

IN RE BRICKS, INC.

EAJA Appeal No. 04-02

FINAL DECISION

Decided December 21, 2004

Syllabus

U.S. EPA Region V (the "Region") appeals from a July 16, 2004 decision by Administrative Law Judge Carl C. Charneski ("ALJ") awarding Respondent, Bricks, Inc. ("Bricks"), \$79,174.15 in attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and its implementing regulations at 40 C.F.R. part 17. The fee award was based on the ALJ's determination that the underlying action was not "substantially justified."

In the Board's opinion in *In re Bricks, Inc.*, 11 E.A.D. 224 (EAB 2003) ("*Bricks I*"), the Board reversed a decision, also issued by Judge Charneski, assessing a \$65,000 penalty against Bricks for alleged violations of the Clean Water Act ("CWA") § 301(a), 33 U.S.C. § 1311(a). The ALJ in that case concluded that Bricks had discharged pollutants (fill material) into "waters of the United States" without first obtaining a permit from the United States Army Corps of Engineers pursuant to CWA § 404(a), 33 U.S.C. § 1344(a). Specifically, the ALJ found Bricks liable for discharging pollutants into wetlands, which he determined were adjacent to a tributary of a navigable water of the United States. In reversing this conclusion, the Board held that the Region failed to prove by a preponderance of the evidence that the wetlands at issue were "navigable waters" within the meaning of the Act. In particular, the Board concluded that the Region failed to prove that the wetlands were hydrologically connected to a navigable water or a tributary thereof to the south of the Bricks site.

On December 2, 2003, Bricks filed an Application for Award of Fees and Expenses under EAJA requesting an award of \$166,088.75 on the grounds that the Region's underlying enforcement action lacked substantial justification. In a decision dated July 16, 2004 ("EAJA Decision"), the ALJ concluded, among other things, that the Region's case was not substantially justified and awarded fees and expenses in the amount of \$79,174.15. Following this decision, the Region filed the instant appeal contending that the ALJ's substantial justification determination was erroneous.

Held: The Board's decision in *Bricks I* turned, in part, on the Board's findings and conclusions relating to the probative value of the witnesses' testimony, including doubts surrounding the depth of the witnesses' knowledge of the relevant circumstances as well as gaps, ambiguities, and contradictions in the testimony of the witnesses when considered in the aggregate. Nonetheless, the Board does not expect the Region to have predicted the outcome of the Board's determinations in this regard. Reviewing the record as a whole, the Board is convinced that the Region's position regarding, among other things, the existence of a hydrological connection between the site and a navigable water or a tributary thereof

had a reasonable basis in law and fact and was, therefore, substantially justified. Accordingly, the Board reverses the portion of the ALJ's EAJA Decision finding that the Region's underlying action against Bricks was not substantially justified and vacates the award of fees and expenses.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

U.S. EPA Region V (the "Region") appeals from a July 16, 2004 decision by Administrative Law Judge Carl C. Charneski ("ALJ") awarding Respondent, Bricks, Inc. ("Bricks"), \$79,174.15 in attorneys' fees and expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and its implementing regulations at 40 C.F.R. part 17.¹ See Order on Respondent's Application for Fees and Expenses (ALJ, July 16, 2004) (hereinafter "EAJA Decision"). The fee award was based on the ALJ's determination that the underlying action was not "substantially justified." The central issue in this appeal is whether the ALJ's determination in this regard was erroneous. For the reasons set forth below, we hold that the ALJ's determination was erroneous and therefore reverse his decision to award fees and expenses to Bricks.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case have been set out in the Board's opinion in *In re Bricks, Inc.*, 11 E.A.D. 224 (EAB 2003) (hereinafter "*Bricks I*"). Therefore, we will only discuss the facts sufficient for an understanding of the issues that give rise to this EAJA appeal.

