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March 26, 2009

KC No.: 0058659

***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 and Amelia Venture Properties, LLC***
CWA Appeal No.: 08-03; Docket No.: CWA-03-2001-0021

Dear Ms. Durr:

Enclosed are an original and five copies of Respondents' Appeal Brief, which I ask you to file on behalf of the Respondents in the captioned case. We also enclose a Notice of Appearance for Christy L. Murphy which also notes that Mary Jane Hall is no longer co-counsel for the respondents.

Please call me if you have any questions. Otherwise, thank you for your assistance in this regard.

Very truly yours,

Hunter W. Sims, Jr.

HWS/nlf
Enclosures
cc: Ms. Lydia Guy, Regional Hearing Clerk (*via* Federal Express w/enc.)
Stefania D. Shamet, Esquire (*via* Fax and Federal Express w/enc.)

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BEFORE THE UNITED STATES
ENVIRONMENTAL APPEALS BOARD

In the Matter of

VICO Construction Corporation and
Amelia Venture Properties, LLC

DOCKET NO CWA App. No. 08-03

Regarding property known as the "Lewis Farms Site" located west of Interstate 664 off Portsmouth Boulevard, 6 miles northeast of the northeast corner of the Great Dismal Swamp, and southwest of the cul-de-sac at the end of Gum Branch Road in Chesapeake, Virginia

Docket No. CWA 03-2001-0021

RESPONDENTS' APPEAL BRIEF

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Docket No. 03-2001-0021

RESPONDENTS' APPEAL BRIEF

Respondents, VICO Construction Corporation and Amelia Venture Properties, LLC (collectively, the "Respondents"), through their counsel, appeal the Remand Decision of the Honorable William B. Moran issued September 8, 2008 ("Remand Decision").

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case when he found jurisdiction both under the Scalia opinion in Rapanos and under the Kennedy opinion in Rapanos.

II. STATEMENT OF THE NATURE OF THE CASE

The Environmental Protection Agency ("EPA") brought this enforcement action against Respondents, the property owner and contractor, claiming that work performed at the property at issue ("Lewis Farms" or the "Property") violated Sections 402 and 404 of the Clean Water Act

("CWA"). Respondents denied all liability contesting, among other things, the EPA's jurisdiction over the Property and the EPA's asserted factual findings. Trial of this matter took six days in 2003. Administrative Law Judge Charneski issued his initial decision on December 13, 2004 ("Initial Decision") where he found that the EPA had established a CWA Section 404 violation based on the spreading of wood chips throughout certain corridors on the Property and that a Section 402 violation was established because storm water was conveyed along the ditch banks without a permit. The Initial Decision assessed Respondents a penalty of $126,800.

The Respondents appealed the Initial Decision to the Environmental Appeals Board ("EAB") which the EAB upheld. The Respondents then appealed the EAB's affirmation of the Initial decision to the United States Court of Appeals for the Fourth Circuit. While that appeal was pending, the United States Supreme Court granted certiorari in and then decided Rapanos v. United States, 547 U.S. 715 (2006). As that opinion could affect the appeal pending in the Fourth Circuit, the Fourth Circuit stayed the appeal and once the United States Supreme Court decided Rapanos, the Fourth Circuit granted the parties' joint motion to remand the matter to the EAB to assess the impact, if any, of the Rapanos decision. The EAB then made a determination that "the facts required to decide the case using the Clean Water Act jurisdictional tests set forth in Rapanos were either not present or not fully developed in the record" and remanded the matter to an administrative law judge to hear evidence and then ultimately rule on the jurisdictional issue.

Administrative Law Judge William B. Moran heard evidence in this matter on May 24, 25, 29, 30, 2007 and August 7, 2007 and issued his Initial Decision on Remand on September 8, 2008 ("Remand Decision"). In the Remand Decision, Judge Moran found Clean Water Act

("CWA") jurisdiction both under the Scalia opinion in Rapanos and under the Kennedy opinion in Rapanos.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. The Property contains some wetlands among its 117 acres.

B. The unnamed tributary[1] to Drum Point Creek is an intermittent waterbody.

C. The unnamed tributary to Drum Point Creek is not a seasonal water.

D. The unnamed tributary to Drum Point Creek does not flow continuously for a season.

E. The unnamed tributary to Drum Point Creek regularly dries up depending on rainfall. In a span of eight days, it went from wet to dry. R. Tr. at 196-98[2]; see also 2003 Tr. at 1343, 1345, 1350[3] (describing photos showing the same place along the tributary both wet and dry at different times).

F. During the 2003 trial, an environmental consultant painstakingly chronicled the unnamed tributary and introduced photos of its condition, many of which indicated dry conditions along its course. 2003 Tr. at 1335-1352[4].

G. The EPA simply never chronicled whether flow was present continuously during any three months of any year. R. Tr. at 216-17.

H. No surface connection between the wetlands on the Property and the unnamed tributary existed prior to the digging of ditches. R. Tr. at 529-30.

I. The wetlands on the Property were isolated and separated from the tributary by a band of non-hydric soil. R. Tr. at 568.

