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CONFIDENTIAL

FACSIMILE COVER SHEET

	NAME	FAX NUMBER	PHONE NUMBER
TO:	**Clerk of the Board, Environmental Appeals Board**	**202.233.0121**	**202.233.0122**
	Stefania D. Shamet, Esquire	**215.814.2603**	**215.814.2682**

FROM: **Beth V. McMahon, Esq.**
FILE NUMBER: **0058296**
FILE NAME: **Vico/Smith Farms**
DATE: **July 12, 2006**

TOTAL NUMBER OF PAGES INCLUDING THIS COVER SHEET: **6**

IN CASE OF TRANSMISSION PROBLEMS, PLEASE CALL (757) 624-3277.

ADDITIONAL COMMENTS:

Please see attached.

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July 12, 2006

KC No.: 0058659

Via Facsimile (202) 233-0121
and 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.: 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 Opposition to Complainant's Motion for Extension of Time Regarding the Board's Orders Dated June 28, 2006 and June 30, 2006 and Statement in Response to Board's Order Dated June 28, 2006.

Please call me if you have questions.

Very truly yours,

Beth V. McMahon

Beth V. McMahon

BVM/kkw
Enclosures
::ODMA\PCDOCS\DOCSNFK\1053692\1

cc: Stefania D. Shamet, Esq. (w/enc. *via* Facsimile and Federal Express)

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ENVIR. APPEALS BOARD

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL 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 OPPOSITION TO COMPLAINANT'S MOTION FOR EXTENSION OF TIME REGARDING THE BOARD'S ORDERS DATED JUNE 28, 2006 AND JUNE 30, 2006 AND STATEMENT IN RESPONSE TO BOARD'S ORDER DATED JUNE 28, 2006

Respondent opposes any further delay in this case, which has had a lengthy and tortured procedural history that has already imposed staggering costs on the Respondent.[1]

[1] As set forth in the extensive briefs filed in this matter, Respondent began working on its property in 1998 with the US Army Corps of Engineers as the supervising entity. The Corps did not ever indicate that work should stop. After the work was performed, the EPA swooped in and contended the work was violative of the Clean Water Act and initiated enforcement proceedings. The enforcement action was tried in a lengthy trial in 2003. The court reporter hired by EPA through a woefully deficient hiring process was incompetent, and she could not produce a transcript of the first trial. Respondent asked that the case be dismissed as a result or that EPA bear the cost of any retrial. That motion was denied, and the case tried a second time. The Initial Decision was rendered on May 5, 2005, and the case appealed to the Environmental Appeals Board. The liability issues in the case were argued before the Board in July 2005. While Respondent certainly recognizes that the pace of litigation is often slow, the progress of this case has been unusually so and extraordinarily costly. Respondent desires that the case be handled as expeditiously as possible now that the Supreme Court has issued its further guidance in Rapanos, and for that reason opposes EPA's request for further delay.

In light of the Supreme Court's fractured decision in the consolidated Rapanos and Carabell cases (referred to as "Rapanos"), courts will undoubtedly wrestle with how to apply Rapanos. As to this particular case, however, the facts relevant to the post-Rapanos jurisdictional analysis are not complex and need not be developed further.

When this litigation began, case law, including governing Eastern District of Virginia authority, strongly supported Respondent's position. As the litigation proceeded, the supportive cases were reversed, and case law support continued to erode until Rapanos. At the time the Initial Decision was appealed to the Environmental Appeals Board, the Fourth Circuit had reversed the supportive law and upheld the hydrologic connection theory (now explicitly disavowed in Rapanos). Respondent, however, believed that the SWANCC decision would be more narrowly construed by the Supreme Court and a mere hydrologic connection theory ultimately rejected; so Respondent reserved the jurisdictional issue (as did Complainant in response), explicitly noting that subsequent case law could impact the analysis. Now that the Supreme Court has issued Rapanos, the jurisdictional issue is ripe for decision. Because this litigation has spanned the evolution of case law on the jurisdictional issue, the considerations now potentially relevant under Rapanos (such as whether the drainages from the property were intermittent, whether each drainage was affected by the tides, whether there is a substantial nexus to navigable water, etc.) were developed fully during the trial of this matter and in the Judge's Initial Decision. Accordingly, there is no need for a remand to the Administrative Law Judge or for further supplementation of the record. The Board simply needs to apply Rapanos to the facts already established in this case. Given this posture, EPA's requested delay of sixty additional days before taking any further action is taken is unnecessary, will only impose greater costs on Respondent, and may confer an unfair tactical advantage upon EPA.

Respondent requests that the Board consider fully the jurisdictional issue in this case in light of the Supreme Court's decision in Rapanos. Accordingly, Respondent requests that the Court establish a briefing schedule so that the parties may address jurisdiction post-Rapanos. If the issue is further briefed, EPA certainly will have enough time to digest Rapanos, sort out its position, and coordinate with other agencies.

While Respondent is always willing to entertain any settlement discussions, mediation does not appear likely to be fruitful at this point if EPA has not yet determined its position as to what impact Rapanos will have on this case. (EPA's counsel had advised that she is not authorized to take any position about the Rapanos case). Once EPA determines its position, Respondent is willing to consider mediation, which at that point could be conducted more meaningfully.

Respectfully submitted,

SMITH FARM ENTERPRISES, LLC

By _____
Beth V. McMahon

Hunter W. Sims, Jr., Esquire (VSB # 09218)
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CERTIFICATE OF SERVICE

I hereby certify that on this 12 day of July 2006, a true and correct copy of the foregoing was sent *via* Facsimile and Federal Express to:

Original and Five Copies:
U.S. Environmental Protection Agency
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