In *Bricks I*, the Board reversed a decision, also issued by Judge Charneski, assessing a \$65,000 penalty against Bricks for alleged violations of Clean Water Act ("CWA") § 301(a), 33 U.S.C. § 1311(a). The ALJ in that case concluded that Bricks had discharged pollutants (fill material) into "waters of the United States" without first obtaining a permit from the United States Army Corps of Engineers pursuant to CWA § 404(a), 33 U.S.C. § 1344(a). See *Bricks I*, 11 E.A.D. at 225. Specifically, the ALJ found Bricks liable for discharging pollutants into wetlands, which he determined were adjacent to a tributary of a navigable water of the United States. In reversing this conclusion, the Board held that the Region failed to prove by a preponderance of the evidence that the wetlands at issue were "navigable waters" within the meaning of the CWA. In particular, the Board concluded

¹ An ALJ who considers a fee petition brought under EAJA issues a "recommended decision," which is reviewable by this Board to the same extent and in the same manner as an initial decision. 40 C.F.R. §§ 17.27, 22.30; see *In re L & C Servs., Inc.*, 8 E.A.D. 110, 111 n.2 (EAB 1999).

that the Region failed to prove that the wetlands were hydrologically connected to a navigable water or a tributary thereof to the south of the Bricks site.² *Id.* at 240.

In ruling in the Region's favor in the underlying enforcement action, the ALJ relied on the testimony of four witnesses at the hearing as well as a site map prepared by Bricks' contractor containing notations suggesting that a ditch on the site was a tributary of a navigable water. *Id.* at 232-33. Although the ALJ considered the presence or absence of a hydrological connection to be "a close question," he ultimately agreed with the Region on this issue. In support of this conclusion, the ALJ, in addition to the site map mentioned above, relied on the following:

(1) the testimony of Thomas Kehoe, an employee of Environmental Consultants and Planners ("ENCAP"), a contractor hired to assist Bricks in obtaining any necessary permits from the U.S. Army Corps of Engineers. Mr. Kehoe testified that water flowed south through a ditch at the site;

(2) the testimony of Randolph Briggs, a Resource Conservationist with the Kane/DuPage Soil Conservation District.³ Mr. Briggs testified at the hearing that: (a) a channel or ditch existed on the property that carried water south from the site, through culverts and under Interstate 88 (which bordered the site to the south), and (b) an "S"-shaped channel existed to the south of the site;

(3) the testimony of Amy Nerbun, an Enforcement Specialist in the Region V Wetlands Section of the Water Division,⁴ that a surface connection existed between the wetlands on the site and the Fox River, a navigable water; and

(4) the testimony of Bricks' expert witness, Tom Slowinski, that drainage from the "general area" goes into Blackberry Creek, a tributary of the Fox River. *See id.* at 12.

² For a fuller discussion of the requirement that a wetland be hydrologically connected to a navigable water, *see Bricks I*, 11 E.A.D. at 231-32.

³ The Kane/DuPage Soil Conservation District is a state and local government unit funded by the Illinois Department of Agriculture. Mr. Briggs' responsibilities include preparing natural resource inventories throughout the county and conducting soil erosion and sediment plan control inspections. Mr. Briggs inspected the site in August of 1999. *See Bricks I*, 11 E.A.D. at 228.

⁴ Ms. Nerbun represented EPA during a multi-agency inspection of Bricks' site in October of 1999. *Bricks I*, 11 E.A.D. at 229.

According to the ALJ:

[N]o one piece of evidence in this case establishes a sufficient nexus between the wetlands on respondent's * * * site and the Fox River to support the proposition that the filling of those wetlands invokes Clean Water Act jurisdiction. However, building upon the testimony of complainant's witnesses Briggs and Nerbun, and the testimony of respondent's witnesses Kehoe and Slowinski, as well as Complainant's Exhibit 2 [site map], it is held that EPA has established, by a preponderance of the evidence, that the wetlands on the Bricks site are "waters of the United States" as defined at 33 C.F.R. 328.3(a) and 40 C.F.R. 232.2, and "navigable waters" as defined at Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7).

Bricks I, 11 E.A.D. at 232-33 (quoting Initial Decision at 27). The Board disagreed.