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[1] Respondents do not admit this is a tributary, but give it this name for identification purposes only
[2] Hereinafter citations to the Remand Transcript shall be in the form R. Tr. at _.
[3] Hereinafter citation to the transcript from the 2003 trial shall be in the form 2003 Tr. at _.

J. Non-hydric soils were verified by William Blake Parker, the soil scientist who wrote the Corps' wetlands delineation manual soils section.

K. Appendix C to R. Ex. RX74[5] shows the precise locations of all fully described soil samples as well as numerous other probes taken by Respondents' experts Pierce and Parker (who took 25–30 additional samples), R. Tr. at 914, 919, which revealed non-hydric soils (Pierce's were all Global Positioning Satellite located for accuracy).

L. These additional probes satisfied Parker that the soil samples were representative of the surrounding area rather than merely small inclusions of non-hydric soils. R. Tr. at 921.

M. Parker specifically said he did not find any areas of hydric soil within the non-hydric band area. R. Tr. at 922.

N. The EPA's witnesses acknowledged the band of non-hydric soil. R. Tr. at 138-39, 143, 191-92.

O. The local depressions on the Property are bounded by higher elevation spots, minimizing water flow. R. Tr. at 575.

P. Respondents' experts found little evidence of erosion or overland flow at the Property, R. Tr. at 701-02 (one example seen in a non-wetlands area), R. Tr. at 763 (no evidence of overland flow from the cleared corridors to the east), R. Tr. at 815 (photo with no evidence of overland flow), R. Tr. at 830 ("virtually no overland flow from the site"), R. Tr. at 888 (no evidence of erosion); R. Ex. RX74 at 40-41, and an EPA observer also noted no overland flow. R. Tr. at 768.

Q. The T-ditch is at its construction depth, so no general erosion or significant sedimentation has occurred. R. Tr. at 809.

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[5] Citations to exhibits used at the 2007 Remand Evidentiary hearing shall be in the form R. Ex. _.

R. The Respondents' hydrologist observed no rills or channels along the ditches (other than one place in non-wetlands), R. Tr. at 797, showing the lack of surface flow.

S. At the Property, the hydrologist saw no evidence of surface flow to the T-ditch, R. Tr. at 762, and concluded any flow was predominantly groundwater flow. R. Tr. at 761.

T. Larry Cahoon, the water quality expert who inspected the site several times after heavy rain agreed, testifying that he saw "extremely small amounts of surface water inflow at best." 2003 Tr. at 1170.

U. There was no evidence "that there were suitable habitat for animal species that would be of importance to navigable waters." R. Tr. at 527-28; see also R. Tr. at 597 ("I do not believe that there were any animal communities in the areas of corridors that would be tied at all to navigable waters").

V. Hummocks are not an exclusive wetlands feature. R. Tr. at 452, 570, 220. They are also found on non-wetlands areas and they function the same way with regard to storing water if they are on uplands. R. Tr. at 570; 584-85, 697-98.

W. Corps inspector Martin conceded that flood desynchronization can also be provided by non-wetlands, R. Tr. at 220, and flood desynchronization is often performed by storm water controls on developed properties such as the sediment ponds on the adjacent property. R. Tr. at 1029.

X. When a wetland is drained, its microtopography remains. Therefore, even if the water table was lowered through ditching, the Property still would hold water and in fact would hold more water, R. Tr. at 452-53, 697-98, which aids in flood control.

Y. Ironically, the ditching activities actually increased the capacity of the property to store water by lowering the water table (or wringing out the sponge). See R. Tr. at 697-98, 700-02.

Z. Only rain falling directly in the ditches would travel through the ditches, so the change in volume and speed would be insignificant. R. Tr. at 699-702.

AA. Water quality expert Larry Cahoon independently verified Mr. Straw's explanation by expressing surprise during the first trial that at how little water was in the ditches after a substantial rain, noting that only the rain that fell in the ditch itself was present after a substantial rainfall and that the "velocity of flow was very low." 2003 Tr. at 1169-70.

BB. The only source of nitrates at the Property is atmospheric deposition. R. Tr. at 154, 412.

CC. The amount of pollutants would be as low at Lewis Farm as at any other piece of Property in the area. R. Tr. at 172.

DD. The Lewis Farm soils contain a significant component of sand. R. Tr. at 555, 707; Figure 12 to R. Ex. RX74.

EE. Denitrification does not occur in sand, so the more sandy the soil, the less the rate of denitrification. R. Tr. at 558, 598, 707, 907; Figure 17 to R. Ex. RX74.

FF. More denitrification occurs in the soil below the surface than when the water is standing in depressional storage on top of the surface. R. Tr. at 705-08.

GG. As the EPA admitted, carbon sequestration and transformation can be performed by non-wetlands. R. Tr. at 220.

HH. Vegetation growing on the Property looks the same throughout the Property whether the vegetation is on wetlands or non-wetlands. Expert Report at 32.

II. The Property's vegetation is primarily facultative (meaning equally likely to occur in wetlands or uplands, R. Tr. at 70), not obligate (meaning they would be found in wetlands conditions 99 percent of the time). See R. Tr. at 202-03, 451, 594.

JJ. The Property's vegetation consists of large amount of loblolly pine, which is a facultative minus (non-wetland) plant. R. Tr. at 592, 594.

