UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of	**)**	
	)	**Docket No. CWA 06-99-1631**
Agronics, Inc.	**)**	**(Equal Access to Justice Act)**
	)	
Petitioner	**)**	

RECOMMENDED DECISION ON APPLICATION FOR AWARD OF FEES AND EXPENSES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

Agronics, Inc. ("Agronics" or "Petitioner"), has filed an Application for Fees and Costs pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 40 C.F.R. Part 17. In its application, Agronics requests an award of fees and costs in the amount of $3,016.17 . EPA opposes the award. Although it is concluded that Agronics is a "prevailing party" within the meaning of the Act and that Complainant hasn't shown it was substantially justified in continuing to pursue this action beyond mid-December, 2002, Petitioner has not shown that it paid or incurred liability for attorney's fees and the great majority of the fees and expenses claimed were incurred prior to the institution of the action or prior to the time Complainant's action was no longer justified.. Moreover, although the EAJA (5 U.S.C.§ 504 (b)(1)(A)) does not limit allowable fees to those paid attorneys, but allows the recovery of reasonable agent's fees, the agents' fees must be incurred in a representative capacity and do not include a principal or employees of the applicant. Therefore, Petitioner has shown that it is entitled at most to a de minimis award ($16.02 for certified mail), and it is recommended that its EAJA application be denied.

I. BACKGROUND

On January 18, 2000, the Director of the Compliance Assurance and Enforcement Division of EPA Region 6 ("Complainant") issued a Class II administrative complaint against Agronics, Inc. pursuant to Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319 (g), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), 40 C.F.R. Part 22. The complaint alleged, inter alia, that at all relevant times Respondent operated a soil conditioner manufacturing/formulating operation, sometimes referred to as the "Clod Buster Mine", located at Old Highway 44, 8.5 miles southeast of Cuba, Sandoval County, New Mexico, the "facility"; that this facility was a point source of pollutants with its storm water, to the receiving waters of an unclassified tributary, thence to the Rio Puerco (east),

thence to the Rio Grande in Segment 2105 of the Rio Grande Basin,[1] which are waters of the United States within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2. The complaint further alleged that the described activity was industrial activity within the meaning of Section 402(p) of the Act and 40 C.F.R. §§ 122.1 and 122.36 (b)(14); that in accordance with Section 301(a) of the Act any discharge of a pollutant except in accordance with the terms of a permit is unlawful and that at the time of an inspection by the New Mexico Department of the Environment on November 24, 1998, Agronics had not obtained an NPDES storm water permit and had not prepared and implemented a Storm Water Pollution Prevention Plan (SWPPP). Although EPA issued an Administrative Order, on March 30, 1999 (supra note 1), requiring Agronics to, inter alia, obtain an NPDES permit and to prepare and implement a SWPPP , it had not obtained an NPDES storm water permit or submitted a SWPPP to EPA as of December 1999.[2] The complaint recited that Agronics was liable for a civil penalty of $11,000 for each day a violation continues up to a maximum of $137,500 (Id. ¶ 15). Complainant, however, apparently intended to assess a penalty of $137,000 for Agronic's alleged violations of Section 301 during the period October 1, 1992, through December 1999 (Id. ¶ 18). As noted infra, however, the proposed penalty was calculated for a period beginning January 1, 1997, and the complaint recites that it does not address NPDES violations occurring past December 1999.

On January 26, 2000, the complaint was served on Petitioner and a return-receipt card was filed with the Regional Hearing Clerk on April 24, 2000, as proof of service. Although Petitioner acknowledged receipt of the Notice of Violation by letter, dated February 24, 2000, referencing Administrative Order Docket No. VI-99-1027 and NPDES No. NMU000328, it is concluded hereinafter that the record strongly supports an inference that the intended reference was to the complaint (infra note 3). Moreover, the Regional Judicial Officer specifically found that the letter was intended as a response to the complaint (infra at 8). Petitioner argued that the Notice of Violation for failing to have a NPDES permit was preempted by the fact it had been

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[1]. The Administrative Order ("AO") issued on March 30, 1999 (Docket No.VI-99-1027) finds that "..the facility was a 'point source' subject to a discharge of 'pollutants' with storm water discharges to an unclassified tributary (arroyo), thence to the Rio Puerco (East), thence to the Rio Grande in Segment 2105 of the Rio Grande Basin,....". (Id.¶ 3) (emphasis added). This may be recognition of Agronics' claim that there were no actual discharges to waters of the United States and to base EPA jurisdiction on the potential for such discharges.