In reviewing the testimony of each of these witnesses, the Board concluded that the Region had failed to prove, by a preponderance of the evidence, the existence of a hydrological connection between the wetlands on the site and a navigable water or a tributary thereof to the south of the Bricks site. In particular, the Board found that:

(1) although Mr. Kehoe testified that there was a drainage ditch on the site, he did not testify about a connection between this ditch and a navigable water or a tributary thereof. *Bricks I*, 11 E.A.D. at 234;

(2) although Mr. Briggs testified that an "S"-shaped channel existed to the south of the Bricks site, he also stated that the channel was a new one and it was unclear to the Board whether this channel existed at the time Mr. Briggs inspected the site or at the time the violations occurred. *Id.* at 235. Further, the Board found Mr. Briggs' testimony regarding the existence of a continuously flowing channel at the site to be ambiguous in that it was unclear whether he was referring to the "newly constructed 'S'-shaped channel south of I-88, the ditch to the north on Bricks' property, or to something else." *Id.* at 236-37. Under these circumstances, the Board found Mr. Briggs'

testimony unconvincing.⁵ *Id.*;

(3) Ms. Nerbun's testimony as to the existence of a hydrological connection between the wetlands on the site and a navigable water, or a tributary thereof, was of limited value because: (a) her opinion was not based on her personal knowledge but on a document admitted only for the purpose of calculating an appropriate penalty. *Id.* at 237; and (b) Ms. Nerbun's testimony referenced the above-mentioned notations on a site map prepared by Bricks' contractor suggesting a surface connection between the Bricks' site and a navigable water. However, the Board expressed serious doubt about the reliability of these notations because the purpose of this map was to delineate the wetlands at the site rather than to illustrate water flow to the south, and because questions existed about the accuracy of the notations. *Id.* at 238; and, finally,

(4) although Mr. Slowinski testified that drainage from the general area goes into a navigable water or a tributary thereof, he also stated that there was no defined channel to the south of the site. Further, he stated that a golf course to the south of the site had disrupted water flow. *Id.* at 239. The Board therefore concluded that "the waters were far muddier than the Region implies." *Id.* at 238

In reversing the ALJ, the Board stated:

The Region's case suffers from a fatal lack of clarity. * * * [T]he testimony at the hearing that the ALJ relies on in support of his Initial Decision is contradictory and inconclusive at best. Under these narrow circumstances, we must rule against the party possessing the burden of proof, in this case the Region. In so doing, we do not rule out the possibility that a hydrological connection exists between the site and [a navigable water] or a tributary thereof. Rather, we simply hold that the Region has not

⁵ The Board also found the ALJ's rationale for crediting Mr. Briggs' testimony over that of Bricks' expert witness, Tim Slowinski, to be misplaced. The ALJ credited Mr. Briggs' testimony because, according to the ALJ, Briggs had been monitoring a wetlands restoration project in the area for the prior year. *Bricks I*, 11 E.A.D. at 237. Upon review, however, the Board found that the time frame for this monitoring did not appear to coincide with the time during which Mr. Briggs inspected the site or in which the violations purportedly occurred. *Id.*

met its burden of proving such a connection by a preponderance of the evidence.

Id. at 240. We therefore reversed the ALJ's finding of liability and vacated the civil penalty assessed.

On December 2, 2003, Bricks filed an Application for Award of Fees and Expenses under EAJA requesting an award of \$166,088.75 on the grounds that the Region's underlying enforcement action lacked substantial justification. *See* EAJA Decision at 1. In his July 16, 2004 EAJA Decision, the ALJ concluded, among other things, that the Region's case was not substantially justified and awarded fees and expenses in the amount of \$79,174.15.⁶ Following this decision, the Region filed the instant appeal contending that the ALJ's substantial justification determination was erroneous. *See* Complainant's Notice of Appeal (Sept. 17, 2004); Brief of U.S. EPA Complainant/Appellant (Sept. 17, 2004) ("Region's Brief on Appeal"). Bricks filed a response as well as a cross-appeal alleging that the ALJ erred in concluding that there were no special factors warranting an award of fees above the statutory maximum, and seeking fees and expenses related to the EAJA application and cross-appeal. *See* Response and Cross-Appeal Brief of Bricks, Inc. (Oct. 11, 2004) ("Bricks' Response and Cross-Appeal"). The Region filed a response to Bricks' Response and Cross-Appeal on November 1, 2004. *See* Response Brief of Complainant Region V in Opposition to Bricks Inc.'s Cross-Appeal (Nov. 1, 2004). Finally, on December 13, 2004, Bricks filed a supplement containing additional information on costs associated with the preparation of Bricks' Response and Cross Appeal. Supplement to Bricks, Inc.'s Response/Cross-Appeal (Dec. 13, 2004).⁷