KK. Wood chips did not alter the flow of water across the site. R. Tr. at 829-30.

LL. In fact, more wood chips on the surface are a good thing for water quality because they add surface roughness, which slows down any overland flow to the extent there is overland flow. R. Tr. at 175.

MM. Even once the chips decomposed, their downstream contribution would be "vanishingly small," R. Tr. at 831, and they would not negatively impact water quality. R. Tr. at 831.

NN. Likewise, the ditching itself had no negative impact on water quality. R. Tr. at 832.

OO. Dr. Cahoon's testing demonstrated that the water in the ditches on the Property and as the water left the Property after the activities at issue was pure, with very low turbidity, and that water quality was "excellent." 2003 Tr. at 1153-1162, 1170-73, 1176.

PP. Cahoon concluded that "there were no water quality impacts that I could detect" from the activities at issue. 2003 Tr. at 1175.

QQ. Further, the wetlands on the Property cannot significantly affect the chemical, physical or biological integrity of navigable water "simply because they are so tiny. The amounts are very small." R. Tr. at 831.

RR. The EPA took no water samples. R. Tr. at 629-30, 220.

SS. EPA did not measure sediment, turbidity, nutrient levels or pollutant levels. R. Tr. at 217.

TT. EPA performed no wildlife evaluations. R. Tr. at 220.

IV. ARGUMENT

A. In the Remand Decision the Administrative Law Judge Erred in Finding Clean Water Act Jurisdiction Over the Wetlands in this Case under the Scalia Opinion in Rapanos

Under the four Justice opinion within the plurality in Rapanos ("Scalia Opinion"), establishing that wetlands are under the jurisdiction of the CWA requires two findings: "[F]irst, that the adjacent channel contains a "wate[r] of the United States," (i.e. a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the 'water' ends and the 'wetland' begins." 547 U.S. at 742. The EPA bears the burden of proving both prongs of the Scalia test in order to prove that CWA jurisdiction exists.

In a discussion of what constitutes "relatively permanent" waters, in the Scalia Opinion, Footnote 5 states "[b]y describing "waters" as relatively permanent we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude seasonal rivers, which contain continuous flow during some months of the year but no flow during dry months - such as the 290- day continuously flowing stream postulated by JUSTICE STEVENS' dissent." (emphasis added). 547 U.S. at 732. The footnote goes on to explain that "channels containing permanent flow are plainly within the definition" and "intermittent and ephemeral streams- that is streams whose flow is '[c]oming and going at intervals . . . [b]roken, fitful,' Webster's Second 1296" are not. Id.

Judge Moran, in the Remand Decision held that both that the waterbody in this case contains a water of the United States and that the wetland has a continuous surface connection with that water, despite the fact that the evidence provided at the hearing, even the evidence from the EPA's witnesses which Judge Moran classified as "highly credible," "forthright," and "credible," did not support this holding. Remand Decision at FN 20, 42, and 43.

1. The waterbody did not contain a water of the United States as it was not a relatively permanent body of water connected to traditional interstate navigable waters

Judge Moran placed great weight on the fact that EPA witness Steve Martin testified that in April and August, 1999, September and December, 2000, February, 2001, May and December, 2002, March and July, 2003, and January, April, and May, 2007 he observed flows in a waterbody identified as a tributary to Drum Point Creek. R. Tr. at 28, R. Ex. CX LF 286. In placing great weight on this testimony, Judge Moran took note that Martin had observed flow in "each and every quarter of the year." Judge Moran did observe that Martin admitted that in July of 1999, June of 2001, June of 2002, and October of 2002 that there was no flow in the tributary. Remand Decision at p. 10, FN 20. Judge Moran further found, based on these facts that "generally it [the tributary] is flowing from December through May in a given year." Remand Decision at p. 23. Judge Moran then relied on these facts, in part, in finding that the first prong of test under the Scalia opinion was met.

However, Judge Moran's factual findings do not result in the first prong of the Scalia test being met. Footnote 5 in Rapanos specifically addressed the applicability of the CWA to water which flows during some months and not in others. Specifically, the court suggested that seasonal rivers, such as those that would flow 290 days a year, would be covered by the CWA. As much as Judge Moran attempted to find that type of water here, it is not.

Clarification of the term "relatively permanent waters" was provided in the EPA and the Department of the Army's ("Corps") publication: Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in Rapanos v. United States & Carabell v. United States on June 5, 2007. In that publication, the EPA and the Corp recognized the constraints of footnote five and suggested that waters that have a seasonal flow, as contemplated by the footnote, typically flow for three months. Publication at p. 6.

Here, Martin did not testify and the EPA did not offer evidence of water flowing through the tributary for a three month span. As noted below, Martin acknowledged, and the EPA admitted, that the tributary is intermittent. In fact, Judge Moran's conclusion that water flowed through the tributary, generally, from December through May is unfounded in the record. While Martin did testify that in this system he "expected" flows from December through May, he offered no facts or evidence of the same and did not say which day or days in this timeframe that he "expected" any flow, and did not offer any description of the flow, i.e. intermittent, intermittent treble, flow for five minutes in a twenty-four hour period, etc. R. Tr. at 198. Further, Martin testified that the fact that there was water flowing in this system in July and then not eight days later was indicative of the fact that this system was variable. R. Tr. at 198. Based on this testimony, it is a large leap in logic to assume that because water was flowing on twelve separate occasions over an eight year span, it continuously flows for months at a time as required by the Scalia Opinion. In fact, Martin testified at the Remand hearing that there was no systematic effort to chronicle the extent of the intermittency. R. Tr. at 217.