[2]. The requirement to prepare and submit a SWPPP is apparently a requirement of the NPDES Storm Water Multi-Sector General Permit for Industrial Activities (60 Fed.Reg. 5084, September 29, 1995), rather than a codified regulation. The AO also required that within 45 days Respondent arrange a meeting with EPA enforcement personnel at its Regional Offices to show cause why enforcement action in addition to the Administrative Order should not be taken (Id. 8). This meeting, attended by Mr. Sharpe, representing EPA, and Mr. Leland Taylor, representing Agronics, took place on September 28, 1999, and is referred to as a "Show Cause Meeting" (Attachment D to Second Affidavit of Taylor M. Sharpe). Costs incurred in connection with attendance at this meeting are included in fees and expenses claimed by Petitioner.

penalized by the Energy, Minerals and Natural Resources Department of the State of New Mexico for the same violation. Petitioner, however, did not file an answer complying with Consolidated Rules of Practice § 22.15 within 30 days after service of the complaint as required by the cited rule.

Agronics' apparent failure to file an answer appears to be the reason the matter eventually came to the attention of the Regional Judicial Officer ("RJO"). In any event, the RJO, noting the lack of any substantive activity by Complainant in the proceeding for over two years, issued an Order on August 8, 2002, directing Complainant to show cause why the action should not be withdrawn for lack of prosecution. Complainant was specifically ordered to file a written explanation detailing why it failed or delayed prosecution for over two years and to file a motion for a default order accompanied by appropriate documentation. Alternatively, Complainant was directed to file a notice of withdrawal of the complaint. Additionally, the RJO ordered Agronics to show cause why it should not be held in default for failure to file an answer to the complaint.

Thereafter, Complainant filed a Motion for Default as to Liability and Penalty on September 20, 2002, seeking a civil penalty in the amount of $131,445 The motion specifically denied that the failure to file pleadings or other documents for over two years constituted delayed prosecution or a failure to prosecute, asserting that Complainant had made numerous contacts with Agronics since the complaint was filed for the purpose of resolving the matter through settlement negotiations. The motion was supported by an affidavit of Taylor M. Sharpe, an enforcement officer in the Water Enforcement Branch of EPA, Region 6, who states, inter alia, that he was the enforcement officer assigned to review CWA regulatory compliance by Agronics, Inc., a corporation incorporated under the laws of the State of New Mexico., whose mailing address is 7100 Second Street NW # C, Albuquerque, New Mexico, 87107. Mr. Sharpe further states that Agronics applied for and was issued NPDES Permit No. NMR05A678, which became effective on February 23, 2000, and expired on September 29, 2000. It is not clear why the permit was effective for a period of less than a year. In any event, Agronics did not apply for a renewal of the permit. Mr. Sharpe asserts that Agronics began operating the facility prior to 1997, and stopped operations when it lost its bond from the New Mexico Mining and Minerals Division in September, 2001. The remainder of Mr. Sharpe's affidavit is devoted to explaining the penalty calculation. As authority therefor, however, he cites CWA § 309(d), the provision applicable to the judicial determination of civil penalties, rather than CWA § 309(g)(3), the provision governing the assessment of civil penalties administratively.[3] He points out that the

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[3]. This error was corrected in a subsequent recalculation of the proposed penalty. See Second Affidavit of Taylor M. Sharpe. Section 309(g)(3) of the Act, entitled "Determination of Amount", provides in pertinent part: In determining the amount of any civil penalty assessed under this subsection, the Administrator or the Secretary as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation, or violations, and with respect to the violator, ability to pay, any prior history of such violations, the degree of

(continued...)

proposed penalty of $131,445 was based on 45 months of operation without a permit[4] and consisted of $6,445 for economic benefit, $90,000 for the gravity of the violation, $45,000 was added for Respondent's compliance history and culpability, nothing was subtracted based on ability to pay[5] and $10,000 was subtracted to reflect litigation risk (Id.6).