II. DISCUSSION

The EAJA is a fee-shifting statute that enables private parties who prevail against the government in certain types of contested proceedings to recover attorneys' fees and expenses when the government's position in the proceedings is not "substantially justified." *See* Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 and

⁶ The ALJ also ruled that Bricks' fee application was timely filed and that Bricks met EAJA's threshold eligibility requirements. EAJA Decision at 2-7.

⁷ Because we reverse the ALJ's determination that the Region's underlying action was not substantially justified, Bricks' request for fees and expenses related to the preparation of the EAJA application and cross appeal is denied. Bricks has also argued that the ALJ erred in concluding that no special factors existed warranting an award of fees above the statutory per-hour maximum rate of \$125. *See* Bricks' Response and Cross-Appeal at 1. However, given our determination in this matter, we do not reach this issue.

28 U.S.C. § 2412).⁸ The primary purpose of the EAJA is to ensure that individuals and organizations will not be deterred from seeking review of, or defending against, unjustified governmental action because of the expense involved in securing the vindication of their rights. As explained in the EAJA's legislative history:

[B]y allowing an award of reasonable fees and expenses against the Government when the action is not substantially justified, [the EAJA] provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991 ("1980 House Report"); *see also Comm'r v. Jean*, 496 U.S. 154, 163 (1990) (EAJA eliminates for the average person the financial disincentive to challenge unreasonable governmental actions).

Under 5 U.S.C. § 504, a party that prevails in an adversary adjudication against an administrative agency and satisfies certain threshold requirements relating to size and income is entitled to fees and expenses incurred in that adjudication, unless the federal agency can show that its position was "substantially justified" or that special circumstances make the award unjust.⁹ 5 U.S.C. § 504(a)(1). The government bears the burden of proof on the issue of substantial justification. *See* 1980 House Report at 11 ("The Committee believes that it is far easier for the Government, which has control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove the Government was unreasonable."); *see also In re L & C Servs., Inc.* 8 E.A.D. 110, 116 (EAB 1999).

⁸ The EAJA is codified under two statutes covering two distinct types of proceedings: 5 U.S.C. § 504, which governs adversary administrative adjudications; and 28 U.S.C. § 2412, which governs civil, non-tort, court actions. Although case law interpreting the EAJA has developed under both statutes, only 5 U.S.C. § 504, relating to administrative adjudications, is at issue in this appeal.

⁹ In its brief on appeal, the Region focuses on whether the underlying proceeding was substantially justified. The Region states, however, that it wishes to preserve certain threshold issues, including the timeliness of Bricks' application for fees under EAJA, "should further proceedings become necessary." Region's Brief on Appeal at 3. Because we conclude that the action in this case was substantially justified, however, we do not reach these issues.

