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— | A Professional Corporation | —

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April 5, 2006

Via Federal Express

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

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ENVIR. APPEALS BOARD

Re: *In the Matter of VICO Construction Corporation, Smith Farm Enterprises, LLC*  
CWA Appeal No.: 05-05; Docket No.: CWA-3-2001-0022

Dear Sir or Madam:

Enclosed for filing on behalf of the Respondent, Smith Farm Enterprises, LLC, is an original and five (5) copies of Respondent's Response to Complainant's Motion to Strike Portions of Complainant's Appellate Briefs.

Please call me if you have questions.

Very truly yours,



Beth V. McMahon

BVM/kkw  
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Enclosures

cc: Stefania D. Shamet, Esquire (w/enc. via Federal Express)

BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
ENVIRONMENTAL APPEALS BOARD

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ENVIR. APPEALS BOARD

In the Matter of

Vico Construction Corporation,  
Smith Farm Enterprises, LLC,

Proceeding to Assess Class II Administrative  
Penalty Under Section 309(g) of the Clean  
Water Act, 33 U.S.C. § 1319(g)

Regarding property known as the “Smith Farms” Site located north of Portsmouth Boulevard (Rt. 337) and east of Shoulders Hill Road, and south of Rt. 17 in Chesapeake and Suffolk, Virginia (the “Property”) CWA Appeal No.: 05-05

Docket No.: CWA-3-2001-0022

**RESPONDENT’S RESPONSE TO COMPLAINANT’S MOTION TO STRIKE  
PORTIONS OF COMPLAINANT’S APPELLATE BRIEFS**

Respondent does not oppose the relief sought by the EPA, but believes additional portions of Complainant’s Brief should be struck as well.


As unadmitted Exhibit 69 states, the Corps formally requested access around March 1999. Prior to this time, however, Respondents welcomed the Corps’ involvement and input into the work at the site. The Corps was invited onto the property, and its access to the site was unimpeded. As Mr. Martin testified, he was on the site seven different times both before and after the formal request for access, gathering information and taking photographs. Tr. at 63-68. He did not testify about any restrictions being placed upon him or any information being denied to him. Respondent did not merely tolerate the Corps’ input and monitoring, it actively sought it.

Respondent disagrees that this is irrelevant to liability or penalty determinations as stated the by EPA on page three of its motion.

Given this background, if only the quoted language of CX 69 is struck on page 19 of EPA's July 22, 2006 brief as requested, the remaining text will be misleading because the record will not contain any reference to the time frame of the granting of the limited request. It would then appear that Respondents always limited access and that the Corps' access was impeded at any point, which are simply untrue. The record of what actually occurred shall be clear. Therefore, the sentence preceding the quoted language (which begins "Respondent fails to inform..."), and the sentence after the quoted language (which begins Mr. Martin's testimony...) should also be struck. Without Exhibit 69, there is no evidentiary support for those two sentences. Therefore, to the extent a motion is required, Respondents move for these additional two sentences surrounding the quoted language to be struck so that the record is clear.

Respectfully submitted,

**SMITH FARM ENTERPRISES, LLC**

By   
Beth V. McMahon

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5 day of April 2006, a true and correct copy of the foregoing was sent *via* Federal Express to:

Original and Five Copies:

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

Stefania D. Shamet, Esquire  
United States Environmental Protection Agency  
Region III  
1650 Arch Street  
Philadelphia, PA 19103-2029



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