2

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

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)

Docket No.: CWA-3-2001-0022

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")

NOTICE OF APPEAL

Respondent, Smith Farm Enterprises, LLC ("Respondent"), through counsel, appeal the Initial Decision by the Honorable Carl Charneski issued May 5, 2005 and the Order Denying Respondent's Motion to Dismiss with Prejudice and Granting Complainant's Motion for New Hearing dated April 30, 2003.

Respectfully submitted,

SMITH FARM ENTERPRISES, LLC

By: Beth V. McMahon
Beth V. McMahon

Hunter W. Sims, Jr.
Marina Liacouras Phillips
Beth V. McMahon
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
Norfolk, VA 23510
Phone: (757)624-3000
Fax: (757)624-3169

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of June 2005, a true and correct copy of the foregoing was sent via Federal Express to:

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fax: (215) 814-2603

Stefania D. Shamet, Esquire
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Beth V. McMahon

DOCSNFK-#982629-v1-vico_smith_not_app_mmt.DOC

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

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")	Docket No.: CWA-3-2001-0022

RESPONDENTS' APPEAL BRIEF

Hunter W. Sims, Jr.
Marina Liacouras Phillips
Beth V. McMahon
Kaufman & Canoles
150 W. Main Street, Suite 2100
Norfolk, VA 23510
(757)624-3000
(757)624-3169 Facsimile

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

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)

Docket No.: CWA-3-2001-0022

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")

RESPONDENTS' APPEAL BRIEF

Respondent, Smith Farm Enterprises, LLC ("Respondent"), through its counsel, appeals the Initial Decision of the Honorable Carl Charneski issued May 5, 2005 ("Initial Decision").

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

A. The Administrative Law Judge erred in concluding that Respondent "filled" the wetlands with wood chips and thus violated Section 404 of the Clean Water Act when he found that Respondent's purpose in spreading the wood chips was only to dispose of waste.

B. The Administrative Law Judge erred in concluding that fill was placed in wetlands based on a finding that "substantial" amounts of wood chips were present throughout the site when the Government samples were isolated and biased and when a more scientifically valid sampling technique revealed no more wood chips than would be expected in a timbered natural forest.

C. The Administrative Law Judge erred in finding Clean Water Act Section 402 liability because he based the violation on a point source (ditches) not claimed in the Amended Complaint, which cites equipment as the only point source.

D. The Administrative Law Judge erred in assessing a penalty just below the maximum that could be assessed based on a finding that Respondents were highly negligent when the Respondents lacked culpability and the EPA failed to establish any resultant environmental harm.

E. The Administrative Law Judge erred in denying Respondents' motion to dismiss the case after the trial transcript from the first proceeding could not be produced because the EPA hired an incompetent court reporter.

F. The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case. (Based on the current status of the law, Respondent will not reiterate its arguments on jurisdiction in this appeal brief, but instead incorporates by reference its post-trial briefs and expressly reserves the issue in the event any subsequent decisions alter the applicable legal landscape).

II. STATEMENT OF THE NATURE OF THE CASE

The EPA brought this enforcement action against the Respondent property owner claiming that work performed on the property at issue violated Sections 402 and 404 of the Clean Water Act ("CWA"). Respondent denied all liability contesting, among other things, the EPA's jurisdiction over the Property and the EPA's asserted factual findings. The case was initially tried in 2003 over six days. When the EPA-hired court reporter could not produce a transcript of the first trial due to her incompetence, the Administrative Law Judge ordered a full retrial of the matter after denying Respondent's motion to dismiss. The case was retried for six additional

days in 2004. The Initial Decision issued on May 5, 2005 found that Respondent violated Sections 402 and 404 of the CWA.

At the property at issue, the Respondent had engaged openly in Tulloch ditching.[1] They had hired a wetlands consultant (a former U.S. Army Corps of Engineers inspector with eight years of enforcement experience), who had consulted and corresponded with the Corps (the governmental body purporting to exercise jurisdiction over the work) prior to any work being performed about the specific detailed procedures that would be used. Tr. Vol. III at 223; Tr. Vol. IV at 112; Tr. Vol. V at 171; Resp't Ex. 10, 11, 13 (attached). The environmental consultant and representatives of Respondent then had a meeting with the Corps specifically about this Property. Initial Decision at 6, Tr. Vol. III at 173, 177. Special equipment was used and exacting procedures were implemented to ensure that all work was performed in accordance with all applicable rules and regulations. Both the property owner and the operator testified that they intended to comply fully with all legal requirements, and that work would have not been undertaken in the first place and would have been ceased immediately if they had been notified that any actions at the site were of concern to any governmental agency. Tr. Vol. III at 223, 227; Tr. Vol. IV at 88, 194-95, 221; Tr. Vol. V at 171.

The Corps inspected the Property at Respondent's request so that the Corps could ensure all work was in accordance with the law, and the Corps never advised Respondent that any work was a violation of any law or regulation. Tr. Vol. II at 64-69. Despite the extensive precautions taken by Respondent, the EPA subsequently claimed in its enforcement action that the work performed at the site resulted in CWA violations based on sidecasting from the ditch excavation, that wood chips on site constituted fill, and that stormwater violations had occurred. Most

alarmingly, the EPA commenced its enforcement action despite its knowledge of the activities at the Smith Farm sites starting in late 1998 or early 1999 (Initial Decision at 13), concurrent with the commencement of such activities, yet the EPA failed to advise Respondent of any concerns until well after the ditching was completed some six months later. Throughout the period during which Respondent proceeded with the project, Respondent innocently relied on feedback from the Corps, while the EPA failed to make known its involvement, express any concerns, or conduct any inspections. Instead Respondent relied upon the inspections of the Corps, which gave the apparently false impression to Respondent that there were no regulatory concerns with the project.

Although the Initial Decision rejected many of the EPA's asserted claims and theories (such as that soil had been sidecasted during ditching or that the wood chips were spread to create a roadbed), the Initial Decision 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 within the confines of the Property along ditches without a permit. The Initial Decision assessed Respondent a penalty of $94,000, giving credit for the settlement value ($32,000) of the settlement reached with another respondent prior to litigation. The maximum penalty that could have been assessed was $137,500; accordingly, the penalty assessed was $11,500 less than the maximum available by law.

[1] As noted in the Initial Decision at page 4, Tulloch ditching is a systematic method of ditching designed to attempt to drain wetlands. Tulloch ditching is completely legal as long as nothing more than incidental fallback occurs during the ditching.

III. FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

A. The Property's Historical Agricultural Use

Smith Farm Enterprises, LLC owns the property at issue in this appeal (the "Property"). The Property is approximately 300 acres, about half forested and half crop fields. Tr. Vol. I at 172; Tr. Vol. V at 237. The Property is undeveloped, and Respondent has no development plans or any history of development. Tr. Vol. IV at 76, Tr. Vol. III at 230, Tr. Vol. V at 172, Tr. Vol. VI at 25, Tr. Vol. I at 61, 67, 76. Rather, the Property has historically been used and is currently used for farming and silviculture; the Property always has been taxed accordingly. Tr. Vol. III at 205-206, 218, Resp't Ex. 41. One of the individual owners of Smith Farm has been involved in silviculture for 50 years and owns other timberland, Tr. Vol. III at 202. The Property was timbered commercially in 1990, Tr. Vol. III at 207-213, and was placed and remains to this day under a Forestry Management plan. Tr. Vol. III at 214-15. After construction of a nearby highway changed farming conditions and made the Property wetter, the owners of Smith Farm wanted to drain water from the Property so that timber and crops would grow better. Tr. Vol. III at 208. When the owners of Smith Farm learned of the National Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399 (D.C. Cir. 1998), decision, they became interested in investigating whether ditches could be dug on the Property.

B. Respondent's Efforts to Comply with All Relevant Laws

Respondent, therefore, retained an environmental consultant and wetlands expert and a surveying/engineering firm in 1998 to advise it whether the ditching could be performed. Tr. Vol. III at 223; Tr. Vol. IV at 112, Tr. Vol. V at 171. Respondent's environmental consultant and wetlands expert had consulted at nearby, similar sites and had previously corresponded with the Corps in August and September 1998 to seek guidance about the proposed similar ditching

activities at a nearby site, Southern Pines. Resp't Exs. 10 and 11. The environmental expert sent the Corps the letter in August 1998 before any work on any site was performed, Resp't Ex. 10, which details the proposed work at the nearby Southern Pines site. The environmental expert received a written response from the Corps in September 1998, again prior to any work at the Property. Resp't Ex. 11; Tr. Vol. V at 174. In its response, the Army Corps of Engineers (the "Corps") approved the procedures for the Southern Pines site set forth in the correspondence. The Southern Pines letter and the Corps' response thereto were shown to the owners of Smith Farm by the environmental consultant and wetlands expert prior to commencement of any work at the Property. Tr. Vol. V at 175.