The term “substantial justification” means that the government’s position in the adjudication must have a “reasonable basis in both law and fact.” See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (“substantial justification” means “justified in substance or in the main,” which is no different from having a reasonable basis in law and fact); *L & C Servs.*, 8 E.A.D. at 116 (government position is substantially justified where there is a reasonable basis in law and fact) (citing *Pierce*); *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 681 (EAB 1998) (same), *aff’d*, 112 F. Supp. 2d 763 (S.D. Ind. 1999). Whether an agency’s position was substantially justified is “determined on the basis of the administrative record, *as a whole*, which is made in the adversary adjudication for which fees and other expenses are sought.” 5 U.S.C. § 504(a)(1) (emphasis added). As the Board has previously stated, it is well-established that this provision requires that the trier of fact evaluate the government’s position *in its entirety*, and may not focus exclusively on the government’s position or conduct during discrete stages of the case.¹⁰ *L & C Servs.*, 8 E.A.D. at 116 (citing *Comm’r v. Jean*, 496 U.S. 154, 161-62 (1990); *United States v. Rubin* 97 F.3d 373, 375 (9th Cir. 1996); *Roanoke River Basin Ass’n v. Hudson*, 991 F.2d 132, 139 (4th Cir. 1993); *Kuhns v. Bd. of Governors*, 930 F.2d 39, 44 (D.C. Cir. 1991)); see also *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000) (analysis should consider support for the government’s position throughout the entire proceeding).

We now turn to the issue before us in this appeal: Was the ALJ’s determination that the Region was not substantially justified in bringing this action against Bricks erroneous? We review an ALJ’s decision on EAJA matters *de novo*, and evaluate the issues raised on appeal to determine whether the factual findings are supported by the record and the legal conclusions are consistent with case law and other applicable legal authority.¹¹ See *L & C Servs.*, 8 E.A.D. at 115.

¹⁰ It is possible that in the course of examining the government’s position in its entirety, a reviewing body might conclude that an action was initially substantially justified but not thereafter. See *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 686 (EAB 1998). Such a situation may occur, for example, where evidence arises in the course of an evidentiary hearing that virtually eliminates the agency’s chief claims. See, e.g., *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992) (substantial justification for bringing worker safety claim lost when NLRB pursued claim after hearing testimony that workers were not contesting unsafe working conditions; EAJA fees awarded from conclusion of hearing onward). This is not, however, the situation in the present case.

¹¹ In its brief, Bricks states, incorrectly, that the Board’s evaluation does not involve *de novo* review “but only whether the ALJ abused his discretion in his determination on the request for fees.” Bricks’ Response and Cross-Appeal at 4. Although a federal district court’s EAJA determinations are reviewed by the federal circuit courts of appeal under the abuse of discretion standard (see *Pierce v. Underwood*, 487 U.S. 552, 559 (1988)), an EAJA determination made by an administrative law judge is treated, for purposes of review by this Board, in the same way as an initial decision, which is subject to *de novo* review. See *supra* note 1; *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 682 n.38 (EAB 1998).

In his EAJA Decision, the ALJ concluded that the Region “was not ‘substantially justified’ in fact.” EAJA Decision at 7. In particular, the ALJ concluded that because the Region had failed to establish an essential element of its case against Bricks (a hydrological connection between the wetlands on the site and a navigable water or a tributary thereof), the action was not substantially justified. The ALJ based this determination solely on the EAB’s Final Decision in *Bricks I*. See *id.* at 7-8 (“Because Bricks prevailed on appeal to the Environmental Appeals Board, it is to the EAB’s findings which we will look to determine whether the government was substantially justified in bringing this action.”). As stated above, however, the substantial justification determination must be based on the administrative record in its entirety. Further, the fact that the government’s position did not prevail on appeal does not create a presumption that its position was not substantially justified. See *Scarborough v. Principi*, 124 S. Ct. 1856, 1866 (2004) (Congress did not intend for the government to pay fees each time it loses); 1980 House Report at 11 (merely because the government loses a case, a presumption does not arise that the government’s position was not substantially justified). The substantial justification analysis should contain an evaluation of the factual and legal support for the government’s position throughout the entire proceeding. *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004); *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000). Thus, in relying solely on the Board’s Final Decision in *Bricks I*, the ALJ used an incorrect standard in his substantial justification analysis. Applying the correct standard, we conclude that the Region’s action against Bricks was substantially justified.

