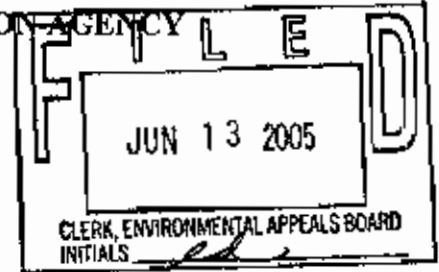


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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____)
In re:)

Smith Farm Enterprises, L.L.C.)

Docket No. CWA-3-2001-0022)
_____)

CWA Appeal No. 05-05

**ORDER GRANTING IN PART AND DENYING IN PART
RESPONDENT'S MOTION FOR EXTENSION OF TIME TO FILE
AND SCHEDULING ORAL ARGUMENT**

On June 9, 2005, U.S. Environmental Protection Agency ("EPA"), Region III, filed with the Environmental Appeals Board ("Board") a motion for extension of time to respond to the appeal in the above-captioned case. *See generally* Motion for Extension of Time to File Complainants' Appellate Brief. As explained below, we deny Region III's motion insofar as it seeks an extension of time to brief issues regarding liability, and we grant the motion insofar as it seeks an extension of time to brief all other issues in the case. Additionally, we are scheduling oral argument for July 14, 2005, as to issues of liability only.

On May 5, 2005, Administrative Law Judge Carl C. Charneski issued an Initial Decision finding Smith Farm Enterprises, L.L.C. ("Smith Farm") liable for violations of Clean Water Act ("CWA") section 301(a). *See* Initial Decision at 48. The underlying complaint, filed by Region III, included two counts. The first count alleged that, in connection with activities on

Smith Farm's 300-acre parcel of land in Chesapeake and Suffolk, Virginia ("the Property"), Smith Farm had discharged fill material (in the form of wood chips) into waters of the United States without an appropriate CWA permit under section 404. The second count alleged that Smith Farm had engaged in construction activities on the Property without the necessary CWA section 402 stormwater permit. The Initial Decision found Smith Farm liable on both counts, and assessed a civil penalty in the amount of \$94,000. *Id.*

Smith Farm filed an appeal with the Board on June 3, 2005, contesting liability as to both counts, and challenging the amount of the assessed penalty. *See* Respondent's Appeal Brief ("Smith Farm's Brief") at 5-6. In addition, Smith Farm argues that Judge Charneski should have granted Smith Farm's motion to dismiss the penalty action after the court reporter that Region III hired was unable to produce a transcript of the six-day evidentiary hearing.¹ *Id.* at 6. On June 9, 2005, Region III filed its Motion for Extension of Time to File Complainant's Appellate Brief ("Region III's Extension Motion"), requesting until July 22, 2005, to respond to Smith Farm's appeal. Region III's Extension Motion at 1.

The Board currently has before it another case, *In re Vico Construction Corporation & Amelia Venture Properties* (CWA Appeal No. 05-01), involving similar factual circumstances, similar CWA-related legal issues, a parcel of land in close proximity to the Smith Farm Property, and some of the same individual actors. *See* Initial Decision, *Vico Construction Corporation and*

¹ Judge Charneski instead ordered a rehearing of the case. *See* Smith Farm's Brief at 40-41.

Amelia Venture Properties, L.L.C., Docket No. CWA-3-2001-0021 (ALJ, Dec. 13, 2004).

Moreover, the same legal counsel is representing Smith Farm in this case and the land-owner and construction company appellants in the *Vico* case. The Board has received all briefs in the *Vico* case and has scheduled oral argument in that case to occur July 14, 2005.

Because of the overlap between this case and the *Vico* case, Smith Farm opposes Region III's Extension Motion. See Region III's Extension Motion at 2. Smith Farm has requested oral argument (see Smith Farm Brief at 41), and apparently intends to request that oral argument in this case be consolidated with oral argument in the *Vico* case (see Region III's Extension Motion at 2). As yet, however, Smith Farm has not requested consolidation. Nonetheless, after reviewing Smith Farm's Brief and the Initial Decision in Smith Farm the Board has made the following preliminary determinations: (1) the liability issues raised in this case appear to be virtually identical to the liability issues raised in the *Vico* case; (2) oral argument on the liability issues will assist the Board in its deliberations in both cases; (3) for reasons of efficiency and judicial economy, oral argument on CWA liability issues in this case should be consolidated with oral argument in the *Vico* case; and (4) such consolidation will not prejudice any party.²

Accordingly, Region III's request for an extension of time until July 22, 2005, to file its brief in this case is DENIED as to the CWA section 301(a) liability issues. As to such liability

² The Board is making no decision at this time regarding the need for oral argument in this case on issues other than CWA liability.

issues the Board hereby extends the deadline for Region III to file brief until July 1, 2005.³ As to all issues raised in the appeal, other than CWA liability issues, Region III's Motion for Extension is GRANTED, and its brief on such issues shall be filed with the Board no later than Friday July 22, 2005.⁴

The parties are hereby advised that oral argument, on the liability issues only, is scheduled to begin at 10:00 A.M. on Thursday July 14, 2005, in the Administrative Court Room, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. The Board has allocated a total of eighty minutes for oral argument, forty minutes per side.⁵ Appellants shall proceed first and may reserve up to five minutes for rebuttal.⁶

The Board requests that the parties focus their arguments on the following issues: (1) the significance, in light of the facts of this case, of the U.S. Army Corps of Engineers' definition of "fill material" as it existed when the Appellants' engaged in the construction activities in question; (2) the significance of the fact that the Appellants chipped and distributed the material

³ Region III indicates in its extension motion that Smith Farm "does not oppose an extension to July 1, 2005." Region III's Extension Motion at 2.

⁴ Documents are filed as of the day they are received by the Board.

⁵ Counsel may divide their allotted time between the two cases as they see fit, and should inform the Judges at the beginning of oral argument how they intend to proceed.

⁶ The parties must notify the Clerk of the Board in writing no later than Friday July 1, 2005, of any changes (due to the consolidation of oral arguments in the *Smith Farm* and *Vico* cases) regarding the counsel who will present oral argument on July 14.

remaining in the cleared areas rather than leaving it intact; and (3) the significance, with respect to liability, of the amount of wood chips discharged into the wetlands area.⁷

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: June 13, 2005

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

⁷ Parties should not interpret this request, or any other information contained in this Order, to suggest that the Board has made any determinations on the merits regarding any of the facts, issues, or legal matters that may be in dispute in this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Granting in Part and Denying in Part Respondent's Motion for Extension of Time to File and Scheduling Oral Argument 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 14 2005**


Annette Duncan
Secretary