On November 22, 2002, the RJO issued a Second Order to Show Cause to the parties, pointing out, inter alia, that neither party had fully complied with the prior order. Regarding Complainant, the RJO noted that Complainant's assertion that it had made numerous settlement contacts with Respondent since the filing of the complaint was not supported by facts indicating that these contacts caused [or contributed to] Complainant's failure for over two years to file any pleadings designed to advance this litigation. Nevertheless, the RJO, noting that Complainant had partially complied with the prior order by filing a Motion for Default as to Liability and Penalty, granted Complainant a further opportunity to support its position. He ruled

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[3](...continued)
culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require....."

[4]. Notwithstanding the fact that the complaint recites that it does not address NPDES violations occurring after December 1999, the 45-month period of violation for operating without a permit includes the period after Petitioner's NPDES permit expired, i.e., from October, 2000, until the facility was shut down in September, 2001. Complainant has not moved to amend the complaint.

[5].In discussing the "economic impact on the violator", Mr Sharpe states that this particular factor takes into account the different impacts of a penalty on violators by looking at their financial capability, and the size of the business or municipality. It also considers Respondent's ability to pay a penalty. He asserts that an inability to pay defense can only be invoked when the violator cannot prove it cannot pay the assessed penalty. This assertion appears to be based on the Interim CWA Settlement Policy (March 1, 1995), which provides at 21 that "[t]he violator has the primary burden of establishing the claim of inability to pay." While this may be an appropriate position to take for settlement purposes, it is simply erroneous as a statement of the law. It is well settled that where the statute requires certain factors, including ability to pay, be considered in determining the amount of a penalty, Congress meant what it said and, under such circumstances, " ability to pay" cannot be an affirmative defense. See, e.g., Merritt v. U.S., 960 F.2d 15 (2d. Cir. 1992) (interpreting Section 15(c) of the Shipping Act of 1984 (46 U.S.C. § 1712(c)), which, concerning determination of the amount of a penalty, contains language indistinguishable from Section 16 of the Toxic Substances Control Act, 15 U.S.C. § 2615. Moreover, EPA, as the proponent of an order under the Administrative Procedure Act, has the burden of persuasion. See, e.g., New Waterbury, Ltd, TSCA Appeal No. 93-2, 5 E.A.D. 529 (EAB, 1994). This is consistent with Rule 22.24 of the Consolidated Rules of Practice,40 C.F.R. Part 22, which places the burden of presentation and of persuasion that the violation occurred as alleged in the complaint and that the relief sought is appropriate upon the Complainant.

that Complainant could submit factual information detailing settlement efforts and contacts with Agronics. The Order also provided that Complainant would have an opportunity to submit information, i.e., a penalty calculation worksheet, if one was prepared, and any and all documentation/communications exchanged between the parties concerning Agronics' inability to pay relevant to penalty calculation issues.

As to Agronics, the RJO pointed out that the record showed a complete failure to comply with Part 22, Rules of Practice, procedures. These failures included the lack of an adequate justification for not responding to [answering] the January 18, 2000, complaint;[6] not responding to the August 2, 2002, Order to Show Cause and to Complainant's September 20, 2002, motion for default.[7] The foregoing, notwithstanding, the RJO held that, because of Agronics' status as a pro se litigant and the RJO's desire to develop a complete record, Agronics would be given a [further] opportunity to show cause why it should not be held in default as to liability and [for the amount of the] penalty as alleged in the complaint.