In its case before the ALJ, the Region presented a significant amount of evidence pointing to a possible hydrological connection between the site and a navigable water or a tributary thereof to the south. This included the testimony of several witnesses, such as Mr. Briggs and Ms. Nerbun, supporting the Region’s assertion that water from the site flowed south through a defined channel, ultimately reaching a navigable water. Further, the record included the map notations, discussed above, prepared by Bricks’ own contractor, suggesting that a ditch on the site flowed south into a navigable water or a tributary thereof. In other words, this is not a situation where the Region omitted a crucial element of proof from its case; rather, this is a situation where proof was in fact presented, but it fell short, in the Board’s view, of meeting the Region’s burden of persuasion. Under these circumstances, we would be hard pressed to conclude that the Region lacked a reasonable basis to proceed.

This is in stark contrast to the situation the Board confronted in *In re L & C Servs., Inc.*, 8 E.A.D. 110 (EAB 1999) (concluding that the Region’s underlying action lacked substantial justification), where the Region put on its case “without a shred of direct evidence establishing key elements of the offenses” alleged. *Id.* at 119. This case has more in common with the facts presented to the Board in *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665 (EAB 1998) (finding the Region’s position substantially justified), where the record contained evidence supporting

the Region's position as well as evidence casting doubt on that position. Under such circumstances, the Board stated that it could not penalize the Region for going forward with its case. Similarly, although the Board ultimately found for Bricks in this case, we cannot say that the Region's case lacked a reasonable basis in fact. *See Hoosier*, 7 E.A.D. at 691 (where the government's position is reasonably supported by evidence in the record, "the mere fact that the record contains some contradictory evidence, which may, in the ultimate judgment of the trier of fact, outweigh the evidence upon which the government's position is based, provides no basis for an award of EAJA fees."); *see also id.* at 692 (Region is entitled to choose between "permissible, though conflicting, views of the available evidence.") (quoting *Jackson v. Chater*, 94 F.3d 274, 280 (7th Cir. 1996)).

Indeed, in his Initial Decision in the underlying proceeding in this matter, dated October 9, 2002, the ALJ reviewed this evidence and concluded that the Region had met its burden of establishing a hydrological connection between the site and a navigable water or a tributary thereof. Although the ALJ considered this to be a "close question," he ultimately found in the Region's favor. While this is not determinative, the closeness of the question is certainly evidence the Region's position was substantially justified. *See Cummings v. Sullivan*, 950 F.2d 492, 498 (7th Cir. 1991) (finding that the "closeness of the question is, in itself, evidence of substantial justification").

Our decision in *Bricks I* turned, in part, on the Board's findings and conclusions relating to the probative value of the witnesses' testimony, including doubts surrounding the depth of the witnesses' knowledge of the relevant circumstances as well as gaps, ambiguities, and contradictions in the testimony of the witnesses when considered in the aggregate. Nonetheless, we cannot expect the Region to have predicted the outcome of the Board's determinations in this regard. That is, we do not expect the Region to have predicted that the Board would necessarily favor the testimony of certain witnesses over others, or discount the relevance of certain evidence. Because we conclude that the Region's evidence reasonably supported the Region's position, we cannot agree with the ALJ that the Region's decision to go forward with its case lacked substantial justification in fact. *See Wilfong v. United States*, 991 F.2d 359, 368 (7th Cir. 1993) (the possibility of "an adverse finding on a credibility issue does not, in and of itself, deprive the [government's] position of a basis in fact.") (quoting *Temp Tech Indus., Inc. v. NLRB*, 756 F.2d 586, 590 (7th Cir. 1985)); *Europlast, Ltd. v. NLRB*, 33 F.3d 16, 17-18 (7th Cir. 1994) (affirming dismissal of fee application under EAJA, and expressing agreement with the ALJ that the government could not have foreseen the outcome of credibility determinations in underlying proceeding).

III. CONCLUSION

When we review the record as a whole, we are convinced that the Region's position regarding, among other things, the existence of a hydrological connection between the site and a navigable water or a tributary thereof had a reasonable basis in law and fact and was, therefore, substantially justified. Accordingly, we **REVERSE** the portion of the ALJ's EAJA Decision finding that the Region's underlying action against Bricks was not substantially justified, and we **VACATE** the award of fees and expenses.

So ordered.