Respondent was not content to rely solely on this written correspondence relating to the Southern Pines site, and so it arranged a specific meeting with the Corps, to review and discuss with the Corps the proposed work at the Smith Farm Property. Tr. Vol. I at 227; Tr. Vol. III at 225, 259; Tr. Vol. V at 175, 177-78. Respondent and its environmental consultant met with the Corps on October 30, 1998. Tr. Vol. III at 225; Tr. Vol. V at 177. At this meeting, Respondent and its expert described the scope of the proposed work and the methods that would be used and requested that the Corps conduct inspections. The Corps knew wood chips would be created by the processes described to it at the meeting. Tr. Vol. V at 197. The Corps advised at that time if the work was performed as described, the activities were **not regulated**. Tr. Vol. III at 226; Tr. Vol. V at 178. After the site-specific meeting, Respondent's environmental consultant wrote to the Corps and **again** detailed the proposed work at the Property and asked for the Corps to respond with any concerns by November 13, 1998. Resp't Ex. 14; Tr. Vol. V at 177. The Corps did not advise that work should not begin or respond in writing prior to this date.[2] Tr. Vol. III at

[2] The Corps inspector did testify that he called and discussed the project generally. Tr. Vol. I at 227. Respondent's expert recalled no such call. Tr. Vol. V at 202.

261; Tr. Vol. V at 202; Resp't Ex. 13. Respondent relied upon the Corps meeting and the follow-up correspondence in deciding to move forward with the work on the Property. Tr. Vol. III at 227. After October 30, 1998, the Corps never advised Respondent of the need for a permit or that any of the work being performed violated any law, rule, regulation, or requirement. Tr. Vol. III at 226-227. The intent of the owner and the contractor in performing work at the Property was to fully comply with all laws and regulations. Tr. Vol. III at 223; Tr. Vol. IV at 88, 221; Tr. Vol. V at 171. In fact, the contract between Respondent and the contractor contained a clause specially inserted into the contract at the request of Respondent such that the contract could be terminated without penalty upon any notice of any governmental agency that the work was not in compliance with all laws and regulations. Tr. Vol. III at 265-66; Resp't Exs. 12 and 13.

Work on the Property began in December 1998. Tr. Vol. III at 262; Tr. Vol. V at 202; Tr. Vol. VI at 79. VICO Construction and its subcontractor, Paxton Contractors, performed the ditching work and related work at the Property. Tr. Vol. IV at 194. The same procedures used for digging ditches at the Property were also used at the nearby Southern Pines property. Tr. Vol. VI at 99, Tr. Vol. V at 174. The Tulloch ditches were not designed to channel storm water on the Property, Tr. Vol. IV at 116, and thus were not graded. Tr. Vol. IV at 117; Tr. Vol. V at 250; Tr. Vol. VI at 90. Further, the ditches were not designed to channel any water that fell onto the mowed areas. Tr. Vol. IV at 152.

The Corps was advised prior to work beginning on the site that trees would be cut down and removed from the Property. Tr. Vol. V at 192, 196, and 198. A logging company removed all marketable wood from certain corridors of the Property leaving behind slash. Resp't Ex. 16. Obviously, cutting trees down with equipment creates wood chips. Tr. Vol. IV at 286; Tr. Vol.

V at 196. After logging, the small trees and saplings left as slash were mowed on the Property using a rotating drum Kershaw machine, Tr. Vol. V at 190, to avoid creating anything that the Corps might consider a corduroy road. Tr. Vol. V at 187-91; Tr. Vol. VI at 65-66. A Kershaw machine mows vegetation by mowing above the soil surface without going into the soil surface, creating chips as it mows. Tr. Vol. V at 191; Tr. Vol. IV at 226; Tr. Vol. VI at 105-06. A Kershaw machine does not direct the wood chips it creates, but randomly disperses them. Tr. Vol. VI at 74. None of the wood chips generated from cutting or mowing trees were directed to any particular location. Tr. Vol. IV at 226; Tr. Vol. V at 204, 205, Tr. Vol. VI at 74. Wood chips were not used on the Property to make a road bed for equipment,[3] and wood chips would have been incapable of forming a sufficient roadbed to support the multi-ton equipment (between 30,000 to 60,000 pounds) used at the site. Tr. Vol. V at 204, 209; Tr. Vol. VI at 74. The wood chips were not spread for the primary purpose of changing the bottom elevation of land or replacing wet land with dry land. Tr. Vol. V at 205.

The Corps was advised that trees would be cut on the Property, that the trees would be removed, that excavation would occur, and that the excavated material would be hauled to uplands using off-road trucks. Tr. Vol. V at 199. This was done, and Respondent undertook extensive efforts to comply with all laws. Specialized off-road equipment was used at the Property to minimize environmental impact. Tr. Vol. V at 198. To avoid sidecasting, excavated material was placed into specialized trucks and taken to uplands. Tr. Vol. VI at 76-78. The trucks that were used on the Property to haul excavated material were customized by VICO Construction for the Tulloch ditching with high sides to avoid spillage in order to comply with the approved conditions in the Corps' correspondence. Tr. Vol. IV at 223; Tr. Vol. VI at 97.

[3] The phrase "prepping the path" was used to describe the specific procedures performed to prepare corridors for ditching. Tr. Vol. I at 189; Tr. Vol. VI at 73. The Initial Decision rejected the EPA's theory that this term was used

Spoil piles on the Property were located in uplands, Tr. Vol. I at 202; Tr. Vol. II at 177; Tr. Vol. V at 225, and were seeded with grass seed to stabilize them. Tr. Vol. IV at 231. This and other vegetation prevented the migration of soil, Tr. Vol. IV at 231-32, and silt fencing is not required if there is a sufficient vegetative barrier. Tr. Vol. IV at 123-24. City inspectors came to inspect the spoil piles and never had any complaints. Tr. Vol. IV at 231. Fourteen rock check dams were installed at the Property. Tr. Vol. V at 249. A construction entrance was constructed on the Chesapeake side of the Property and was maintained as needed. Tr. Vol. VI at 90-91. Respondent never received any citation from the Cities of Chesapeake and Suffolk about tracking mud, debris or other materials onto the adjacent roads. Tr. Vol. VI at 91. Erosion and Sediment Control Plans were obtained and were not modified subsequently because the administering cities had viewed the accepted plans with lesser controls as sufficient. Tr. Vol. IV at 121. Localities do not require that minor changes in or enhancements in functionality to Erosion and Sediment Control Plans be reported to them. Tr. Vol. IV at 122. The existing pond on the Property functioned as to slow sediment down and filter any such sediment out of water exiting the Property. Tr. Vol. IV at 126.

All work performed at the Property was done exactly in accordance with the conditions enumerated in the correspondence with the Corps. Tr. Vol. VI at 8. Specifically, no material was double handled. Tr. Vol. IV at 224; Tr. Vol. VI at 85. No stumps were dug with more than a single pull of the excavator. Tr. Vol. IV at 224; Tr. Vol. VI at 85. No corduroy road was constructed. Tr. Vol. IV at 225; Tr. Vol. VI at 86. There were no discharges on the Property in the wetlands other than incidental fallback. Tr. Vol. IV at 227; Tr. Vol. VI at 86. Shrubs and saplings were mowed along the length of the proposed excavation. Tr. Vol. VI at 87. The root mat of vegetation remained intact after the Kershaw mowing. Tr. Vol. IV at 106. No bulldozers

---

to mean "build a roadway."

or rootrakes were used in the wetlands. Tr. Vol. IV at 227; Tr. Vol. VI at 87. Large tree stumps were avoided when the ditches were dug with the ditches zigzagging around them. Tr. Vol. I at 243; Tr. Vol. IV at 227-228; Tr. Vol. VI at 87, 137; Tr. Vol. V at 211. Large trees were cut down with a chainsaw or a fellerbuncher. Tr. Vol. VI at 87. Off-road trucks were used to remove excavated material directly from the backhoe bucket. Tr. Vol. IV at 228; Tr. Vol. VI at 87. Soil material was taken to spoil piles in uplands. Tr. Vol. IV at 228-29, 231. Wooden mats were used to traverse ditch crossings. Tr. Vol. I at 241; Tr. Vol. IV at 229. All of these items were addressed in the correspondence.

A VICO Construction supervisor conducted periodic unannounced inspections several times weekly to ensure that all conditions enumerated in the correspondence with the Corps were complied with. Tr. Vol. IV 222-23. The precautions taken and procedures used at the Property involved the use of highly customized equipment and, as such, were much more expensive than regular ditching would otherwise be; but Respondent followed the necessary procedures, utilized the specialized equipment, and incurred the extra expense to ensure regulatory compliance. Tr. Vol. III at 267. Despite visits by the Corps and requests to the Corps to advise if any problems existed, VICO Construction was never advised that any of the work they performed was violative of any law or regulation. Tr. Vol. IV at 194. If VICO Construction had been so advised, it would have immediately stopped work. Tr. Vol. IV at 195. If the Respondent had been told any work on the Property was violative or any law or regulation, work would have been halted. Tr. Vol. III at 227.