Complainant responded to the Second Order to Show Cause under date of January 6, 2003, alleging, inter alia, that Complainant's present counsel was the third EPA attorney assigned to this matter and that, although the file was limited regarding specific prosecutorial activities which took place after April 2000 and before May 2002, EPA's enforcement officer, Mr. Taylor Sharpe, can attest that communications with Agronics were made during the mentioned time period for compliance purposes and for the purpose of resolving the matter via negotiated settlement (Id.1, 2).Complainant argued that its good faith efforts to reach a negotiated settlement with Respondent constitutes "reasonable dispatch" and that, consequently, dismissal of the case [for lack of prosecution] is not proper. Complainant points out that,

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[6]. As indicated supra, Agronics acknowledged receipt of the Notice of Violation by letter, dated February 24, 2000 (Second Affidavit of Taylor M. Sharpe, Attachment E). Although the letter refers to the Administrative Order rather than the complaint, the fact that the letter is dated within 30 days after service of the complaint while the Administrative Order (AO) was issued on March 30, 1999, approximately eleven months previously, and refers to a penalty which the AO threatened but did not assess (Id. 9), strongly supports an inference that the intended reference was to the complaint. The RJO was unaware of this letter until receipt of Complainant's Status Report, dated December 16, 2002 (infra note 10).

[7].Unbeknownst to the RJO at the time, Respondent by letter, dated September 23, 2002, filed a Motion to Dismiss for Lack of Jurisdiction and Stating a Claim Upon Which Liability Can be Based, dated September 24, 2002, for the reason that any discharges from the facility at issue were not to waters of the United States. As will be seen infra, this issue was addressed in some detail in the RJO's Order, dated May 7, 2003, Denying Complainant's Motion for Default and Assessment of a Civil Penalty and Respondent's Motion to Dismiss. Although a Certificate of Service, dated September 24, 2002, indicates that Agronics' motion was sent by certified mail and addressed to the Regional Hearing Clerk and Enforcement Officer Taylor M. Sharpe, the RJO found as a fact that the motion was not filed with the RHC (infra at 8).

although Agronics failed to file an answer to the complaint, it did, as noted supra, in late February 2000, file a Notice of Intent ("NOI") to be covered under the NPDES Storm Water Multi-Sector General Permit for Industrial Activities. On February 23, 2000, Respondent was issued permit number NMR05A678 effectuating coverage under the general permit, which as noted supra expired on September 29, 2000. By letter, dated February 21, 2000, Respondent informed EPA that it was forwarding under separate cover a Storm Water Pollution Prevention Plan developed by its consultants, John Shomaker [Shoemaker] and Associates. In April 2000, Complainant says that it learned that the New Mexico Mining and Minerals Department had revoked Agronics' bond and shut down its facility for reasons unrelated to the complaint herein.[8]

Complainant recites that because Agronics was shut down, it has argued that it is unable to pay a penalty (Response to Second Order to Show Cause at 3). In a letter, dated March 22, 2000, addressed to Mr. Sharpe, Agronics acknowledged an EPA letter, dated March 14, 2000 (not in the record), and stated that "we" will provide the documentation which clearly demonstrates Agronics limited ability to pay the assessed fees (Attachment E to Second Affidavit of Taylor M. Sharpe). Additionally, Agronics questioned EPA's jurisdiction, asserting that the waters in question are not surface waters and are fully contained in the west containment pond which has never overflowed [and thus, the waters are not waters of the United States]. Agronics also pointed out that it was being penalized by the State for not having an NPDES permit and thus, [to be penalized by EPA for the same violation] was to be penalized twice for the same infraction which was not tolerable. As indicated supra, in its letter, dated February 24, 2000, Agronics had argued that to be penalized by both the State and EPA for not having an NPDES permit was a violation of due process .Without explanation, Mr. Sharpe states that the penalty imposed by New Mexico was for a different violation -perhaps, not having an NPDES permit for a different period? The next record indication of Agronics' financial condition being discussed is a telephone conversation between its president, Mr. Leland T. Taylor, and Mr. Sharpe on August 27, 2001, wherein Mr. Taylor reported that the State had shut Agronics down