Additionally, Judge Moran did not consider the breadth of evidence presented at the Remand hearing which went to the heart of this issue. First, Dr. William Straw testified that there is a difference between "seasonal" and "intermittent" streams. R. Tr. at 794. This

distinction means there are times when seasonality will have nothing to do with intermittency. R. Tr. at 795. Martin, on the other hand, testified that flows are seasonal in nature, R. Tr. at 148, and, therefore, intermittency is associated with seasonality. Martin's confusion of the terms "seasonal" and "intermittent" could be part of the reason Judge Moran felt comfortable making some of the factual conclusions he made, but should not have. Second, Martin agreed in his testimony that the tributary should be characterized as intermittent. R. Tr. at 148. In Footnote 6 of the Rapanos decision, Scalia takes great pains to explain that, due to the definition of a stream, there must be emphasis placed on continuous such that the words intermittent streams are oxymora. 547 U.S. at 733. He goes on to explain that even Justice Kennedy "concedes that an intermittent flow can constitute a stream only when it is flowing, which would mean that the channel is a water covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels." Id. Under this reasoning, absent one of the exceptions in Footnote 5, like an extraordinary exception such as a drought, an intermittent flow does not fall under CWA jurisdiction. Therefore, by Martin's own testimony, which Moran described as particularly forthright and credible, the EPA failed to meet its burden of proof under the first prong of the requirements under the Scalia Opinion.

The EPA simply did not present evidence to satisfy the first requirement under the Scalia test for when the CWA has jurisdiction over a wetland. Sufficient evidence was not shown that the waterbody in this case was a relatively permanent body of water connected to traditional interstate navigable waters. At most, the EPA presented evidence of an admittedly intermittent waterbody which had water flowing through it on twelve separate occasions in eight years. This evidence, coupled with the fact that the Respondents showed multiple times when water was not

flowing through the waterbody, certainly are enough to place this channel in the category of broken streams whose flow is coming and going at intervals. Pursuant to footnote 5 under the Scalia Opinion in Rapanos, this is exactly the type of water which the CWA does not have jurisdiction over. Especially illustrative of this is the fact that water was there one day and gone eight days later.

Contrast the factual scenario here with the one in United States v. Cundiff, No. 055469 (6th Cir., 2/4/2009), which conducted a post-Rapanos analysis of whether there was CWA jurisdiction over tributaries of the Green River which flows into the Ohio River. The court found that the district court took evidence which proved that water flowed through the channel "for all but a few weeks a year" and that two creeks were "open waterbodies with significant flowing water" which flowed into the Green River. Therefore, based on this evidence, the Sixth Circuit concluded that the first prong of the Scalia opinion's test was met. Here, no such evidence was presented by the EPA. At best, the EPA presented evidence that on twelve separate occasions over an eight year span water flowed in the tributary. This is simply not the level of proof required to satisfy the first prong of the Scalia opinion's test for when there is CWA jurisdiction.

Finally, Judge Moran drew an incorrect legal conclusion in his analysis of the Scalia Opinion which also illustrates his error. Judge Moran held "relatively permanent waters include small, shallow and intermittent waters, as long as they are more than ordinarily dry channels through which water only occasionally or intermittently flows." Remand Decision at 42. First, Judge Moran contradicts himself in that very sentence. Another way to write the sentence is: relatively permanent waters include intermittent waters as long as they are more than ordinarily dry channels through which water intermittently flows. How else does intermittent water travel than intermittently? Second, this is not the correct application of the law as presented by the

Scalia Opinion. Scalia states specifically, in Footnotes 5 and 6, that the true test of the first prong is continuity, but that continuity must be analogous to seasonal, i.e. a minimum three months straight or as much as 290 days or more as stated in Footnote 5. The evidence that Judge Moran used to find that the Scalia test was satisfied showed only that the flow was more than occasional. It is not enough to find that it must be more than occasional. It must be continuous.

Therefore, both under his incorrect legal findings, failure to consider all of the evidence, and improper application of the standard under the Scalia Opinion, Judge Moran erred as a matter of law in finding that the first prong of the Scalia test for CWA jurisdiction was met in this case.

2. The wetlands at issue in this case do not have a continuous surface connection with that water

Even if the EPA did properly prove that the waterbody contained a "water of the United States," it did not prove that the wetlands have a continuous surface connection with that water. The wetlands must have a continuous surface connection with the waterbody, here the tributary, which makes it difficult to determine where the tributary ends and the wetlands begin. See Rapanos, 547 U.S. at 742. Basically, wetlands are "waters of the United States" if they have such a physical connection to "waters of the United States" that they are *indistinguishable* from them. Id. at 755.

