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July 2, 2008

***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.: 05-05; Docket No.: CWA-3-2001-0022

Dear Sir or Madam:

Enclosed for filing on behalf of the Respondent in the captioned matter are an original and five copies of Respondent's Renewed Motion for Leave to File a Reply, which incorporates Respondent's Reply on *Ex Parte* Communication Issue.

Thank you for your assistance. Please call me if you have questions.

Very truly yours,

Beth V. McMahon

BVM/kkw
Enclosures
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cc/enc.: Honorable William Moran (*via* Federal Express)
Stefania D. Shamet, Esq. (*via* Facsimile)

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region III
1650 Arch Street
Philadelphia, PA 19103

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

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 RENEWED MOTION FOR LEAVE TO FILE A REPLY

EPA filed Complainant's Response to *Ex Parte* Communication Pursuant to 40 C.F.R. Section 22.8 on June 23, 2008. On June 26, 2008, Respondent Federal Expressed its Motion seeking leave to file a Reply, which was received by the EPA early the next morning. On June

27, 2008 Administrative Law Judge William Moran entered an Order ruling on a motion to reopen the case and reducing the administrative penalty according to a stipulation between the parties. The June 27 Order is the final order in the case, which will now be appealed to the Environmental Appeals Board (no appeal has yet been noted by Respondent). Judge Moran has not ruled on Respondent's Motion for Leave to File a Reply. Respondent is therefore uncertain about the status of the Motion or the procedures to be followed. Accordingly, whether this matter is now before the Environmental Appeals Board or still with Administrative Law Judge Moran, Respondent requests that it be granted leave to file the Reply as set forth below:

RESPONDENT'S REPLY ON *EX PARTE* COMMUNICATION ISSUE

Robert Boyd wrote the EPA Administrator a letter at his invitation after they spoke at a graduation ceremony (Mr. Boyd is a Rector of Virginian Wesleyan College, at which EPA Administrator Johnson was the commencement speaker). The letter was designed to relay the Boyds' ongoing frustration; it was not intended to be a compendium of the eight years of litigation history replete with transcript cites. Mr. Boyd was not aware of any policies regarding such contact, and counsel did not assist in preparing the letter. Mr. Boyd did not intend for his simple letter to become a new battlefront in this ongoing saga, and Respondents do not wish to add further fuel to a fire they would love to extinguish. Respondent does not have any objection to Mr. Boyd's letter to Administrator Johnson ("Letter") being filed or the settlement correspondence attached to the Letter being struck or sealed as requested by the EPA. Respondent does have concerns, however, about the EPA's response to the Letter, and therefore provides the following reply in order to provide full context.

Respondent stands fully behind the Letter's overall message that the Government's decision to commence this enforcement action was misguided. It is undisputed that Respondent

sought the advice of the Government (specifically the United States Army Corps on Engineers) before performing any work in order to confirm their understanding that the work could be performed without violating any applicable rules or regulations. Respondent reviewed correspondence between their environmental consultant and the Corps issued in connection with Tulloch ditching work at another property, which advised that no permits were required if work was performed in compliance with the conditions set forth in the letter. RX 10 and 11; Tr. Vol. III at 254-59. Respondent then requested a meeting with the Corps to discuss Respondent's specific project. Id. Subsequent to the meeting, Respondent then wrote the Corps through its consultant to summarize the meeting, which affirmed that Tulloch ditching was permissible if certain conditions were met and that a permit was not required. RX 14; Tr. Vol. III at 259-60. Respondent explicitly asked for input and ongoing Corps involvement. Tr. Vol. III at 260-61.[1] The Boyds, both active attorneys, were concerned that any work comply fully with the law. Despite the Government's responsibility to communicate with landowners pursuant to 33 C.F.R. Section 326.3, no Government official ever told Respondents that the work violated the law.

Steve Martin, the Corps inspector, testified that he remarked while inspecting the property to Respondent's environmental consultant, not the owners themselves, that the work was not what he expected or anticipated and that he "wasn't quite sure" about it. Tr. Vol. I at 271. This equivocal statement is hardly equivalent to the Government advising that the work violated the law or even that it was suspected that the work may violate the law. In fact, Martin had been told by his Corps supervisors not to say anything to the property owners while the Corps and EPA were considering the issues because telling the landowners that an investigation was ongoing would jeopardize the information needed to build the case. Tr. Vol. II at 20.

[1] These facts certainly distinguish this case from the other cases involving Tulloch ditching in the Hampton Roads area.

The Government never rescinded its letter relating to the other site, qualified it, or advised generally that they believed anything transpiring at the Property violated any law or procedure. The Government never responded in writing to the follow-up correspondence that was written after the Boyds' personal meeting with the Corps. Mr. Boyd's point in his Letter was that this entire situation was avoidable if the Government had communicated its concerns when asked. The situation is particularly unfortunate because Respondent never intended to take any action that would have incurred any risk of any enforcement action, and in fact, sought the Government's counsel about the work prior to its undertaking.

