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February 13, 2009

KC Matter No.: 0058296

Via Federal Express

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, NW
Suite 600
Washington, DC 20005

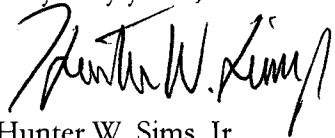
Re: ***In the Matter of VICO Construction Corporation, Smith Farm Enterprises, LLC***
CWA Appeal No.: 08-02; Docket No.: CWA-03-2001-0022

Dear Sir or Madam:

Enclosed for filing on behalf of the Respondent in the captioned matter are an original and five copies of a Motion for Additional Extension of Time to File Respondent's Appeal Brief.

Please call me if you have questions. Otherwise, thank you for your assistance in this regard.

Very truly yours,



Hunter W. Sims, Jr.

HWS/lsw

Enclosures

cc: Ms. Lydia Guy, Regional Hearing Clerk (*via* Federal Express w/enc.)
Stefania D. Shamet, Esquire (*via* Fax and Federal Express w/enc.)

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Chesapeake

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
United States Environmental Protection Agency
Washington, D.C

In the Matter of)
)
Smith Farm Enterprises, L.L.C.,) CWA Appeal No.: 08-02
Docket No.: CWA-032001-0022)
Respondent.)

**MOTION FOR ADDITIONAL EXTENSION OF TIME TO FILE
RESPONDENT'S APPEAL BRIEF**

NOW COMES Respondent, Smith Farm Enterprises, L.L.C. ("Respondent"), by counsel, and moves for an additional extension of time from March 6, 2009 to April 8, 2009 to file its Appeal Brief. In support of this motion, Respondent states:

SUMMARY

1. The purpose of this extension is to permit the Respondent to receive and consider a letter EPA stated it would provide to Respondent setting forth the final terms EPA would accept to settle this matter. As set forth in more detail below, the letter was to be sent to Respondent during the week of February 2, 2009. However, EPA has not sent it as of this date, February 13, 2009, although it has been prepared and the terms and conditions have been approved by both EPA and the U.S. Army Corps of Engineers for some time, because it is still being considered by the U.S. Department of Justice. Respondent's Appeal Brief is now due on March 6, 2009. Without the requested extension, Respondent must now commence to prepare the Appeal Brief which will be a major effort generating significant attorneys' fees given the record in this case. However, if the extension is granted, Respondent will have sufficient time to receive EPA's letter once it is reviewed by the Department of Justice and then make its decision

to either settle the case or continue with this litigation before any attorneys' fees are incurred to prepare the Appeal Brief.

GROUND FOR MOTION

2. As set forth in previous motions for extensions of time, the parties have been in active negotiations seeking a resolution of this matter, which will avoid further litigation. In that regard, on January 12, 2009, the Environmental Appeals Board granted the parties' January 6, 2009 joint motion for extension of time which extended the Respondent's time to file its Appeal Brief to March 6, 2009 and extended Region III's time to file its brief to April 10, 2009. That motion recounted that the extension was needed so that the parties could conduct further face-to-face negotiations at a meeting scheduled for January 30, 2009.

3. The January 30, 2009 meeting occurred and further progress was made toward resolving this matter. However, during the meeting, EPA stated that it had made a mistake concerning its position on a crucial point in the negotiations. EPA's counsel advised that she would provide to the Respondent a letter setting forth EPA's position to clarify EPA's total settlement position (the "Letter"), the following week. (No specific date was provided, but the time reference would have been February 2-6, 2009). No Letter was received by counsel for the Respondent by February 5, 2009 and, therefore, Respondent's counsel contacted EPA's counsel concerning the status of the Letter. At that point, EPA's counsel advised that the letter had been approved by EPA and by the U.S. Army Corps of Engineers, but was under review by the U.S. Department of Justice.