Judge Moran heard the following evidence at the Remand Hearing on this issue: non-hydric non-wetland soils bordered the tributary, R. Tr. at 529, the ditches in question here were connected to the tributary through non-hydric soils, R. Tr. at 567, the non-hydric soils were verified by William Blake Parker, the soil scientist who wrote the Corps' wetlands delineation manual soils section, R. Tr. at 916, and Steve Martin, the EPA's witness who Judge Moran found to be forthright and credible acknowledged the non-hydric soil in his testimony, R. Tr. at

138-39, 143, 191-92. Of course, hydric soils must be present to meet with definition of a wetland. Therefore, the Respondents presented evidence, and the EPA provided no evidence to the contrary, that non-hydric non-wetland soils bordered the tributary. In fact, the EPA's witness, Martin, acknowledged the non-hydric soils. Consequently, the evidence showed that the wetlands did not have a continuous surface connection to the tributary.

Judge Moran completely rejected this evidence. Judge Moran provided no legal reasoning for rejecting this evidence, in the form of scientific data, including soil samples, except to say that he thought Dr. Pierce, one of the Respondent's experts, was not an objective observer. However, the scientific data, the validity of which has not been challenged, proved, itself, that non-hydric soils divided the wetlands from the tributary. This evidence certainly cannot be ignored regardless of Judge Moran's assessment of the credibility of Dr. Pierce as a witness.

Further, Judge Moran heard the following evidence which showed surface flow from the wetlands was precluded: local depressions are bounded by higher elevation spots, minimizing water flow, R. Tr. at 575, surface flow from the cleared corridors is precluded because the water would infiltrate into the soil along dry edge created by the drainage effect of the T-ditch, R. Tr. at 770-71, Respondents' experts found little evidence of erosion or overland flow at the Property, R. Tr. at 701-02 (one example seen in a non-wetlands area), R. Tr. at 763 (no evidence of overland flow from the cleared corridors to the east), R. Tr. at 815 (photo with no evidence of overland flow), 830 ("virtually no overland flow from the site"), R. Tr. at 888 (no evidence of erosion); R. Ex. RX74 at 40-41, and an EPA observer also noted no overland flow, R. Tr. at 768, the T-ditch is at its construction depth, so no general erosion or significant sedimentation has occurred, R. Tr. at 809, the hydrologist observed no rills or channels along the ditches (other than one place in non-wetlands), R. Tr. at 797, showing the lack of surface flow, at the Property, the

hydrologist saw no evidence of surface flow to the T-ditch, R. Tr. at 762, and concluded any flow was predominantly groundwater flow, R. Tr. at 761, and Larry Cahoon, the Respondents' water quality expert who inspected the site several times after heavy rain agreed, testifying that he saw "extremely small amounts of surface water in flow at best". Transcript from 2003 trial at 1170.

In Cundiff, the Sixth Circuit found that the second prong of the Scalia test "requires a topical flow of water between a navigable-in-fact waterway or its tributary with a wetland, and that connection requires some kind of dampness such that polluting a wetland would have a proportionate effect on the traditional waterway." No. 05-5469 at p. 14. The evidence as presented above shows that this topical flow simply does not exist here. Further, even if a sufficient flow existed, there simply isn't a connection by way of dampness such that polluting the wetland would have a proportionate affect on the traditional waterway.

Nonetheless, Judge Moran, yet again, completely rejected all of this evidence. Judge Moran provided no basis for his rejection of this evidence except to say that Straw's evidence, which is described above, was contradicted "based on the wealth of record evidence to the contrary" on the issue of whether a swale existed. Remand Decision at p. 14. Judge Moran simply made this blanket statement, that Straw was contradicted "based on the wealth of record evidence to the contrary." He did not provide citations to the record in any way which substantiate this position. The Respondents contend that it is error for Judge Moran to have failed to consider all of the available evidence as consideration of this evidence would have certainly led to the conclusion that the wetlands in this case do not have a continuous surface connection to the tributary.

Therefore, both due to Judge Moran's failure to properly consider the evidence and his failure to apply the facts to the law, Judge Moran erred as a matter of law in finding that the second prong of the Scalia test for CWA jurisdiction was met in this case.

B. In the Remand Decision, the Administrative Law Judge Erred in Finding Clean Water Act Jurisdiction Over the Wetlands at issue in this Case under the Kennedy Opinion in Rapanos

Justice Kennedy is of the opinion that the proper test for jurisdiction under the CWA was established in Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) ("SWANCC"). Citing SWANCC, Kennedy held that the applicable test for determining whether or not a water or wetland is navigable is the "significant nexus" test. Rapanos, 547 U.S. at 759. Justice Kennedy further stated that a water or wetland is only navigable under the CWA if it possesses a "'significant nexus' to waters that are or were navigable in fact or that could reasonably be so made." Id. A wetland meets the "significant nexus" test if, "either alone or in combination with similarly situated lands in the region, [it] significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable'" Id. at 780. "When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters." Id.

The Sixth Circuit, in Cundiff, held that there was a significant nexus between wetlands and a navigable-in-fact water where there was evidence which proved the wetlands performed ecological functions such as providing temporary and long term water storage, filtering of acid runoff and sediment from a nearby mine, and providing important habitats for plants and wildlife. Further, the court in Cundiff found that the landowners' unauthorized ditch digging undermined the wetlands' ability to store water which increased flooding and impacted crop

production, erosion, and sedimentation. Additionally, the court in Cundiff found that the ditch digging caused acid mine runoff which bypassed the wetlands and went directly into the river and had a direct impact on aquatic food webs. The court held this was enough to establish a significant nexus both because of the ecological functions and because of the effect the ditch digging had on the water. No. 05-5469 at p. 12-13.

