacted by EPA. In that regard, Yost Associates informed EPA that even if a transcript could be prepared using the materials from the original court reporter, Yost Associates could not certify the transcript.² This prompted counsel for respondents to reply in part:

In light of the fact that the Smith Farms hearing was held in June 2002, and there is no guarantee that we will ever receive an accurate transcript of the Smith Farms hearing and, in any event, even if Yost Associates is able to produce a transcript of the Smith

² Eventually, Yost Associates gave up their attempt to transcribe the Smith Farm I hearing, concluding that they could not do the job.

Farm hearing . . . they will not be able to certify its accuracy, the Respondents respectfully request that the Court dismiss this case with prejudice.

Letter dated February 12, 2003.³

C. A New Hearing Is Ordered

On April 30, 2003, an order was issued granting EPA's request for a new hearing and denying Vico's and Smith Farm's request for dismissal. By order dated June 6, 2003, the parties were informed that this case would be reheard on October 6-9, 2003. In response, both complainant and respondents amended their prehearing exchanges, sought the issuance of subpoenas, and filed a joint stipulation of facts. Also, in anticipation of the upcoming hearing, a conference call was held with the parties on September 24, 2003. During this conference call, counsel for respondents informed this Tribunal that respondent Smith Farm was in the process of seeking injunctive relief in State court. Specifically, Smith Farm was seeking a Court order compelling the original court reporter in Smith Farm I to produce a transcript. Upon obtaining such an order, respondent informed this Tribunal that it would seek a continuance of the hearing scheduled to begin on October 6.

D. Respondent's Injunctive Relief And Motion For Continuance

In late September of 2003, Smith Farm filed a Bill of Complaint in the Circuit Court of the City of Virginia Beach, Virginia. In this complaint, Smith Farm pled that "[a]n order of this Honorable Court compelling the defendant to produce the transcript of the hearing will be an enforceable, effective cure for the wrong being and about to be suffered by the plaintiff." Compl, ¶ 13.

On September 26, 2003, the State Circuit Court granted Smith Farm the injunctive relief that it sought. The Court ordered the original court reporter of Smith Farm I "to forthwith commence and conclude the production of the written transcript on or before October 15, 2003 of the hearing of June 2002, in the matter of the *United States Environmental Protection Agency v. Smith Farm Enterprises, L.L.C. et al* and the Defendant shall report to Tayloe and Associates, Inc. office at 10:00 am on September 30, 2003 to start the transcript work."

In light of the Court's order, Smith Farm filed a motion with this Tribunal seeking a continuation of the hearing scheduled in this matter for October 6-9, 2003.

³ Counsel's letter was somewhat prophetic as subsequently EPA filed a motion for a new hearing and respondents filed a motion to dismiss.

II. Discussion

This Tribunal is cognizant of the additional burden and expense to both parties resulting from the rehearing of this case. Nonetheless, despite the exhaustive effort to obtain an accurate and reliable transcript of the Smith Farm I proceeding, the undersigned is convinced that such a transcript cannot be produced.

Indeed, even counsel for Smith Farm has offered, on more than one occasion, the same view. For example, in its motion to dismiss, counsel for respondents stated, “[the court reporter’s] work was unacceptable.” Mot. at 4. Counsel added, “[a]ccording to the Yost Associates’ court reporter who attempted to create a transcript from [the court reporter’s] notes, *huge portions of testimony were dropped, rendering the transcript undecipherable.*” *Id.* (*Emphasis added.*) As to that point, there seems to be no dispute. For example, in its opposition to Smith Farm’s motion for a continuance, EPA cites to several transcript sections previously provided by the original court reporter which appear to contain errors. These transcript citations are sufficient to call into question the reliability of any transcript work product created by the original court reporter in Smith Farm I. Moreover, throughout this post-hearing ordeal, there has been absolutely no showing to this Tribunal, by either EPA or respondents, that a complete and accurate transcript of Smith Farm I can be produced.⁴

In sum, while this Tribunal believes that the original court reporter in Smith Farm I will produce some type of work product in response to the State Court’s order, this Tribunal does not believe that any transcript produced will be accurate and reliable. Accordingly, this Tribunal sees nothing to be gained by further delaying these proceedings.

Carl C. Charneski
Administrative Law Judge

Issued: October 2, 2003
Washington, D.C.

⁴ In its motion for a continuance, Smith Farm suggests that it began its attempt to obtain the transcript in Smith Farm I only after EPA attempted to do so, but failed. Mot. at 1. Respondent’s statement to this effect is not accurate. While it is true that EPA took the lead in attempting to obtain the transcript, it is this Tribunal’s recollection that respondents were more or less partners with EPA in this endeavor. Throughout EPA’s post-hearing efforts in this regard, respondents were not only kept informed, but always had the opportunity to suggest an approach for obtaining the transcript.