Mr. Boyd's letter states that the US Army Corps of Engineers visited the property six different times. This is correct. Tr. Vol. II at 64-68 (January 8, March 16 and 31, April 5 and 8, and September 10). EPA's response states that the visits after the Corps' initial visit in January 1999 were merely to check monitoring wells. This misses the point entirely. Even if the premises of the visits were just to check monitoring wells (which were all installed in the area of ditching), that is not all the Corps did while on the property. Instead, the Corps continued to photograph features other than monitoring wells and to gather evidence, even performing wetlands delineations in March 1999. Tr. Vol. I at 249-50. While ostensibly "checking monitoring wells," Corps inspector Martin was documenting wood chips (Tr. Vol. I at 257 (in March 1999- Tr. Vol. I at 256)), photographing rock check dams (Tr. Vol. I at 263 in April 1999) and documenting waterways (e.g. Tr. Vol. I at 254, 256, 258, 260-61, 262-63 (in March and April 1999)), all the time gathering evidence which was introduced against Respondent during the trial.

The point made in Mr. Boyd's Letter, which remains salient, is that the EPA was investigating and building its case after the property owners had been told by the Corps in

writing and in person that the work was not violative and did not need a permit. See Vol. II at 68-69.[2] While Respondent certainly appreciates that no agency building a case includes the opposing party in their strategy meetings, to have all this going on while Respondent was operating in reliance upon its good faith inquiries that all was well with the project is flatly inconsistent both with 33 C.F.R. Section 326.3 and with notions of fundamental fairness.

EPA's response also suggests that Respondent was not really concerned with complying with the law and instead was "pushing the envelope." Such an inference is simply inconsistent with the record evidence detailing the special precautions taken to comply with the directives in the Army Corps of Engineer's letter (e.g. Tr. Vol. V at 198, Vol. IV at 224, 227-28, 231, Vol. VI at 76-78, 85), which cost 250% more than standard ditching procedures. Tr. Vol. III at 267. The record evidence further clearly indicates that the vast majority of work was completed well in advance of Respondent knowing both that the EPA was involved or that anyone was concerned about the work. See CX 7.

EPA's reply states that Mr. Boyd's Letter was incorrect because the hurricane he cited (Hurricane Floyd) struck **after** the EPA's visit. But EPA's response does not mention that another hurricane, Hurricane Dennis, struck immediately **before** the EPA's site visit. Tr. Vol. V at 237, 256, Vol. VI at 84, 94. Rather the EPA cites only the heavy (3 inches) rainfall of two days prior to the site visit (which was, in fact, round two of Hurricane Dennis after it stalled and circled back over the area). RX 23. Two days prior, round one of Hurricane Dennis had dumped an additional 4.89 inches of rain. RX 23; Tr. Vol. III at 15. In the week immediately prior to the EPA's site visit, a total of 9.5 inches of rain had fallen. See Tr. Vol. III at 15; CX 47; RX 23.

[2] This is why Respondent reacted to the Virginia DEQ and locality's inquiries by stating its understanding that permits were not required. Not only had the Corps so advised, so had its consultants, Tr. Vol. IV at 112-13, and so had the DEQ itself. Tr. Vol. III at 279 (complete discussion at 274- 281). When eventually told with certainty that permits were required, Respondent obtained them immediately.

This was not a typical (albeit heavy) rain, but a serious hurricane that devastated the area days before the EPA's visit as is apparent from the newspaper articles introduced as RX 23.

Instead of researching or recognizing the impact that such a tremendous quantity of rain in a short period would have had on the property, those inspecting the site did not consider the hurricane. In particular, the EPA storm water inspector who was chronicling erosion during his visit testified that he was not aware of the hurricane or the heavy rainfall. Tr. Vol. III at 38, 16 (Q: "Do you recall the area just prior to your visit had had a hurricane? A: No, I wasn't aware of that." and A: "I wasn't aware that there was that much rainfall during that period." and Q: "Do you recall there were some rainfall events for days prior to your visit? A: No, I wasn't aware of that. I know it did rain the evening before inspection."). Asked specifically whether he questioned whether the surface water he viewed was the result of recent rainfall, the storm water inspector testified that he just assumed what he observed was from rain the day before. Tr. Vol. III at 38; see also Tr. Vol. 2 at 102 (Corps inspector Martin stating he did not recall the timing of the hurricane). The impact of a typical rain cannot fairly be compared to the impact of a hurricane that dumped a huge amount of rain, then stalled and dumped another huge amount of rain two days later—days before the EPA site visit.

Respondent certainly recognizes that the EPA views this case from a very different perspective and that with a record as voluminous as this one, different facts can be pulled out to argue almost any position. (And Respondent does not cast any aspersions about the integrity of counsel for EPA). What has been most upsetting to the Boyds, however, is the EPA's assertion that they have not been candid. Mr. Boyd merely wanted to reiterate Respondent's good faith in attempting to comply with the law, his sincere belief that Respondent has been wronged in this enforcement action, and his hope that this matter can be resolved without further litigation.

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 2 day of July 2008, a true and correct copy of the foregoing was sent to:

Original and Five Copies by Federal Express
U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, NW, Sixth Floor
Washington, DC 20005
Fax: (202) 233-0121

Original and One Copy by Federal Express
Ms. Lydia Guy, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
1650 Arch Street (3RC00)
Philadelphia, PA 19103

By Federal Express
Hon. William Moran
U.S. Environmental Protection Agency
Office of the Administrative Law Judges
Franklin Court, Suite 350
1099 14th Street, N.W.
Washington, DC 20005

By Facsimile
Stefania D. Shamet
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Beth V. McMahon

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