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**UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD**

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ENVIRONMENTAL APPEALS BOARD

_____)
In The Matter of)
Smith Farm Enterprises, LLC,)
Respondent)
Initial Decision: May 5, 2005)
Docket No. CWA-3-2001-0022)
Presiding Officer: Administrative Law)
Judge Carl C. Charneski)
_____)

CWA Appeal No. 05-05

**COMPLAINANTS' RESPONSE TO RESPONDENT'S MOTION
REQUESTING ORAL ARGUMENT AND CONSOLIDATION OF ORAL ARGUMENT
WITH CASE NO. CWA-3-2001-0021**

Complainants respectfully file this response to Respondent's "Motion Requesting Oral Argument and Consolidation of Oral Argument with Case No. CWA-3-2001-0021."

By way of background, the reference in Respondent's motion to "Case No. CWA-3-2001-0021" refers to *Matter of Vico Construction Corporation and Amelia Venture Properties, L.L.C.*, CWA Appeal No. 05-01 ("*Vico Construction Corporation*"). That matter was tried before Administrative Law Judge Charneski on January 13-17 and February 6, 2003. The Initial Decision was issued December 13, 2005, and briefing before the Board was completed February 16, 2005. On May 5, 2005, the Board issued an Order Scheduling Oral Argument for July 14, 2005.

The Initial Decision in this matter ("*Smith Farm Enterprises, L.L.C.*") was issued May 5, 2005, following a hearing before Administrative Law Judge Charneski on October 6-9 and October 28-29, 2003. On June 2, 2005, Respondents filed a Notice of Appeal along with their

appellate brief. The Notice of Appeal and appellate brief were served on Complainants' counsel by Federal Express and received June 3, 2005. Complainants' responsive brief currently is due June 22, 2005, and Complainants have moved for an extension to July 20, 2005, which motion remains pending before the Board.

Pursuant to 40 C.F.R. § 22.12, the Board may consolidate two or more proceedings where: "there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings."

Although these matters involve common counsel and were assigned to the same administrative law judge, these two matters previously were not consolidated. Separate hearings were conducted, separate briefs were filed, and separate Initial Decisions were issued. Complainants believe that both Initial Decisions are fully supported by the law and by their respective hearing records. Complainants note, however, that to the extent the Board's decision will turn on the application of facts to law, the hearing records are not identical, and each matter must be decided based on its own separate record. For that reason, Complainants oppose consolidation of the two matters for decision.

With respect to Respondent's request for oral argument in the *Smith Farm Enterprises, L.L.C.* matter, it is Complainants' view that the law and the record amply support the Initial Decision and that oral argument is not necessary to assist the Board in issuing a final decision consistent with the Initial Decision.

If the Board nevertheless is inclined to grant oral argument and to the extent the Respondent seeks consolidation solely for the purpose of oral argument, Complainants state as

follows. With respect to the first factor under Section 22.12, *i.e.*, there are no common parties.¹ There also are no common questions of fact, because separate hearings were conducted, there are separate hearing records, and ALJ Charneski issued separate Initial Decisions. To the extent that both matters may implicate the relationship between Sections 402 and 404 of the Clean Water Act (33 U.S.C. §§ 1342 & 1344), and the U.S. Environmental Protection Agency's definition of "fill material" (40 C.F.R. § 232.2) and the U.S. Army Corps of Engineers' definition of "fill material" (33 C.F.R. § 323.2(e)) as those definitions existed in 1998, the two matters may raise a common question of law. However, as noted above, to the extent the Board's decision will turn on the application of facts to the law, each matter must be decided based upon its separate hearing record.

With respect to the second factor under Section 22.12, it is not clear that consolidation for purposes of oral argument would expedite or simplify consideration of these matters. Given that briefing of the *Smith Farm Enterprises, L.L.C.* matter is not yet completed, it would seem likely that consolidation would necessitate rescheduling the oral argument in *Vico Construction Corporation* (currently scheduled for July 14, 2005) to allow both the Board and the parties adequate time to review the *Smith Farm Enterprises, L.L.C.* briefs and to prepare for oral argument on that matter. Thus, consolidation would not expedite the Board's consideration of the *Vico Construction Corporation* matter, and it is not clear that consolidation would significantly expedite the Board's consideration of the *Smith Farm Enterprises, L.L.C.* matter. In addition, as noted above, to the extent the Board must apply the facts to the applicable law, the *Vico Construction Corporation* and *Smith Farm Enterprises, L.L.C.* matters each must be

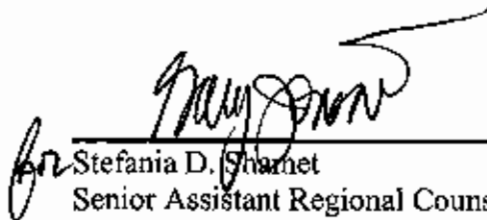
¹ Vico Construction Corporation and Complainants reached a settlement prior to the hearing in the *Smith Farm Enterprises, L.L.C.* matter, and therefore Vico Construction Corporation is no longer participating as a Respondent in that matter.

decided based on separate hearing records. Thus, it would seem that consolidation would not simplify the Board's consideration of either matter.

With respect to the last factor in Section 22.12, Respondent's motion does not state whether Vico Construction Corporation or Amelia Venture Properties, L.L.C. consent to consolidation for purposes of oral argument. Assuming that their common counsel obtained their consent prior to filing the motion on behalf of Smith Farm Enterprises, L.L.C., Complainants note that all parties could be adversely affected by any confusion caused by oral argument that likely would involve citation to two different hearing records. Nevertheless, Complainants note that it does not appear that any party would be prejudiced by consolidation for purposes of oral argument.

Respectfully submitted,

Date: 6/14/05


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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the foregoing Complainants' "Response to Respondent's Motion Requesting Oral Argument and Consolidation of Oral Argument with Case No. CWA-3-2001-0021" in the Matter of Smith Farm Enterprises, LLC, CWA Appeal No. 05-05 to be served in the following manner:

BY FIRST CLASS MAIL, AND BY FACSIMILE to 757-624-3169:

Hunter W. Sims
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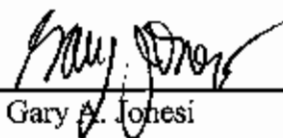
Lydia Guy, Regional Hearing Clerk
EPA Region III (3RC00)
1650 Arch Street
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Original and Five Copies BY HAND DELIVERY:

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
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6/14/05

Date



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