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[8]. Response to Second Order to Show Cause at 3. Mr. Sharpe states, however, that on April 17, 2000, he was informed by Karen Garcia of the New Mexico Mining and Minerals Department that New Mexico was seeking to revoke Agronics' bond and that the facility was temporarily shut down (Second Affidavit at 3) (emphasis added). Mr. Sharpe states his understanding that the facility was permanently shut down in September 2000 and that Agronics no longer had access thereto past that date (Id.). This understanding appears to be based on and supported by telephone conversations with Mr. Leland Taylor, Agronics' president, who stated, inter alia, that Agronics had been assessed a penalty of $2,600 for not having an NPDES permit and that the facility was shut down in September 2000 by order of a New Mexico court (Telephone Message Log, Attachment A to Second Affidavit of Taylor M. Sharpe). It is noted, however, that the Settlement Penalty Calculation Worksheet reflects 45 months of operating without a permit, that is, from January 1, 1997, through January 1, 2000, and from October 1, 2000, through September, 2001 (Attachment B to Second Affidavit of Taylor M. Sharpe). The RJO found that the penalty action by the State of New Mexico was taken [initiated] on March 4, 1999 (Order at 3).

because it did not have a $500,000 reclamation bond and that he (Agronics) no longer had control of the facility (Attachment A to Second Affidavit of Taylor M. Sharpe). Mr. Taylor is reported to have stated that he (Agronics) could not afford a penalty.

Thereafter, the parties appear to have engaged in settlement negotiations extending over a period of many months (Second Affidavit of Taylor M. Sharpe at 3).Mr. Sharpe relates that periodically, i.e., every 2-3 months, he would correspond by telephone and e-mail with Agronics' president, Mr. Leland Taylor, to discuss whether he was ready to settle as well as to make financial settlement offers. He (Sharpe) states that usually each offer would be higher [than the last] in order to give Agronics an incentive to settle. Describing Agronics' responses, Mr. Sharpe states that Mr. Taylor either would not respond or would repeat claims of why he should not have to settle. These included:(1) the facility was not discharging to waters of the U.S.; (2) that Agronics' settlement with New Mexico for a different violation constituted a settlement with EPA; and (3) Agronics did not have the ability to pay any penalty. Mr. Sharpe asserts that he informed Mr. Taylor to document his claims for settlement purposes and that in particular, there were several conversations wherein Agronics was told to make official its claims of inability to pay and to document such claims.

By a letter, dated May 14, 2002, addressed to Mr. Sharpe, Agronics (Mr. Taylor) referred to a telephone conversation of that date and stated that EPA's proposed settlement of $45,000 was above his company's ability to pay.[9] The letter pointed out that the facility had been shut down by court order since around September 2001 and was no longer operational. The letter, portions of which were provided Mr. Taylor by Mr. Sharpe, referred to the Clean Water Act Settlement Policy and requested that EPA perform an "inability to pay" analysis of "my" financial information for the purpose of reducing or eliminating the penalty. The letter stated Mr. Taylor's agreement to providing EPA financial information necessary to perform such an analysis, including giving EPA permission to access financial institutions and to make information requests to such institutions. Additionally, the letter expressed Mr. Taylor's realization that [such information] would include the last several years of IRS returns, bank statements, and summaries of assets.

Complainant alleges that Agronics did not furnish information necessary for the performance of an inability to pay analysis until November 2002. This information, discussed infra, enabled the performance of several inability to pay analyses which are not in the record. Complainant has reported that the parties had reached an agreement in principle to settle this

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[9]. Attachment H to Second Affidavit of Taylor M. Sharpe. In addition to stating that he had been shut down by court order since around September 2001, Mr. Taylor is reported to have informed Mr. Sharpe in the mentioned telephone conversation that he (Agronics) was not the owner of the land and that the court prohibited him from doing anything including reclaiming the land (Case Summary Log, Attachment A to Second Affidavit of Taylor M. Sharpe).

matter and that a CAFO to memorialize the settlement had been drafted, but apparently was never executed by Agronics.[10]

On January 16, 2003, the RJO ordered Complainant to supplement the administrative record with additional evidentiary documentation. .Complainant's response, Supplement to the Administrative Record, dated January 28, 2003, included the Second Affidavit of Taylor M. Sharpe, dated January 15, 2003 (supra, note 3), and attachments A through L, several of which have been referred to previously. Mr. Sharpe says that the financial data submitted by Agronics were U.S. Corporation Income Tax Returns (Form 1120) for the years 1999, 2000, and 2001 (Second Affidavit at 4; Attachment L). Mr. Sharpe points out that the return for the calendar year 1999 is neither dated nor signed, while the returns for 2000 and 2001 were signed and dated August 22, 2002, by Leland Taylor, Agronics' president. Agronics' corporate return for the calendar year 1999 shows gross receipts of $408,287 and a net loss of $107,417; its corporate return for 2000 shows gross receipts of $160,211 and a net loss of $74,846; and Agronics' corporate return for 2001 shows gross receipts of $292,035 and a net loss of $6,575. Not mentioned by Mr. Sharpe is a Dun & Bradstreet Report, apparently dated December 11, 2002 (Attachment K), which shows payments on several accounts with suppliers were out-of-time , numerous unsatisfied judgments, notices of liens and UCC filings.