4. It should be noted that on February 5, 2009, the parties filed their Joint Status Report at the request of the Board and pursuant to the Board's Order Granting Third Extension of time dated January 12, 2009. In that Joint Status Report, paragraph 2 on page 2, the parties

described their face-to-face meeting, along with representatives of the U.S. Army Corps of Engineers, in Norfolk, Virginia for approximately six hours on January 30, 2009. The parties further stated that as of that time, they were unable to reach an agreement in principle and, while the parties intend to continue negotiations, they believe that further extensions of the briefing schedule (which at the time provided for Respondent to file its appeal brief on March 6, 2009 and the EPA to file its appeal brief on April 10, 2009) would not facilitate their ability to reach an agreement in principle. The basis of this statement, from Respondent's perspective, was the statement by the EPA at the January 30, 2009 meeting that it would send the Letter setting forth in writing the EPA's position during the week of February 2, 2009. On February 5, 2009 when the Joint Status Report was filed, the Respondent was under the impression that the Letter would be forthcoming. The parties also represented to the Board that they intended to continue negotiations. The Respondent also felt that if, after receiving the Letter, if received as anticipated, it was apparent that a resolution of the matter could not be obtained, Respondent would still have approximately 30 days to prepare and file its Appeal Brief.

5. On February 11, 2009, EPA's counsel advised that the U.S. Department of Justice still had the Letter under review and she did not know when that review would be completed so that the Letter could be sent to the Respondent for its consideration. As of this date, February 13, 2009, the Letter still has not been received by Respondent. Given this circumstance, which was not present when the Joint Status Report was provided to the Board, the Respondent now makes its request for additional extension to file its Appeal Brief.

6. The Respondent's appellate brief is due to the Environmental Appeals Board on March 6, 2009. The factual background of the case is complex, technical and requires consideration of the records of two proceedings. One of the Respondent's trial counsel, who was

one of the two attorneys representing the Respondent at the evidentiary hearings before two Administrative Law Judges who heard this matter, and who was the principal attorney in charge of Respondent's appeal brief, has retired from Kaufman & Canoles, P.C. Another attorney, who was not previously involved in the matter, Mary Jane Hall of Kaufman & Canoles, P.C., will be the principal attorney to prepare Respondent's Appeal Brief and requires additional time to become familiar with the voluminous record. In addition, the legal issues implicated revolve around the decision by the Supreme Court of the United States in *Rapanos v. United States*, 126 S.Ct. 2208 (2006), which remains a very unsettled area of the law.

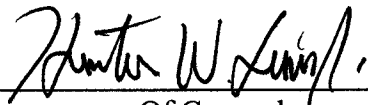
7. Respondent is a Virginia limited liability company owned by individuals who have already incurred significant legal fees in this matter commencing in 1999 as indicated by the procedural history of this case.

8. The additional extension sought will enable Respondent to receive and consider EPA's Letter setting forth the EPA's settlement position which will hopefully lead to a resolution of this matter. However, without this extension, Respondent's counsel must immediately commence preparing Respondent's Appeal Brief in order to meet the now pending March 6, 2009 filing deadline. In the meantime, if the parties ultimately settle the case, Respondent will have incurred significant legal fees which otherwise will not be necessary.

9. Counsel for EPA is unable to state whether EPA will oppose this motion. EPA will file a response promptly.

WHEREFORE, Respondent, Smith Farm Enterprises, LLC, respectfully requests an additional extension of time within which to file its Appeal Brief to and including April 8, 2009. If the extension is granted, Respondent would agree to a reasonable extension for the EPA to file its brief.

SMITH FARM ENTERPRISES, L.L.C.

By 
Of Counsel

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Mary Jane Hall, Esquire
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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2009, the foregoing *Motion for Additional Extension of Time to File Respondent's Appeal Brief* was furnished:

Via Federal Express (the original and five copies):

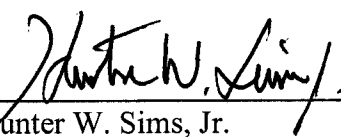
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Via Fax and Federal Express:

Stefania D. Shamet, Esquire
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fax: (215) 814-2603

Via Federal Express:

Ms. Lydia Guy, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
1650 Arch Street (3RC00)
Philadelphia, PA 19103



Hunter W. Sims, Jr.