Respondent's engineer advised Respondent that erosion and sediment control permits were not required for the proposed work based on his experience and on his discussions with the administering city officials. Tr. Vol. IV at 112. Even though the engineer had advised that

erosion and sediment control permits were not required, Respondent obtained such permits out of an abundance of caution. Tr. Vol. IV at 113. The engineer further advised the Respondent prior to work beginning that no Virginia Pollutant Discharge Elimination System ("VPDES") plan would be required. Tr. Vol. IV at 113. Respondent sought input from the City of Suffolk regarding erosion and sediment control measures at the Property, even after the Suffolk Erosion and Sediment Plan was approved. Tr. Vol. III at 273. At the time the work was performed in 1998 and 1999, the Section 402 permit program pursuant to the Clean Water Act was administered by the Commonwealth of Virginia Department of Environmental Quality ("Virginia DEQ"), which issued National Pollutant Discharge Elimination System ("NPDES") permits. Tr. Vol. II at 198; Tr. Vol. VI at 147-148. Throughout 1998 and 1999, the Virginia DEQ accepted Erosion & Sediment Control Plans as the functional equivalents of storm water pollution prevention plans and did not require a separate storm water pollution prevention plan. Tr. Vol. IV at 117; Tr. Vol. VI at 148. In February 1999, the Virginia DEQ advised Respondent that a permit could be required for the activities at the Property. Tr. Vol. III at 276. Respondent called that day and subsequently spoke with the Virginia DEQ, which advised that a permit would not be required. Tr. Vol. III at 276-77. In fact, the Virginia DEQ advised Respondent that a permit **could not** be issued for agricultural land such as the Respondent's. Tr. Vol. III at 279; Tr. Vol. IV at 113-15; Resp't Ex. 26. When the Virginia DEQ later advised in September 1999, contrary to its initial advice, that a permit should be obtained because of the Environmental Protection Agency's ("EPA") involvement, VICO Construction immediately obtained the permit for Respondent, driving through a hurricane to apply. Tr. Vol. IV at 197-98. Respondent has paid for property inspections for erosion and sediment control measures every month since the ditches were dug. Tr. Vol. IV at 77.

C. The Corps' Acquiescence in the Work

During the time the work was being performed, the Corps was the enforcing agency in charge of the Property. Tr. Vol. I at 91. The Corps inspected the Property in January 1999 to document violations and to assess whether permits were required. Tr. Vol. II at 63-64; Tr. Vol. I at 229. After the January 6, 1999 site inspection by the Corps, no citation, cease and desist order, or stop work order was issued, Tr. Vol. V at 210, 213, because the Corps concluded there had been no spillage at the Property. The Corps visited the Property five times throughout 1999 and **never** indicated that activities were violative or that permits were required. Tr. Vol. II at 64-69. In fact, the Corps' inspector assigned to the Property, Steve Martin, **never observed any activity he considered a violation**. Tr. Vol. II at 69, 105. In March of 1999, the local branch of the Corps was advised by its headquarters specifically in connection with the Property that if the ditching could not be conducted without more than minimal discharges, then the Corps should regulate the ditches. Tr. Vol. II at 69. The Corps never regulated the activities on the Property. Tr. Vol. II at 69. In March of 1999, the local branch of the Corps was advised by its headquarters to require the Respondent to clean up the site if the work was sloppy. Tr. Vol. II at 69-70. The Corps never told Respondent to clean up operations. Tr. Vol. II at 70. In March of 1999, the local branch of the Corps was advised by its headquarters to require that the ditches be plugged if the work resulted in more than incidental fallback. Tr. Vol. II at 70. The Corps never asked that the ditches be plugged, Tr. Vol. II at 70, and never cited Respondent for any violations relating to deposition of materials. Tr. Vol. II at 70. In March of 1999, the local branch of the Corps was advised by its headquarters to cite the Property owners for rutting if the rutting constituted fill. Tr. Vol. II at 71. The Corps never cited the Property owners for rutting. Tr. Vol. II at 71. After April 1999 when the local branch of the Corps was advised by its

headquarters that wood chips could be considered fill in certain circumstances, the Property owners were never cited for filling issues prior to the enforcement action brought in May 2000, a full year later. Tr. Vol. II at 73. In April 1999, the local branch of the Corps was advised by its headquarters to cite the Property for discharges, if any. Tr. Vol. II at 75. The Property owners were never cited by the Corps for fallback. Tr. Vol. II at 75.

The Corps inspected and photographed the Property when the ditching project was underway, Tr. Vol. I at 233-238, and found that the work had been performed in accordance with the conditions set forth in the site-specific correspondence with the Corps. Until May 2000, neither the Corps nor the EPA issued a cease and desist stop work order citation or any official action indicating any problems with the work at the Property. Tr. Vol. V at 213. Most disturbingly, the Corps and EPA had been consulting for months, since the beginning of 1999 and contemporaneously with the first weeks of the Smith Farm project, trying to determine their positions as to whether the work was regulable. Despite that dialogue, neither the Corps representative, Steve Martin (who inspected the Smith Farm sites on six occasions during the project), the Corps generally, nor the EPA ever gave Respondent so much as a hint of any regulatory concerns about the project until well after its completion. Instead, Respondent was left to rely upon the acquiescence of the Corps as the lead regulatory agency.

D. The EPA's Substandard Site Visit

The EPA requested enforcement lead from the Corps in June 1999. Tr. Vol. I at 171. The EPA site visit to the Property was on September 8, 1999. Tr. Vol. I at 212. At the time of the EPA site visit, no work was ongoing and no operations were being performed, but some of the ditches had been dug in the preceding month. Tr. Vol. V at 253, Tr. Vol. VI at 71, 91, 96.[4]

[4] The area of the Property inspected by the EPA had little vegetation because the ditches had been freshly dug. Tr. Vol. VI at 97.

The Property was one of the largest the EPA inspector assigned to the Property had inspected. Tr. Vol. I at 169. Despite this, the EPA site visit lasted only two to three hours. Tr. Vol. I at 172; Tr. Vol. II at 168; Tr. Vol. V at 235. The EPA did not walk the whole Property, consisting of over 300 acres, but inspected only a small portion of the Suffolk side of the Property. Tr. Vol. I at 168, 172-173; Tr. Vol. III at 28; Tr. Vol. V at 236. One team of EPA personnel inspected the Property to assess whether wetlands were filled and the other team assessed potential storm water violations.

In order to assess whether wetlands had been filled, the EPA relied upon a soil scientist, who took three soil samples, one of which was a reference sample, for the 300 acre site. The EPA did not determine a sampling methodology prior to arriving at the Property. Tr. Vol. III at 97-98. Instead, the EPA picked sample sites based on their off the cuff assessment of what would be a good sample site. The EPA's soil scientist's conclusion that the three soil samples taken close to each other were representative of the entire 300 acres of the Property was based only on her assumption that conditions throughout the Property were similar. Tr. Vol. III at 109. The sample sites at which the EPA based its conclusion of fill (points A and C) were not representative.[5] EPA soil Sample A was taken in a location right beside a big stump with corresponding wood chips where a tree had been cut down.[6] Tr. Vol. III at 162; Tr. Vol. V at 239. To test whether Sample A was fairly representative, Respondent's soil expert sampled in a six-foot radius around Sample A. Tr. Vol. III at 164. EPA's finding at Sample A were not representative of the immediate vicinity because no wood chips were found in adjacent areas to Sample A. Tr. Vol. III at 164. Further, EPA soil Sample C was taken where a tire rut had

[5] The EPA did not fill out inspection reports for soil sample points A and C. Tr. Vol. I at 187. The EPA did not photograph sample point C. Tr. Vol. I at 202; Tr. Vol. III at 82.

[6] The EPA's soil scientist acknowledged that wood chips would be created in the vicinity of where a tree was cut down. Tr. Vol. III at 120.

"squirted up" the soil to an unrepresentative peak in which a mix if soil and wood chips was more likely. Tr. Vol. III at 100, 163; Tr. Vol. V at 240. Unlike Respondent's expert, the EPA's soil scientist did not take samples indicating the breadth as opposed to the depth of any wood chips. Tr. Vol. III at 104. The EPA simply did not take enough samples to validate its conclusions. Tr. Vol. III at 182.

In addition, the EPA's soil scientist considered "wood chips" to be everything woody that had been ground up or chopped. Tr. Vol. III at 80. The EPA's soil scientist noted no naturally occurring woody material at the Property. Tr. Vol. III at 115. This strains credibility given that the Property is heavily wooded. Tr. Vol. I at 228. The EPA's soil scientist did not differentiate between woody debris that was dead prior to the activities on the Property and woody debris that was alive until the activities in question on the Property. Tr. Vol. III at 116. The EPA soil scientist did not quantify the amount of wood chips mixed in with soil. Tr. Vol. III at 17. The EPA's soil scientist lacked any basis for her assumption that Respondent's soil scientist used the same terminology as she used for woody debris. Tr. Vol. III at 117.

In contrast to the EPA's soil scientist, Respondent's soil expert selected a methodology to determine the sample sites prior to viewing the Property to avoid bias. Tr. Vol. III at 168. Following the predetermined methodology, Respondent's soil expert took soil samples exactly every 200 feet along the ditches at three transects of 5, 25, and 55 feet from the ditch edge, unless the second sample at 25 feet was in an undisturbed area, in which case no sample was taken at 55 feet. Tr. Vol. III at 167-168. Respondent's soil expert used a hip chain to measure distances exactly. Tr. Vol. III at 168-169. Respondent's soil expert took 55 soil samples throughout the entirety of the Property. Tr. Vol. III at 172. Thirty-two of the 55 soil samples were in undisturbed areas. Tr. Vol. III at 172. Respondent's soil expert called naturally

occurring material "sticks" or "limbs." Tr. Vol. III at 172-73 and 189-190. Respondent's soil expert distinguished between woody materials that were alive at the time of activities on the Property and those that were already dead. Tr. Vol. III at 174 and 189-190. Because organic matter such as twigs and branches would be expected on an undisturbed forest floor, Tr. Vol. III at 176, Respondent's soil expert considered wood chips to be only mechanically altered woody debris. Tr. Vol. III at 190.