The Ninth Circuit, in Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007), held that there was a significant nexus between a pond and a river creating CWA jurisdiction. In Healdsburg, the evidence showed that there was an actual surface connection between the pond and the river such that the bodies of water commingled. Id. at 1000.Evidence also showed that 26% of the pond's volume reached the river annually. Additionally, the pond and its wetlands supported birds, mammals, and fish. The river supported cormorants, great egrets, mallards, sparrows, and fish-eaters. Id. at 1001. Finally, the court found that the pond "significantly" affected the chemical integrity of the river "by increasing its chloride levels." Id. This was as a result of the discharge of sewage in the pond. The court found that this was enough to establish a significant nexus between the pond and the river both because of the pond's affects on the physical, biological, and chemical integrity of the river and because of the fact that the effects were not speculative or insubstantial. Id.

Finally, in Environmental Protection Inform. v. Pacific Lumber, 469 F.Supp.2d 803 (N.D. Cal. 2007), the court found that sufficient evidence was not presented to establish a significant nexus because the party bearing the burden of proof failed to prove that the streams in question were significant to the water quality of the water of the United States. Id. at 824. The court found that, while the party had shown a hydrologic connection, that alone was not enough.

Id. The party must also show that the stream has "some sort of significance for the water quality" of the navigable water. Id. at 823.

Reading these cases together, one can get a sense of the applicability of Kennedy's test for when CWA jurisdiction exists. Under Kennedy's test, CWA jurisdiction does not exist here. First, the EPA failed to show that the wetlands here significantly affect the chemical, physical, and biological integrity of the navigable water. Second, even if the EPA could show all of that, the EPA completely failed to show that those effects have any significance for the water quality of the navigable water.

1. The EPA failed to prove that the wetlands at issue in this case significantly affect the chemical, physical, and biological integrity of the navigable water

Judge Moran's conclusions on the ecological functions of the wetlands here were drawn almost entirely from the testimony of Charles A. Rhodes. First, it should be mentioned that, during his testimony, Judge Moran had to admonish Rhodes for his failure to answer the questions asked of him. In fact, Judge Moran told Rhodes "you're having a pension to not exactly answer the questions asked." R. Tr. at 460. However, no mention of Rhodes' failure to cooperate in his testimony was made in the Remand Decision despite the fact that Judge Moran took issue with the Respondent's witnesses' testimony multiple times in his opinion. Further, Judge Moran, despite the fact that he admonished Rhodes during his testimony, stated in footnote 42 of the Remand Decision that he found "Mr. Rhodes to have been a highly credible witness."

Nonetheless, Rhodes testified, and Judge Moran accepted, that the wetlands were performing ecological functions, mainly, flood flow alteration, desynchronization, water quality improvement, primary production, and habitat/ecosystem support. R. Tr. at 403. However, Judge Moran failed to take into consideration Rhodes' reluctant responses on cross examination

which explained that these functions occur both in wetlands and in non-wetlands. Rhodes agreed that minimization of flooding impact occurs in non-wetlands. R. Tr. at 452. Rhodes agreed that ups and downs in the landscape occur in non-wetlands. R. Tr. at 452. Rhodes agreed that roughness also occurs in non-wetlands. R. Tr. at 453. Rhodes agreed that the carbon process also occurs in non-wetlands. R. Tr. at 456. Judge Moran's failure to consider that these functions were also being performed in non-wetlands caused him to incorrectly conclude that the wetland functions were significant as required in Rapanos. Wetlands functions which are also occurring in non-wetlands are not significant as any potential effects on the navigable water can be provided by both the wetland and the non-wetlands. The test is not whether wetlands have any affect on the chemical, physical, and biological integrity of the navigable water, but whether the wetlands have a significant affect on it.

Further, Rhodes testified that he did not see any living creatures on the Lewis Farms site either of the times he was there, yet he still made the conclusion that the wetlands were providing habitat support. R. Tr. at 456. The test under the Kennedy Opinion is an "and" test such that the EPA must show that the wetlands have a significant affect on the chemical and physical and biological integrity of the navigable water. However, aside from simply asserting that the wetlands here were providing habitat support, Rhodes was unable to offer any scientific evidence of the same. Therefore, the Kennedy test was not met insomuch as the EPA was unable to show that the wetlands had a significant effect on the biological integrity of the navigable water.

Further, Rhodes' analysis relied in part on a comparison between the Shoulders Hill preservation site and the Lewis Farms site which Rhodes stated on direct were similar vegetation communities and were comparable. R. Tr. at 422-23. However, on cross examination, Rhodes admitted that Shoulders Hill preservation and Lewis Farms were different in vegetation as they

differed in Sample Points 1, 3, and 4. R. Tr. at 448-49. Yet, Judge Moran failed to consider this in his Remand Decision.

