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## CONFIDENTIAL

### FACSIMILE COVER SHEET

**TO: U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board**

**FAX PHONE: 202/233-0121**

**OFFICE PHONE: 202/233-0122**

**FROM: Beth V. McMahon, Esquire**

**FILE NO.: 0058659**

**FILE NAME: Amelia Venture Properties, LLC**

**Date: 9/15/06**

ENVIR. APPEALS BOARD

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September 15, 2006

Via Facsimile (202) 233-0121  
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U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, NW  
Suite 600  
Washington, DC 20005


EC No. 0058659  
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ENVIR. APPEALS BOARD

Re: *In the Matter of VICO Construction Corporation and Amelia Venture Properties, LLC*  
CWA Appeal No.: 05-01; Docket No.: CWA-3-2001-0021

Dear Sir or Madam:

Enclosed for filing in the referenced matter is an original and five (5) copies of a Statement of Respondents VICO Construction Corporation and Amelia Venture Properties, LLC Pursuant to the Environmental Appeals Board Order Entered September 7, 2006.

Should you have any questions, please feel free to contact me. Otherwise, thank you for your assistance in this regard.

Very truly yours,  
  
Beth V. McMahon

BVM/kkw  
Enclosures  
::ODMA\PCDOCS\DOCSNFK\1133413\1

cc: Stefania D. Shamet, Esq. (via facsimile and Federal Express)

Disclosure Required by Internal Revenue Service Circular 230: This communication is not a tax opinion. To the extent it contains tax advice, it is not intended or written by the practitioner to be used, and it cannot be used by the taxpayer, for the purpose of avoiding tax penalties that may be imposed on the taxpayer by the Internal Revenue Service.

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

In the Matter of:	)
	)
Vico Construction Corporation,	)
Amelia Venture Properties, LLC,	)
	)
Respondents.	)
	)
Docket No. CWA-3-2001-0021	)
	)

CWA Appeal No.: 05-01

**STATEMENT OF RESPONDENTS VICO CONSTRUCTION CORPORATION  
AND AMELIA VENTURE PROPERTIES, LLC PURSUANT TO THE  
ENVIRONMENTAL APPEALS BOARD ORDER ENTERED SEPTEMBER 7, 2006**

Pursuant to the September 7, 2006 Order of the Environmental Appeals Board, Respondents Vico Construction Corporation and Amelia Ventures Properties, LLC (collectively "Respondents") submit this statement with respect to their position setting forth what action they believe the Board should take with respect to the jurisdictional issues in this case in light of the decision of the United States Supreme Court on June 19, 2006 in *Rapanos v. United States*, Number 04-1034 and *Carabell v. United States Army Corps of Engineers*, Number 04-1384. See 2006 W.L. 1667087 (U.S. June 2006), 547 U.S. \_\_\_\_\_.

The Respondents respectfully submit that the Board should decide the legal issue of whether the United States has jurisdiction in this case based upon the factual record developed before Administrative Law Judge Carl C. Charneski rather than remanding the case to Judge Charneski.

The EPA filed its Administrative Complaint against the Respondents on May 21, 2001 and its First Amended Complaint on January 7, 2002. In paragraph 19 of the First Amended

Complaint, the EPA alleged that the Site in question contained "wetlands which constitute 'waters of the United States.'" On February 5, 2002, the Respondents filed their Answer. In paragraph 19, the Respondents denied that the United States had jurisdiction over the land of Amelia Venture Properties, LLC ("Amelia") and in paragraph 12 of their affirmative defenses, stated in part as follows: "Respondent denies that jurisdictional wetlands exist on the property. Wetlands, if any, existing on this property, are isolated wetlands that are exempt from regulation under the Clean Water Act."

The administrative hearing was held on January 13 through January 17, 2003 and on February 6, 2003. A major issue to which the parties devoted a great deal of attention was whether the United States had jurisdiction over Amelia's land that would allow the EPA to enforce the alleged violations of the Clean Water Act. The parties called lay and expert witnesses. Respondents' expert witnesses included W. Blake Parker, Lawrence B. Cahoon, Gary J. Haste, Steve Ferguson and Robert N. Needham, all of whom charged expert witness fees. In addition, Respondents' attorneys charged fees for their services in preparing and trying the case. Moreover, Amelia has effectively not been able to use its land in any way since May 21, 2001, when the Administrative Complaint was filed, pending a resolution of this case.