Respondent's soil expert found wood chips in seven of the thirty-two disturbed samples. Tr. Vol. III at 174. Quantification of wood chips in soil samples is important to assess the source of materials. Tr. Vol. III at 175. Respondent quantified the amounts found in his report, Resp't Ex. 32, for instance noting that one chip of ¼" size was found in one sample. The amount of wood chips observed at the Property was consistent with normal logging operations and the amount of wood chips created thereby, with which the expert was familiar. Tr. Vol. III at 178. In contrast, the EPA's soil scientist was not familiar with logging, and therefore had no reference point to assess whether the amount of chips was consistent with logging. Tr. Vol. III at 110. Respondent's soil scientist found no evidence that the bottom elevation of the landscape had been changed at the Property. Tr. Vol. III at 181. Respondent's soil expert saw no evidence that wet land changed into dry at the Property. Tr. Vol. III at 102, 181. The EPA did not present any evidence to the contrary.

The EPA's storm water inspection was similarly cursory. The EPA's storm water inspector erroneously assumed all ditches on the Property had been dug long before the EPA's site visit. Tr. Vol. III at 16. The EPA's storm water inspector did not view any location where water exits the Property bounds. Tr. Vol. III at 34. That runoff may occur from a particular point at the Property does not equate to a finding that runoff occurred from the Property bounds.

Tr. Vol. IV at 127-28. The EPA's storm water inspector did not calculate or predict the volume of discharge at the Property or how much surface runoff, if any, would enter the ditches. Tr. Vol. III at 31-32. The EPA's storm water inspector did not test for water turbidity or take water samples. Tr. Vol. III at 34. Two days prior to the EPA's site visit, voluminous amounts of rain fell on the Property because of a direct hit by a devastating hurricane. Tr. Vol. III at 12-17; Tr. Vol. V at 237; Resp't Ex. 23. The EPA's storm water inspector was not aware of the volume of recent rain or that a hurricane had just occurred at the Property, even though the inspection form indicates recent precipitation should be considered. Tr. Vol. III at 38. Despite this significant rainfall, the EPA observed no dirt coming off the Property at the Property's entrances, Tr. Vol. III at 22-23, and observed no woody debris in the ditches. Tr. Vol. III at 24.

E. The EPA's Failure to Establish Any Environmental Harm or Impact

The EPA failed to establish any adverse environmental impact of the activities at the site. First, it introduced no evidence about the effect of wood chips. Topographic profile maps were generated depicting the Property's topography at the points where the EPA took soil samples A and C, the points at which the EPA claimed to have found substantial fill. Tr. Vol. IV at 178; Resp't Ex. 39. The topography of the Property is very flat. Tr. Vol. IV at 116 and 181-82, and minor dips in the topography are insignificant. Tr. Vol. IV at 182. When the Property was systematically mapped out along a transect (as opposed to the EPA's method of picking uncharacteristic individual points to skew the sample results), no significant differences in elevation or topography between disturbed areas (land timbered and kershawed) and undisturbed areas (forest) at the Property were found. Tr. Vol. IV at 182. The only change in elevation at the Property that occurred as a result of the activities at the Property was the depression of the

ditches themselves, not any change in elevation caused by the random dispersal of wood chips. Tr. Vol. IV at 183; Tr. Vol. VI at 90.

Likewise, the EPA failed to establish any environmental impact of the alleged storm water violations. Despite the ease with which water samples could be taken, the EPA took no water samples to test whether any materials were in the water. But Respondent did, hiring a highly qualified expert duly qualified in the fields of water quality and the impact of storm water runoff on water quality. Tr. Vol. IV at 6. Respondent's water quality expert took water samples to test turbidity with a turbidity meter. Tr. Vol. IV at 13. In the 24 hours immediately prior to water quality expert's visit to the Property in March 2000, an inch of rain fell. Tr. Vol. IV at 10-11. If sediment runoff and turbidity were present at the Property, these conditions would have been apparent at the time of the expert's visit because of the recent rainfall. Tr. Vol. IV at 11. Respondent's water quality expert took turbidity measurements on the Property in various ditches, in the sediment pond at the Property, and below the pond. The turbidity readings at these locations were extremely low indicating "exceptionally clean particle-free water."[7] Tr. Vol. IV at 19. Any discoloration of the water observed was due to natural phenomenon and is not indicative of sediment in the water. Tr. Vol. IV at 20 and 26. The water quality expert observed very little flow in the ditches,[8] Tr. Vol. IV at 21, and saw no evidence that sediment from the Property leaves the property bounds. Tr. Vol. IV at 24. Respondent's water quality expert observed the water outfalls (where the water exits the Property bounds) at both the Suffolk and Chesapeake sides of the Property and assessed water quality at these points. Tr. Vol.

[7] Virginia has no numeric standard for water turbidity. Tr. Vol. IV at 13. North Carolina's standard for water turbidity is 50 NTUs, which the water quality expert used as a reference. Tr. Vol. IV at 13. The highest value of water turbidity observed at the Property was 10 NTUs, which by any standard is very low and represents no problem with turbidity. Tr. Vol. IV at 19.

[8] The bottom of the ditches on the Property were lined with leaves, stones, and other debris from natural sources, but not with sediment. Tr. Vol. IV at 24-25.

IV at 29. Because an effective storm management system prevents sediment from running off the property bounds, in order to assess whether storm water management features are working together as a unit, water quality at the outfalls must be assessed. Tr. Vol. IV at 29-30. The EPA failed to examine any outfalls. But Respondent's expert did, concluding that the storm water management procedures and practices at the Property were entirely effective. Tr. Vol. IV at 30.

The water quality expert sampled water at the Property a second time in May 2002. Tr. Vol. IV at 31. In May 2002, water quality at the Property showed "very, very low" turbidity readings despite recent rainfall. Tr. Vol. IV at 32. The turbidity values of water at the Property were lower than tap water samples tested by the expert. Tr. Vol. IV at 33-34. The ditches on the Property exhibited very low flow rate and were filled with bottom dwelling microscopic algae that are found only in drainage features with undisturbed bottoms. Tr. Vol. IV at 38. Most water leaving the Property exited the Property through a sediment pond with existing, effective silt fencing. Tr. Vol. IV at 39-40.

The EPA presented no testimony that any discharge from the Property, if any, resulted in a change of flow or reach of the wetlands system. The EPA presented no evidence of the acreage, if any, drained or converted to uplands by the Respondent's activities on the Property. The EPA presented no evidence of any damage to plant or animal life caused by the activities at the Property. The EPA presented no evidence that any material or sediment ever exited the Property, much less caused any harm to navigable waters.

F. The EPA's Shortcomings in Hiring the Court Reporter Caused a Retrial

The case was first tried in 2003. As the complaining Governmental entity, the EPA was tasked with hiring a court reporter to transcribe trial testimony. 40 C.F.R. § 22.25. The EPA employee who selected the court reporter had received only two thirty-minute informal training

sessions on procurement generally. McCray Tr. at 5-6 (Portions of the testimony cited were attached to the Briefs in Support of Respondent's Motion to Dismiss, which is a part of the record in this case). When she began the detail with the EPA in January 2002, she had no prior experience with Government contracting. Id. When she was asked to locate a court reporter for the Smith Farm trial, she had no understanding of the geographic nature of the area and whether court reporters from cities contiguous to Virginia Beach should be considered. Id. at 19. She did not consider the nature of the engagement, and did not consider whether multiple court reporters should be used for the multi-day trial. Id. The EPA employee had no understanding of whether any court reporting services had been provided to the EPA or to any other Governmental entity in the area before. Id. at 19-20. She did not ask attorneys who practice in the location of the hearing (such as the U.S. Attorney's Office or opposing counsel) for any recommendations. Id. at 12-13.

Instead, the EPA employee consulted a website that contains electronic yellow page listings, without any understanding of the scope of the resource. Id. at 16. Based on the information posted on the website, the coverage of this resource is not the same as the physical yellow pages. The EPA employee simply called the listed court reporters on this website for the Virginia Beach area only until she obtained three responses that confirmed availability and provided pricing information. One of the listed agencies was Net Reporting Services, a proprietorship owned and operated by its sole court reporter, Cheryl Nettingham.

When she called the court reporters, the EPA employee did not ask any questions about competency. She did not ask about the court reporter's licensing, accreditation, or prior experience, such as experience with highly technical testimony. Id. at 19-21. The EPA supervisor also did not ask about Ms. Nettingham's experience, her licensure, her accreditation,

or her capacity to transcribe multi-day hearings and technical testimony. Jones Tr. at 28-29. No references were requested. Id. Therefore, the EPA at the time of hiring did not know if the court reporter selected had ever transcribed any other testimony ever. Id. at 29. Other than confirming availability for the dates requested, the only information gathered by the EPA was the pricing information. McCray Tr. at 10. Therefore, the only facts known to the EPA pertinent to Ms. Nettingham's ultimate selection was that she was available and her pricing. Jones Tr. at 46. As the EPA's Contracts Specialist subsequently admitted, availability is not equivalent to ability. Id. at 68.