Judge Moran erred in failing to consider the discrepancies in Rhodes' testimony. Second, even if Rhodes' testimony is taken as correct, Judge Moran erred in its application to the Kennedy test. Even Rhodes' testimony itself explains that the functions allegedly being performed, flood flow alteration, desynchronization, water quality improvement, and primary production could have been performed by non-wetlands, this belying the significance of the wetlands' effect on the navigable water. Therefore, Judge Moran erred in concluding that the wetland functions had a significant affect on the integrity of the navigable water. Further, Rhodes testimony shows that he made an assumption (guess) that the wetlands were supporting habitats without ever seeing a living creature on Lewis Farms.

Additionally, as he had numerous times previously, Judge Moran completely dismissed the testimony of Dr. Pierce and Dr. Straw that the wetlands did not have a significant effect on the integrity of the navigable water. Judge Moran simply states their positions, calls Dr. Pierce "misguided and agenda-driven" and dismisses their testimony in whole. Remand Decision at p. 16. However, once again, scientific data speaks for itself. Pierce discerned no appreciable difference between the functions performed by wetlands at Lewis Farms as compared to the functions performed by non-wetlands. R. Tr. at 528. Had Judge Moran considered Rhodes' testimony on cross examination he would have seen that even Rhodes' testimony substantiates this opinion. Pierce also could not find any evidence "that there were suitable habitat for animal species that would be of importance to navigable waters." R. Tr. at 528. Even Rhodes testified that he never saw a living creature on Lewis Farms.

Further, Judge Moran dismissed the testimony of Straw calling it irrelevant. Straw stated that the ditching on the Lewis Farms site increased the flood storage capacity at the site thus offering an explanation for the flood flow alteration. Judge Moran called this explanation irrelevant, but to the contrary, it is entirely relevant if it offers an alternate explanation for something the EPA asserts is an ecological function of the wetland under the Kennedy test for CWA jurisdiction.

Judge Moran also adopted the opinions of Dr. Havens with respect to this issue. Judge Moran found the following facts relevant as presented by Havens: that water was flowing suggesting it was moving off site, there was a cavity in a tree indicative of habitat function, and the presence of oxidized rhizospheres which reflect denitrification. However, Judge Moran failed to recognize the fact that Havens only went to the Lewis Farms site one time for a total of 4-5 hours in April of 2007. R. Tr. at 1020, and, therefore, his testimony that water was flowing was with respect to that one day at that one time only. Judge Moran also failed to consider Havens testimony on cross examination that there are dead and hollowed out trees that can act as habitats for any kind of creatures on non-wetlands as well. R. Tr. at 1029. Again, this negates the argument that any wetland function has a significant effect on the integrity of navigable water. Further, as previously stated, Respondents offered an abundance of evidence on the denitrification issue which Judge Moran dismissed without consideration.

Judge Moran again erred in failing to consider the discrepancies in Havens' testimony. Second, even if Havens' testimony is accepted as the evidence of the case, Judge Moran erred in its application to the Kennedy test. Even Havens' testimony itself explains that the function allegedly being performed, habitat function, could have been performed by non-wetlands. Again, Judge Moran erred in finding that the wetland function had a significant effect on the

integrity of the navigable water since non-wetlands were performing the same functions Further, Havens spent minimal time on one day at the Lewis Farms site. Therefore, taking his conclusions as to water flow as the evidence of the case is erroneous in and of itself.

Additionally, Judge Moran erred finding the wetlands function had a significant effect on the integrity of navigable water because he failed to take into consideration the absence of evidence on the EPA's behalf. The EPA took no water samples. R. Tr. at 220, 629-30. The EPA did not measure sediment, turbidity, nutrient levels, or pollutant levels. R. Tr. at 217. The EPA performed no wildlife evaluations. R. Tr. at 220. It is, therefore, erroneous, in the absence of evidence on these issues, and in the presence of evidence from the Respondents showing that the wetland functions, if any, have no significant effect on the integrity of navigable waters to find that the EPA met their burden of proof under the Kennedy test.

The EPA failed to meet its burden under the Kennedy Opinion as it failed to prove that the wetlands at issue in this case significantly affect the chemical, physical, and biological integrity of navigable water.

2. The EPA failed to show that any potential effects on the integrity of the navigable water have any significance for the quality of that water

Even if the EPA proved that the wetlands at issue in this case affect the chemical, physical, and biological integrity of navigable water, the EPA failed to show that those effects have significance for the quality of that water. Like in Pacific Lumber, this is a fatal flaw in the EPA's case here under the Kennedy Opinion.

First, even if wetlands are performing the functions of flood flow alteration, desynchronization, water quality improvement, primary production, and habitat/ecosystem support the EPA's own witnesses admitted that non-wetlands perform many, if not all, of the

same functions. See Argument B(1) above. Therefore, the wetlands functions, if any, are not significant in and of themselves as required by the Kennedy Opinion.