From the initiation of this matter, all parties have been aware that the issue of whether or not the United States had jurisdiction of the wetlands on Amelia's land has been one of the principal issues in this case. The parties have had a full opportunity to present any and all facts on this issue that they believed were probative. For example, at the hearing Respondents introduced evidence that all the drainages from the property were intermittent, and EPA responded to this evidence. The parties filed post-hearing briefs in which the jurisdictional issue was fully vetted. In their post-hearing briefs, Respondents relied upon and detailed the holdings

of *United States of America v. Newdunn Assocs.*, 195 F. Supp.2d 751 (E.D. Va. 2002), *United States of America v. RGM Corp.*, 222 F. Supp.2d 780 (E.D.Va. 2002), *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5<sup>th</sup> Cir. 2001), *U.S. v. Rapanos*, 190 F. Supp.2d 1011 (E.D. Mich. 2002); *In re Needham*, 279 B.R. 515 (Bankr. W.D. La. 2001), and *FD & P Enters., Inc. v. United States Army Corps of Engineers*, 239 F. Supp.2d 509 (D. N.J. 2003) (all of which narrowly construed CWA jurisdiction and most of which were subsequently reversed directly or indirectly<sup>1</sup>). Respondents, citing these cases, urged Judge Charneski to reject the hydrologic connection theory and instead to find that EPA failed to establish a substantial nexus between the property at issue and navigable water. Respondents proposed the following finding of law: "EPA still has not proven a sufficient connection between the Lewis Farms Site and navigable waters or waters of the United States to establish jurisdiction over the Lewis Farms Site." Accordingly, EPA had every opportunity to establish any facts needed to counter these arguments, which are once again brought to the fore under the Supreme Court's decision in *Rapanos*. The *Rapanos* decision is not a completely new standard necessitating development of a different set of facts; rather, it is essentially an endorsement of the positions urged below by Respondents. Accordingly, the factual record on these issues was fully developed.

On December 13, 2004, Administrative Law Judge Charneski rendered his opinion wherein, among other issues, he ruled that jurisdiction existed under the Clean Water Act and explained his decision in detail.

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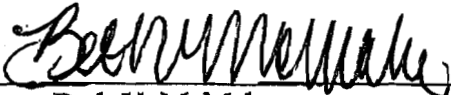
<sup>1</sup>Because the Fourth Circuit expressly accepted the hydrologic connection theory of jurisdiction in *United States v. Deaton*, 332 F.3d 698 (4<sup>th</sup> Cir. 2003) on June 12, these cases were no longer controlling or persuasive authority by the time the Vico and Amelia case was pending before the Environmental Appeals Board

On September 29, 2005, the Environmental Appeals Board rendered its decision which the Respondents appealed to the United States Court of Appeals for the Fourth Circuit. Thereafter, on October 11, 2005, the United States Supreme Court granted certiorari in *Rapanos* and *Carabell*. The Respondents and the United States then requested the United States Court of Appeals for the Fourth Circuit to stay the case pending a decision by the Supreme Court of the United States in *Rapanos* and *Carabell*. After the Supreme Court decided *Rapanos* and *Carabell* on June 19, 2006, the Respondents and the United States jointly asked that the case be remanded to the Environmental Appeals Board for further proceedings in light of *Rapanos* and *Carabell*.

While the Supreme Court's decisions in *Rapanos* and *Carabell* changed the law with respect to federal jurisdiction over any wetlands on Amelia's land, and therefore jurisdiction under the Clean Water Act in this case, all of the facts to be considered in applying *Rapanos* and *Carabell* were presented when this matter was heard before Administrative Law Judge Charneski. Therefore, the factual record is ready for a decision by the Environmental Appeals Board applying *Rapanos* and *Carabell*. There is no need to remand the case to Administrative Law Judge Charneski for a further evidentiary hearing as suggested by the Environmental Protection Agency. This will only cause further delay and additional expenses associated with a remand and yet another evidentiary hearing. Instead, the Environmental Appeals Board should decide, based upon the factual record now before it, the issue of whether the United States has jurisdiction over the wetlands on Amelia's land, and whether the Clean Water Act applies to this case, based upon the United States Supreme Court's June 19, 2006 decision in *Rapanos* and *Carabell* and the fully developed factual record that already exists.

Respectfully submitted,

**VICO CONSTRUCTION CORPORATION and  
AMELIA VENTURE PROPERTIES, LLC**

By   
Beth V. McMahon

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 15 day of September 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

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