The Smith Farm court reporting contract was awarded to Net Reporting Services on the basis (albeit mistaken) that it had provided the lowest aggregate bid. Ironically, Net Reporting Services did not, in fact, submit the lowest bid, but the highest. Net Reporting Services' base bid (the charge for an original transcript, two copies, and appearance fees) was higher by approximately $1,800 than the other two agencies that submitted pricing information (both of which were skilled and experienced). McCray Tr. at 39-41. The EPA employee concluded that because the other two reporting agencies would have charged for copying exhibits that Net Reporting Services was the lowest bid because it would not charge for exhibit copying. She had no explanation for how she calculated this or what her underlying assumptions were. Id. at 30-32, 38. When asked how she could determine who would be the lowest bidder without using a number for the expected number of copies, she said she was "not for sure." Id. at 38. The EPA employee did not consult with anyone, such as the EPA's attorneys or paralegals or her supervisors, about this determination, which apparently was made based on her assessment that "more than thousands of copies" were going to be needed. Id. at 32. She admitted that at a cost of $0.25 per copy over 7,000 pages of exhibits would have been required before Net Reporting

Services would have been the lowest bidder. Id. at 41-42. In fact, both the Respondents and Complainants had prepared an extra set of copies to provide to the court reporter such that the court reporter was not required to make any copies whatsoever. That no copies were needed could have been confirmed prior to the hiring of the court reporter through a simple consultation with the EPA's own attorneys or paralegals.

When the hearing was extended for an additional two days, a contract modification was issued. The contract extension was not competitively bid, but was simply awarded to Net Reporting Services. Jones Tr. at 38-40. Although the EPA employee determined the price to be paid for the extra two days, she could not explain how the add-on price had been calculated. McCray Tr. at 50-54. Once the EPA employee erroneously determined that Net Reporting Services was the lowest bidder, there was no double check on her calculations. Jones Tr. at 25. No one verified her calculations or questioned her assumptions. Id. at 23-25. No one checked back with the other vendors. Id. at 23-25.

The court reporter's work was wholly unacceptable. She was not able to produce a transcript of the six-day hearing. According to a more reputable court reporter who attempted to create a transcript from the EPA-hired reporter's notes, huge portions of testimony were dropped, rendering the transcript undecipherable. Decl. of Cathy D. Aiello ¶¶ 10, 13 (attached to EPA's brief). Despite extensive efforts to recreate the transcript, no transcript could be produced. The EPA-selected court reporter was overwhelmed by the task and simply stopped "hitting the keys" on her stenographic machine. Respondent moved for the case to be dismissed and the Administrative Law Judge refused, instead ordering a retrial. The case was retried in 2004. Respondent spent $168,253 in legal fees and expert witness fees in connection with the

first trial, an amount well in excess of the maximum penalty that could be assessed in this action, and then incurred additional expenses for the second trial.

IV. ARGUMENT

A. The Administrative Law Judge erred in concluding that Respondent "filled" the wetlands with wood chips and thus violated Section 404 of the Clean Water Act when he found that Respondent's purpose in spreading the wood chips was only to dispose of waste.

As is explained in the Initial Decision, the Respondent removed timber via logging from certain swaths of land on the site to prepare for ditching, which resulted in logging slash (woody debris) and small saplings being left behind. Because of a concern that this debris could be considered a corduroy road[9] (construction of which had been prohibited by the Corps, Resp't Ex. 11 and 14) if equipment traversed it, Tr. Vol. V at 187-89, Respondent's wetlands consultant advised that the slash and saplings should be mowed using equipment that chewed the slash up into wood chips.[10] Tr. Vol. VI at 65-66; Tr. Vol. V. at 189. The Corps had previously advised Respondent's wetlands consultant that moving of shrubs and saplings was acceptable as long as it did not result in a more substantial discharge.[11] Resp't Ex. 11 and 14. Thus, the wood chips were randomly dispersed by the equipment as it ran over the slash. Initial Decision at 9, Finding of Fact 38; Tr. Vol. IV at 226; Tr. Vol. V at 204-05; Tr. Vol. VI at 74. The Initial Decision recognized that the wood chips were spread only to get rid of the material (to "clear the saplings

[9] A corduroy road is a "roadway" constructed out of logs placed adjacent to each other. Tr. Vol. I at 179; Vol. V. at 187-88.

[10] Ironically, this concern may not have been warranted. Whether the woody debris was chewed up into chips or left intact is a distinction without a difference as the material is the same material no matter what form it takes. The EPA's theory that the woody debris became violative only once it was chopped up is untenable. The mass and the composition of it is identical whether it is intact slash or chipped slash. The only basis for drawing a distinction is if the debris was chopped up for a violative purpose.

[11] Respondent's contention is not that wood chips could never be considered fill. In fact, Respondent's expert volunteered in his testimony that he had previously (while a Corps inspector) cited a company for fill after it spread wood chips to a depth of twelve (12) feet to create a parking lot. Tr. Vol. VI at 11. The Initial Decision finds Respondent's expert's awareness that wood chips could be used as fill "most telling," Initial Decision at 35, but this simply misconstrues Respondent's position. Respondent's expert consistently focused on what the purpose was in spreading chips and whether chips were extensive.

and other woody debris (also called 'slash') left behind in the paths." Initial Decision at 9, Finding of Fact 37) and noted that the chips were just "randomly distributed" out the rear, not directed to any particular area. Initial Decision at 9. The Administrative Law Judge rejected the EPA's contention that the chips were spread to form a roadbed.[12] The factual findings should have resulted in the Court ruling that the wood chips did not constitute violative fill.

Nonetheless, the Initial Decision found that the EPA had established that Respondent had filled the wetlands with wood chips. The Administrative Law Judge erred both in applying the law and in finding other facts with regard to the fill issue. With regard to the Administrative Law Judge's application of the law:

At the time the work was performed on the Site, "fill material" was defined in 33 C.F.R. § 323.2 (e) and (f) by the Corps as "material used for the **primary purpose** of replacing an aquatic area with dry land or changing the bottom elevation of a waterbody." (emphasis added).

The chipping of wood certainly did not make the wetlands dry as conceded by the EPA's soil expert, Tr. Vol. III at 101-02, and the EPA never claimed otherwise. Thus, the first prong of the test for fill was not established. The Administrative Law Judge rejected the evidence offered by the EPA to establish the second prong of the test – namely that Respondent had intended to form a roadbed. Thus, left without any evidence to satisfy either prong of the test, the Initial Decision merely concludes that because a discharge occurred that the discharge would "inevitably serve to replace an aquatic area with dry land or to change the elevation of a waterbody." Initial Decision at 32. The Administrative Law Judge's reasoning is circular and

[12] Respondents do wish to clarify that even the cited testimony of the Corps and EPA witnesses does not establish that there was a several inch layer of wood chips only. Rather, the testimony was that there were layers where wood chips were mixed in with soil down to a certain depth. None of the Corps' or the EPA's witnesses made any effort to quantify the amount of chips versus soil. Respondent's expert did, however, and found the percentage of woody debris to be low and completely consistent with silviculture.

renders the test for whether material is "fill" a nullity; under his theory, **any** discharge would "inevitably" satisfy the test and qualify as fill.

As the Initial Decision notes, the EPA had a different definition of "fill" at the time. The EPA defined fill as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." Initial Decision at 30. The EPA's definition stressed the **effect** of the fill rather than the **purpose** of the fill. Nonetheless, the prevailing case law at the time of the alleged violations applied the Corps' "primary purpose" test. Resource Inv. Inc. v. U.S. Army Corps of Engineers, 151 F.3d 1162 (9th Cir. 1998); Bragg v. Robertson, 54 F. Supp.2d 653 (S.D. W.Va. 1999); Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of the City of NY, No. 94CIV0436 (RPP), 1996 WL 131863 at *12 (S.D.N.Y. March 22, 1996); United States v. United Homes, Inc., No. 98 C 3242, 1999 WL 117701 at *3 (N.D. Ill. March 1, 1999). The primary purpose test is also most consistent with the definition of "discharge of fill material" governing at the time. The definition of "discharge of fill material" stated that:

> The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary to the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt or other materials for its construction; site-development fills for recreational, industrial, commercial, residential and other uses, causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures, such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

Initial Decision at 29. What is central to this definition is that the intended use, and thus the purpose in placing fill is determinative. Further, the Corps' definition should control in this case

because Respondents were dealing only with the Corps as the permitting authority and as the agency with regulatory authority. Tr. Vol. I at 91. Any permit to be issued would have been issued through the Corps. The Respondent had no contact with the EPA until after the ditches had been dug. Furthermore, to the extent the differing definitions would impact the result in this case, the rule of lenity should be applied, and the definition more favorable to Respondent applied. U.S. v. Granderson, 511 U.S. 39, 54 (1994); U.S. Plaza Health Labs., Inc., 3 F.3d 643 (2d Cir. 1993).