Second, the results found in Healdsburg, large effect on multiple wildlife and *significant* chemical affects and increased chloride levels, and Cundiff, increased flooding leading to affects on crop production and acid runoff affecting aquatic life, are not present here. The basic violation complained of here is the spreading of wood chips throughout certain corridors in violation of Section 404 of the CWA. The irony of this is that the Respondents actually produced evidence that the "conduct of depositing wood chips onto the Site's wetlands" actually provides a benefit to the wetlands as wood chips provide a source of carbon. See Remand Decision at 31. Further, there was testimony from Calhoon at the 2003 trial and from Martin that the water was tea-colored which is an indication of good water quality. R. Tr. at 209. Therefore, evidence of good water quality clearly negates the notion that the integrity of navigable water is compromised by wetland function.

Therefore, even if the EPA can show that wetlands affect the chemical, physical, and biological integrity of navigable water, the EPA has failed to show that those affects have any significance for the quality of that water. Consequently, the EPA has failed to meet its burden under the Kennedy test for CWA jurisdiction.

C. This Board has the Discretion to Use the Test Under the Scalia Opinion or the Test Under the Kennedy Opinion to Analyze CWA Jurisdiction and, Therefore, Should Use the Test Under the Scalia Opinion

Some of the circuits have concluded that Kennedy's Opinion controls and have adopted the "significant nexus" test for determining when CWA jurisdiction exists. U.S. v. Robison, 505 F.3d 1208 (11th Cir. 2007); See Healdsburg, 496 F.3d at 999-1000; U.S. v. Gerke Excavating, Inc., 464 F.3d 723, 724-25 (7th Cir. 2006). Other circuits have concluded that "the Act confers

jurisdiction whenever either Justice Kennedy's or the plurality's test is met." Cundiff, supra (citing U.S. v. Johnson, 467 F.3d 56, 64 (1st Cir. 2006)).

In the 7th, 9th, and 11th Circuits, where the courts have used only the Kennedy Opinion to determine whether there is CWA jurisdiction, the courts did so from an analysis under Marks v. United States. 430 U.S. 188 (1977). Under Marks, "[w]hen a fragmented [Supreme] Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding . . .may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 430 U.S. at 193. However, this case often requires a strict application which is not easily applicable here.

The 1st and the 6th Circuits each gave a splendid explanation for the inapplicability of Marks in Cundiff and Johnson. In Cundiff, the Sixth Circuit explained that "Marks is workable . . . only when one opinion is a logical subset of other broader opinions." No. 05-5469 at p. 11. However, in Rapanos, neither Scalia's Opinion nor Kennedy's Opinion is a subset of the other. Therefore, it is highly likely that application of the two different opinions could result in different outcomes in the same case. This presents just one of the problems with the application of Marks here. Johnson, 467 F.3d at 64. Another problem with the use of Marks here is that there is no clear guidance or authority on what is the narrowest ground under the Rapanos decision and, therefore, the narrowest ground can change case-by-case. Therefore, under Marks, sometimes the Scalia Opinion could be the narrowest ground and sometimes the Kennedy Opinion could be the narrowest ground. See Johnson, supra. That certainly does not create a workable framework for determining the proper opinion to use.

Therefore, here, this Board should adopt the holdings of the 1st and 6th Circuits and use the discretion to adopt either the Scalia Opinion or the Kennedy Opinion to determine whether

there is CWA jurisdiction. Further, with the discretion to use either opinion to determine jurisdiction, the Respondents urge this Board to use the Scalia Opinion to find there was no CWA jurisdiction here. The Scalia Opinion represents the opinions of Four Justices of the Supreme Court and encompasses a two-part definable test for jurisdiction. Further, the Scalia Opinion provides a test which is simple and easily applied to this case while the Kennedy Opinion provides a test which is murky and ill-defined. Therefore, this Board should use the test as provided in the Scalia Opinion.

V. CONCLUSION

In sum, the Remand Decision's finding of jurisdiction under the Clean Water Act was clear error and, therefore, should be reversed.

VICO CONSTRUCTION CORPORATION and AMELIA VENTURE PROPERTIES, LLC

By _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2009, an original and five copies of the foregoing were sent via Federal Express to:

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

and by first class mail to:

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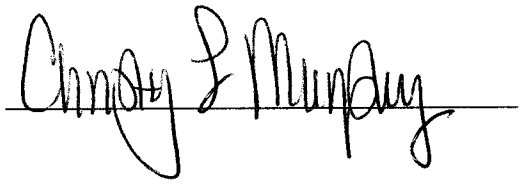

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD
WASHINGTON, D.C.

In the Matter of:	)	
	)	
Vico Construction Corporation,	)	CWA Appeal No.: 08-03
Amelia Venture Properties, LLC,	)	
	)	
Respondents.	)	
	)	
Docket No. CWA-03-2001-0021	)	
	)	

NOTICE OF APPEARANCE

NOW COME Respondents, VICO Construction Corporation and Amelia Venture Properties, LLC (the "Respondents"), by counsel, and give notice that Christy L. Murphy, Esquire, an attorney with Kaufman & Canoles, P.C., will appear as additional counsel for the Respondents and Mary Jane Hall, Esquire should no longer be listed as co-counsel for the Respondents as she is now a Judge for the Circuit Court of the City of Norfolk, Virginia.

Respectfully submitted,

VICO CONSTRUCTION CORPORATION and AMELIA VENTURE PROPERTIES, LLC

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March, 2009, a true and correct copy of the foregoing ***Notice of Appearance*** was served:

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