Nonetheless, even if the EPA's definition were to be applied, the EPA still failed to establish that the bottom elevation of the site was changed. The mere fact that wood chips were observed mixed in with soil to a certain depth (according to the Corps and EPA) does not establish a change in elevation. Chips could have been ground into soil without changing the "elevation" of the soil because the chips could have been incorporated into the soil without a resultant change in elevation. Because the EPA introduced **no evidence about any elevations** at any point on the extensive site, it failed to establish a fill violation even based on its own definition. Cf. Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 924 (5th Cir. 1983) (noting that fill material had leveled the landscape).

To the contrary, Respondent presented testimony of topographical surveys taken across the locations from which the Government sampled. The topographical surveys mapped transects across the disturbed area that had been sampled by the EPA and into the undisturbed areas in which the Government contended no chips were found. The topographical cross-sections established that no significant difference in elevation was present between the areas where a wood chip and soil layer was found according to EPA's witnesses and the areas that were

undisturbed woods.[13] Tr. Vol. IV at 182; Resp't Ex. 39 (topographical cross sections taken across the ditch banks, showing that the undisturbed sides of the ditches have the same elevation as the disturbed sides of the ditches along which wood chips were spread.)

Because the Initial Decision correctly determined that the wood chips were created only as a means of disposal, this factual finding should have resulted in the legal conclusion that the wood chips do not constitute fill because the Respondent's primary purpose was not to replace an aquatic area with dry land or change the bottom elevation of a waterbody. Further, the evidence established no change in the bottom elevation of the Property.

B. The Administrative Law Judge erred in concluding that fill was placed in wetlands based on a finding that "substantial" amounts of wood chips were present throughout the site when the Government samples were isolated and biased and when a more scientifically valid sampling technique revealed no more wood chips than would be expected in a timbered natural forest.

Factually, the Initial Decision's finding about the amount of wood chips at the Property is against the weight of the evidence introduced at trial. The Administrative Law Judge found that Section 404 had been violated because a "substantial amount" of wood chips were present along certain cleared corridors.[14] The testimony established, however, that the amount of wood chips on the site did not exceed the amount that would normally be associated with any timbering operation. Tr. Vol. III at 178. The Initial Decision erroneously assumes (as did the EPA) that anything woody found in the soil was as a result of Respondent's ditching activities at the site. This is simply a grossly overbroad assumption. The EPA's soil expert characterized everything she found in the soil that was woody as a "wood chip" no matter what its shape or form, Tr. Vol.

[13] When this case was tried, the EPA characterized the cross-sections as irrelevant, claiming that because the cross-sections were not taken contemporaneously with the work, no baseline exists from which to compare the results. The EPA misunderstands the scope of the topographical survey, however, because a "baseline" was built in given that the transects continued from the Government sample point into the undisturbed woods. The undisturbed area is the "baseline."

[14] Even the Initial Decision does not find that wood chips were present throughout the site.

III at 80, and found no naturally occurring woody material. Tr. Vol. III at 115. Of course, woody material would be expected both in a forested area as a result of natural processes and in an area where logging had occurred as a result of the timbering operation. Tr. Vol. III at 120, 176. None of the testimony at trial established that the equipment (the only alleged point source) caused anything that looked like chopped-up sticks, which the EPA's soil expert called chips. Rather, the testimony established that the equipment used would create either wood shreds or fairly uniform wood chips. Initial Decision at 8, Finding 35.

The Initial Decision discounts the extensive testimony and thorough testing of Respondent's soil expert only because of the passage of time. Initial Decision at 32.[15] The differences between the EPA's and Respondent's experts' findings do not reflect merely their usages of different terminology, but rather a different methodology. Respondent's expert had forty-eight (48) years of experience specifically in wetlands and hydric soils. Resp't Ex. 43. He wrote the wetlands manual defining hydric soils. Resp't Ex. 43. Respondent's soil expert followed an unbiased and exhaustive sampling procedure, resulting in 55 soil samples taken from across the entirety of the site. Tr. Vol. III at 167-68, 172. He finalized a sampling methodology **prior** to visiting the site, which called for sampling along systematic transects along each timbered corridor at specified distances. Id. He measured off the sample points with a hip chain to avoid even the slightest amount of selection bias. Id. He sampled along the entirety of the site, including along the timbered swaths where no ditching had occurred. Based on a careful analysis of the soil profiles and his systematic descriptions of any woody debris found in the soil samples, he concluded that the amount of wood chips present was not in excess of those that would be produced in a silviculture operation, Tr. Vol. III at 178, and that none of the unbiased

samples indicated the presence of any "fill" material. Tr. Vol. III at 181. Unlike the EPA's expert, he distinguished between woody material such as sticks that would naturally be found on any woody site and wood chips. Tr. Vol. III at 190. He also quantified the wood chips he found in his soil profiles, and concluded the amounts were far from "substantial." Resp't Ex. 32.

In contrast, the EPA simply concluded there was "fill" based on two hand-auger-sized soil samples that contained a mix of wood and soil. The EPA walked and sampled only along a sliver of the 300 acre extensive site, although no constraints were placed upon its site visit or sampling. Initial Decision at 2. The EPA used no methodology in selecting samples, but simply assessed the site visually to pick samples, a technique that introduces bias and produces uncharacteristic results. Tr. Vol. III at 97-98. Respondent's expert's findings demonstrate the sampling bias as one sample was taken near a large, freshly cut tree stump and the other was at the peak of a tire rut, both likely locations of more wood chips than at other points. Tr. Vol. III at 162-64, 100; Tr. Vol. V at 239-40. Furthermore, because the EPA did not sample in the timbered but unditched swaths, any conclusion of fill along the ditched areas is invalid because there is no valid reference point to compare it to where timbering had occurred, but no wood chipping.

Although the Initial Decision placed great weight on the inspectors' eyeball estimates about the depth of the chip layer and the soil samples taken at uncharacteristic locations, the more scientifically valid approach of Respondent's expert showed no evidence of "fill." Therefore, the Initial Decision's finding that the chips on site generated by the ditching were "substantial" is against the weight of the evidence, and it should be rejected.

[15] Interestingly, the EPA soil scientist admitted that decomposition of the wood chips would occur more slowly in wet soil. Tr. Vol. III at 119. Even assuming the fastest rates of decomposition, decay of the woody debris could not account for the differences in the soil scientist's findings. Tr. Vol. III at 179.

C. The Administrative Law Judge erred in finding Clean Water Act Section 402 liability because he based the violation on a point source (ditches) not claimed in the Amended Complaint, which cites equipment as the only point source.

The Administrative Law Judge further erred in finding that Respondent violated Section 402 of the CWA. He found that the ditches themselves were the required point sources. The Administrative Law Judge cited evidence of "rilling" along the ditch banks, general erosion, and ditch bank failure.[16] Initial Decision at 39. However, even were these factual findings to be accepted, they are not sufficient to support Section 402 liability as no "point source" was established as set forth in the Administrative Complaint.

A point source is defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14). The Initial Decision correctly notes that a "point source" is required to establish a Section 402 violation, Initial Decision at 36, but then does not correctly apply the standard.

As stated in 40 C.F.R. § 22.24, the EPA "has the burdens of presentation and persuasion that the violation occurred **as set forth in the complaint** . . .." (emphasis added). The EPA's Complaint unambiguously asserted that the "equipment used at the Site is a point source" for the 402 violations. Am. Compl. at ¶ 30.[17] No other point source is identified in the Amended Complaint.[18] Importantly, the EPA did **not** claim that the ditches themselves were point sources,

---

[16] That some "rilling" may have been present should not be surprising given that a hurricane hit the Property two days before the EPA's site visit.

[17] Obviously, the equipment was also identified as a point source for the alleged 404 violation regarding the spreading of wood chips

[18] While case law certainly supports that a plethora of geographic features could qualify as point sources, this is irrelevant as "equipment" and "equipment" only was identified as the point source in the Amended Complaint. Although the EPA argued in its brief the similar case, Vico Construction Corp. and Amelia Venture Properties, L.L.C., CWA Appeal No. 05-01, that the site itself could be a point source, this was not mentioned in the Administrative Complaint. Even if it had been, the Government introduced no evidence that water flowed off the

although that is the basis of the Administrative Law Judge's finding of a violation. Initial Decision at 39. Even if the ditches had been named as point sources, they could not be qualifying point sources in this case because the EPA never even looked at the outfalls and thus never established that the ditches were discharging or could discharge any material. The Initial Decision also perfunctorily cites equipment as a point source, id., but contains no analysis of how the equipment functioned as a point source for storm water. The testimony at trial clearly established that the equipment (the only alleged point source in the Complaint) used at the site did not contribute to the claimed "sloughing" of the ditch banks. The Kershaw mower was not used in connection with the digging of the ditches and could not have contributed to any sloughing off the ditch bank sides. The excavator used to dig the ditches likewise could not have contributed to the sloughing after the ditches were dug. No equipment was in the ditches after they were dug.

Therefore, the EPA failed to allege any viable "point source" for its allegations that matched the allegations in the Complaint. Because the EPA did not meet its burden of establishing a violation as set forth in the Complaint, the Initial Decision should be overturned. Cf. United States EPA v. New Orleans Public Serv., Inc., 826 F.2d 361 (5th Cir. 1987) (reversing EPA order because proof did not match allegations in the Complaint).

Accordingly, even accepting all the Initial Decision's factual findings, no basis existed for imposing Section 402 liability.

---

site (as opposed to its theoretical calculations about how water moved within the site), so the site itself could not be the qualifying point source. The EPA had no such evidence because it never inspected the outfalls.

D. The Administrative Law Judge erred in assessing a penalty just below the maximum that could be assessed based on a finding that Respondents were highly negligent when the Respondents lacked culpability and the EPA failed to establish any resultant environmental harm.

After giving the Respondent a $32,000 credit for the settlement in this case by VICO Construction Corporation, the Administrative Law Judge concluded that a penalty of $80,000 for the Section 404 wood chip violation was appropriate because the Respondents were "highly negligent" in the spreading of wood chips and that they were "highly negligent" with regard to the Section 402 permit violation, thereby supporting a penalty of $14,000. Therefore of the maximum allowable penalty of $137,500, the penalty assessed for the conduct at issue in this case totaled $126,000, just $11,500 short of the maximum. These findings about culpability are completely contrary to the evidence in the case.

The Respondent clearly attempted to comply fully with the law. The managers of Smith Farm Enterprises, LLC are well-respected, law-abiding members of the community, attorneys at law, and officers of the court. Tr. Vol. III at 201-02. To ensure their compliance with the law, they hired a wetlands consultant (a former Corps inspector) to advise them. The Corps pre-approved the activities that were conducted on Site both orally and in writing, a determination upon which the Respondent relied. See Section III B, infra; Resp't Ex. 11 and 14. Respondent sought the advice of the Corps prior to beginning work because it wanted to ensure all work complied fully with any applicable rules and regulations. Tr. Vol. III at 223; Tr. Vol. IV at 221; Tr. Vol. V at 171. Not content to rely only on the other site's correspondence, Respondent set up an individualized meeting with the Corps to discuss the work to be performed. Tr. Vol. I at 227; Tr. Vol. III at 225, 259; Tr. Vol. V at 175, 177-78. Neither the Corps nor the EPA ever advised that the work was problematic or that work should stop. Initial Decision at 6. Both the owner and the operator testified that work would have stopped if they had been advised of any trouble.

The Corps was kept apprised about the nature of the work being performed at the various sites throughout the region upon which the contractor was operating.[19] The work was performed openly and in full accordance with the conditions that had been agreed upon, as noted in the Initial Decision at 9 n.8. The Corps inspected the work as it was being performed at Respondent's invitation. Respondent and its contractor followed the Corps-approved process to the letter, and conducted spot inspections of their own work to ensure compliance. Tr. Vol. VI at 8; fn 4, infra; Tr. Vol. V 222-23. Special equipment and more cumbersome and expensive procedures were employed so as to eliminate environmental impacts of the work. E.g., Tr. Vol. III at 267; Tr. Vol. IV at 223; Tr. Vol. V at 198; Tr. Vol. VI at 97. Pollution control measures were installed, inspected regularly, and repaired as needed. E.g., Tr. Vol. IV at 231; Tr. Vol. V at 249; Tr. Vol. VI at 90-91. Once advised that a Section 402 permit could be required, Respondent immediately applied for one, driving through a hurricane to the DEQ office immediately upon notice. Tr. Vol. IV at 197-98.

It defies reason that Respondent consciously disregarded environmental regulations at the same time they sought Corps pre-approval of work to be performed, invited the Corps to inspect sites while work was being performed, invested in special equipment to prevent environmental damage, followed less-efficient but safer procedures, and hired an environmental expert to ensure compliance with all rules and regulations.[20] Also, if Respondent had been cavalier about

[19] The Initial Decision discounts the expert's correspondence with the Corps about the Southern Pines site because the Corps' response said it was "site specific." Given this language, however, Respondent did subsequently obtain site-specific advice for its site, upon which it relied.

[20] EPA has argued that Respondent hired the consultant to "evade" the CWA. This is false. Although the EPA does not like the National Mining decision, it clearly established that Tulloch ditching is a legal method to drain wetlands. Respondent hired the consultant to ensure its actions in undertaking the legal activity were fully compliant with the law. If anyone has been disingenuous, it is the EPA. When Tulloch ditching was recognized as legal, the EPA concocted (as evidenced by this enforcement action) alternative ways to prosecute Tulloch ditching indirectly by pursuing violations incidental to the ditching. The EPA's attitude has been if Tulloch ditching itself cannot be stopped directly, we will ensure that those engaging in Tulloch ditching violate other regulations, thus stopping it indirectly. In the year the EPA was "determining" whether other portions of the CWA could be used to stop Tulloch

compliance, why would they have bothered with anti-pollution measures such as conducting Erosion and Sediment Control inspections, diverting the ditches' outfall through a pond, and installing check dams?[21] E.g., Tr. Vol. IV at 77; Tr. Vol. V at 249. All of these factors indicate that the Respondent tried mightily to comply with the bewildering array of multi-tiered and multi-agency administered regulations.

This case hardly presents a portrait of recalcitrant, knowing lawbreakers. At every turn, the Respondent actively sought the Corps' guidance and involvement, and they tried to comply with all rules and regulations. If they had ever been advised any of their activities were violative, they would have ceased. This case is thus wholly unlike other cases in which a respondent was found highly negligent. Cf. United States v. Wilson, 133 F.3d 251 (4th Cir. 1997) (finding negligence when expert had advised that permits were required).

The Administrative Law Judge further erred in assessing the severity of the alleged violations. The Administrative Law Judge found in assessing the penalty that the "adverse consequences of the Section 404 violation in this case are significant." Initial Decision at 39. This finding is wholly unsupported because absolutely no evidence at trial even suggested that the wetlands at issue were diminished or even altered in their functioning or reach. No evidence at trial suggested that any loss of wetlands acreage was caused or that the Tulloch ditches were effective in draining the wetlands. The EPA introduced no evidence that any "pollutant" (in this case silt, not dangerous chemicals) ever left the Smith Farm site, much less that any navigable-in-fact waters were compromised by the activities at the Site, and no evidence that any plants or animal life were impacted. Instead, the only testimony introduced by the EPA related to the

---

ditching, landowners such as Respondent proceeded with work and have found themselves ensnared by the EPA's enforcement zeal.

[21] The Initial Decision faults Respondent for not taking appropriate measures to stabilize ditch banks, but offers no steps that it could have taken to do so without being accused of filling in wetlands. Initial Decision at 45.

general value of wetlands. Perhaps recognizing the weakness of the impact testimony in this case, the Administrative Law Judge cites testimony from another case, Initial Decision at 41, to bolster his findings. But the further cited testimony is still only in the nature of "wetlands are good." Everyone agrees that wetlands are good, but what is missing is any evidence that the spreading of wood chips **hurt** the wetlands. The Initial Decision's syllogism is as follows: wetlands are good; Respondent was trying to drain wetlands; therefore, Respondent is bad. But even if the legally permissible ditching was effective in draining the wetlands (which was not established), the syllogism misses the mark. What is relevant is whether the alleged violation (the spreading of wood chips) damaged the wetlands. Evidence of this was wholly lacking. Accordingly, any violation did not result in any significant environmental impact.

The EPA's failure to introduce evidence about the alleged storm water violation was similar. The Initial Decision relies on the testimony of the EPA storm water inspector who was asked how extensive the violations were.[22] He did not testify about the **impact** of the technical violations, and no other testimony was offered about any adverse impact. Instead, the only water quality expert to testify found "exceptionally clean particle-free water," Tr. Vol. IV at 19, and found that, in sum, the pollution control measures installed were entirely effective in controlling any discharges. Tr. Vol. IV at 30. Therefore, the EPA failed to establish that the Tulloch ditches increased any flow of material off the site. The Initial Decision discounts the findings of Respondent's expert because his testing was six months after the EPA site visit. Initial Decision at 40. But even if his findings are discounted on this basis, they at a minimum establish that any violation was short-lived at best and not significant environmentally, further counseling against the hefty penalty imposed by the Initial Decision.

[22] The EPA visited the site within forty-eight hours after a direct hit hurricane, hardly a representative time.

The Initial Decision's imposition of such a significant penalty on these facts is inequitable and should be reversed.

E. The Administrative Law Judge erred in denying Respondent's Motion to Dismiss the case after the trial transcript from the first proceeding could not be produced because the EPA hired an incompetent court reporter.

As set forth in the factual background, the EPA process that culminated in the hiring of the incompetent court reporter was truly an astounding example of gross negligence and ineptitude.

Case law considering similar circumstances was not found. Most other cases addressing lost transcripts arise out of facts where no one is at fault for the loss or in the context of a criminal case, in which a retrial would only improve a defendant's position.[23] Reynolds v. Romano, 118 A. 810, 811 (Vt. 1922) ("The right of a party to have his exceptions heard in this court is a substantial right, the loss of which entitled him to a new trial if it has occurred without his fault."); McVey v. Fussell, 295 So.2d 499 (Ct. App. La. 1974) (noting there was "no question but that the loss is not imputable to the appellant"); Guillie v. Louisiana Department of Transportation, 538 So.2d 1144 (Ct. App. La. 1989) ("we are unable to determine the party or parties responsible for the absence of material evidence in the record"); Patterson v. Autry, 110 So.2d 377 (Miss. 1959) ("no charge that appellees were guilty of fraud or were in any manner responsible for the dereliction of the court reporter"). Even in such cases not always are retrials ordered. See, e.g., Patterson v. Autry, 110 So.2d 377 (Miss. 1959) (dismissing appeal and refusing to remand for trial); cf. Bergerco, U.S.A. v. The Shipping Corp. of India, Ltd., 896 F.2d

[23] Unlike a criminal defendant whose odds of acquittal would increase with a new trial, Respondent here was penalized when a new trial was ordered. The EPA was able to use the first trial as a "dress rehearsal," and it massaged the testimony of key witnesses, such as the Corps inspector, so that his testimony was much more favorable to the EPA during the second trial.

1210, 1216 (9th Cir. 1990) (noting that "no federal appellate court has remanded a civil case for a new trial due to a missing or inadequate transcript . . ." prior to its decision).

Unlike the reported cases, Respondents do assert for the reasons set forth in the factual section that it was the EPA's fault that the particular inadequate court reporter was hired. The appropriate focus is not upon the EPA's attempts to rectify the situation once it arose, but rather upon the EPA's role in creating the problem. Respondents recognize that the EPA would have never intended the unfortunate result of its procurement decision, but the gross inadequacies of its process led to the result and Respondent was penalized therefor. Respondent incurred costs of $168,253 in connection with the first trial, an amount well in excess of the maximum penalty that could have been imposed, along with additional costs for the second trial. The Administrative Law Judge should have "sentenced" Respondent to the equivalent of "time served" in a criminal case and refused to order a retrial. The Administrative Law Judge should have granted Respondent's motion to dismiss pursuant to Fed. R. Civ. P. 41(b).

F. The Administrative Law Judge erred in finding Clean Water Act jurisdiction over the wetlands at issue in this case. (Based on the current status of the law, Respondent will not reiterate its arguments on jurisdiction in this appeal brief, but instead incorporates by reference its post–trial briefs and expressly reserves the issue in the event any subsequent decisions alter the applicable legal landscape).

V. CONCLUSION

In sum, the Initial Decision's finding of liability for Clean Water Act violations Sections 402 and 404 should be reversed. If liability is established, however, the penalty should be greatly reduced.

Oral argument is requested.

Respectfully submitted,

SMITH FARM ENTERPRISES, LLC

By _____
Beth V. McMahon

Hunter W. Sims, Jr.
Marina Liacouras Phillips
Beth V. McMahon
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
Norfolk, VA 23510
Phone: (757)624-3000
Fax: (757)624-3169

CERTIFICATE OF SERVICE

I hereby certify that on this 2 day of June 2005, a true and correct copy of the foregoing was sent via Federal Express to:

Ms. Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029
Fax: (215) 814-2603

Stefania D. Shamet, Esquire
United States Environmental Protection Agency
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Beth V. McMahon

::ODMA\PCDOCS\DOCSNFK\982630\1

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

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)

Docket No.: CWA-3-2001-0022

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")

EXHIBITS TO RESPONDENTS' APPEAL BRIEF

Needham, Jernigan
& Associates, Inc.
Environmental Consultants

Robert N. Needham, PWS (910) 371-6082
Leon S. Jernigan, Jr., Ph.D. (910) 438-9436

9100 Charlestowne Rd. SE, Winnabow, N.C. 28479

24 August 1998

Mr. John Evans
Corps of Engineers
Regulatory Branch
803 Front Street
Norfolk, VA. 23510

Re: **Southern Pines** - overturning of "Tulloch Rule"

Dear Mr. Evans:

Several years ago Southern Pines Associates began upland excavation which has lowered water tables in former wetland areas of the tract. With the recent Appeals Court ruling on Tulloch, Southern Pines Associates is planning to excavate a series of "vee" ditches in the wetland area of the tract. Mr. Robert N. Needham of Needham Jernigan & Associates contacted you by phone on 24 August 1998 to discuss these plans. The following conditions serve to summarize concerns and methods for performing "Tulloch ditches" in wetlands until further notice from the Corps.

For these excavations to be non-regulated activities, pursuant to the Clean Water Act, these ditches must conform to the following:

- No sidecasting of dredged material
- No double handling
- No digging of stumps with more than a single pull of the excavator
- No "corduroy" road from woody vegetation
- No discharge in the wetland except for "incidental fallback" associated with ditch excavation

To conform with the above, Southern Pines proposes the following:

- Mowing of shrubs and saplings along length of proposed excavation
- No bulldozers or root rakes in wetlands
- Avoidance of large tree stumps
- Large trees will be felled by chain saw to allow rotation of the excavator
- Use of "offroad" trucks to remove excavated material directly from backhoe bucket
- Placement of removed material onto non-wetland areas confirmed by previous wetland survey

RNN 000245

- Potential use of temporary wooden matts as used in timber harvest operations in soft soil areas

Southern Pines plans to implement this excavation process on or after Monday 31 August 1998. Should you have any questions or input please contact our office prior to close of business 28 August 1998.

We will be available for an onsite meeting to discuss specifics of ditch excavation if you would like to review the alignment locations. Should you have questions, please, do not hesitate to call (919) 371-6082.

Sincerely,

Robert Needham, President

DEPARTMENT OF THE ARMY
NORFOLK DISTRICT, CORPS OF ENGINEERS
FORT NORFOLK, 803 FRONT STREET
NORFOLK, VIRGINIA 23510-1096

REPLY TO
ATTENTION OF:

September 11, 1998

Western Virginia Regulatory Section
92-5417-27 (Deep Creek)

Needham, Jernigan & Associates, Inc.
Mr. Robert N. Needham
9100 Charlestowne Road SE
Winnabow, NC 28479

Dear Mr. Needham:

This is in reference to your August 24, 1998, letter that discussed ditch excavation activities on the 100 acres of wetlands on the Southern Pines tract, in Chesapeake, Virginia. Specifically, you indicated that your ditch excavation activity would not include:

1. Sidecasting of excavated material.
2. Double handling of excavated material in wetlands.
3. Digging of stumps other than excavation with a single pull of the excavator.
4. Corduroy roads from any fill material, including woody vegetation.
5. Any other discharge of excavated material except for "incidental fallback" associated with the ditch excavation.

To insure that the excavation activity does not cause any discharge into wetlands, except for "incidental fallback", you have also stated that the contractor will use the following procedures for excavation activities in wetlands.

A. Shrubs and saplings will be mowed along the length of the proposed excavation.
B. There will be no bulldozers or root rakes in wetlands.
C. Large tree stumps will be avoided.
D. Trucks will remove excavated material directly from backhoe bucket.
E. Any placement of removed material will be in upland.
F. Wooden matts may be used in soft soil areas.

We have determined, based on Corps and EPA joint guidance dated April 11, 1997, that the proposed activity does not result in the movement of substantial amounts of dredged material from one location to another in waters of the United States. Therefore, as long as your project does not include a more substantial discharge that would trigger Section 404 regulation, a Corps permit will not be required for the excavation of ditches in wetlands on the Southern Pines site as you have proposed. This is a case specific determination and does not apply to any other site. Please contact John Evans, at (757) 441-7794, if you have any further questions about regulated activities on this site.

Sincerely,

W. H. Poore Jr.

William H. Poore, Jr.
Chief, Regulatory Branch

RNN 000247

Needham, Jernigan
& Associates, Inc.
Environmental Consultants

Robert N. Needham, PWS (910) 371-6082
Leon S. Jernigan, Jr., Ph.D. (910) 438-9486

9100 Charlestowne Rd. SE, Winnabow, N.C. 28479

6 November 1998

Mr. Nick Konchuba
Corps of Engineers
Regulatory Branch
803 Front Street
Norfolk, VA. 23510

Re: Smith Farm, proposed Tulloch Ditching - Office meeting with Mr. Robert and Jim Boyd

Dear Mr. Konchuba:

This letter is a follow up to our office meeting with you on 30 October 1998 to discuss Tulloch Ditching. With the recent Appeals Court ruling on Tulloch, the Boyds are planning to excavate a series of "vee" ditches in the forested area of the Smith Farm tract. The following conditions serve to summarize concerns and methods for performing "Tulloch ditches" in until further notice from the Corps.

For these excavations to be non-regulated activities, pursuant to the Clean Water Act, these ditches must conform to the following:

- No sidecasting of dredged material
- No double handling
- No digging of stumps with more than a single pull of the excavator
- No "corduroy" road from woody vegetation
- No discharge in wetlands except for "incidental fallback" associated with ditch excavation

To conform with the above, the Boyds propose the following:

- Mowing of shrubs and saplings along length of proposed excavation
- No bulldozers or root rakes in wetlands
- Avoidance of large tree stumps
- Large trees will be felled by chain saw to allow rotation of the excavator
- Use of "offroad" trucks to remove excavated material directly from backhoe bucket
- Placement of removed material onto agricultural areas confirmed by NRCS "PC" status
- Potential use of temporary wooden matts as used in timber harvest operations in soft soil areas

The Boyds plan to implement this excavation process on or after Monday 16 November 1998. Should

you have any questions or input please contact our office prior to close of business 13 November 1998. NJ&A will be available to meet with your field representative to review the 11 acres of agricultural fields off Shoulder's Hill Road. We await your call to confirm a date for that meeting.

We will be available for an onsite meeting to discuss specifics of ditch excavation if you or your staff would like to review the alignment locations. Should you have questions, please, do not hesitate to call (919) 371-6082.

Sincerely,

Robert Needham, President