On May 7, 2003, the RJO issued a lengthy "Order Denying Complainant's Motion for Default and Assessment of a Civil Penalty and [Denying] Respondent's Motion to Dismiss" ("Order"). The Order recites Complainant's contention that Respondent is in default for failing to file an answer to the complaint issued on January 18, 2000, and Respondent's motion to dismiss, wherein it contended that Complainant cannot prove that Agronics discharged pollutants to waters of the United States. Although it has been inferred (supra note 6) that Respondent's letter, dated February 24, 2000, was intended to refer to the complaint rather than the Administrative Order, the RJO found that the letter was in fact a response to the complaint (Order at 3). Additionally, the RJO stated that he was unaware of Respondent's motion to dismiss until Complainant filed its Status Report on December 16, 2002, and. he found as a fact that the motion was not filed with the Regional Hearing Clerk (Order note 1).

Referring to Complainant's Motion for Default as to Liability and Penalty, wherein Complainant is seeking a finding of liability and a penalty totaling $131,445, the RJO emphasized the discretionary nature of Rule 22.17(a) concerning "Default" in the Consolidated Rules of Practice (40 C.F.R. Part 22), i.e., "a party may be found in default"upon specified

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[10]. Status Report, dated December 16, 2002. The Report refers to the Motion for Dismissal for Lack of Jurisdiction and Stating a Claim Upon Which Liability Can be Based submitted by Agronics which was stamped into Complainant's enforcement office on September 27, 2002. Complainant says that it is under the impression that the Motion may not have been filed with the Regional Hearing Clerk, but asserts that, in any event, it is untimely and does not constitute an answer [to the complaint]. Moreover, referring to language in the cover letter purporting to preserve the issue of Complainant's jurisdiction for review in Federal District Court, Complainant argues that the Motion is irrelevant.

occurrences, including " failure to file a timely answer to the complaint" (Order at 6, 7). The RJO also pointed out that default is a harsh and disfavored sanction reserved only for the most egregious behavior and that a marginal failure to meet time requirements will not support the imposition of a default judgment.[11] . While he acknowledged that there was no dispute regarding Respondent's failure to file a timely answer to the complaint labeled as such (indeed, no such answer had been filed to the date of the RJO's Order), the RJO listed actions taken by Respondent since it accepted service of the complaint on January 26, 2000 (Order at 8, 9). These were the submission of a SWPPP to EPA by a letter, dated February 21, 2000, and the presentation of factual and legal defenses to the complaint by letters, dated February 24, and March 22, 2000. The RJO noted that the February 24 letter appeared to be timely as an answer to the complaint and that the March 22 letter, in addition to challenging the allegation that the facility discharged pollutants to waters of the United States, challenged the proposed penalty and raised an inability to pay issue (Id. 9).

The RJO determined that Respondent's communications with EPA's enforcement representative [Taylor Sharpe] were in a pro se capacity (Order at 8, note 3) and cited Respondent's status as a pro se litigant as one of the reasons for denying Complainant's motion for default (Order at 8-10). .In this regard, Mr. Sharpe states that at various times during the course of these proceedings Respondent was represented by counsel, P.V. Domenici, Jr., Esq. (Second Affidavit at 2). This assertion is supported by the fact that Agronics' letters, dated February 24 and March 22, 2000, were copied to Mr. Domenici. Moreover, the arguments raised, i.e., preemption, due process, jurisdiction, "waters of the United States", appear to be the work of an attorney or, at the very least, an attorney's advice. Although he pointed out that Respondent had not filed its letters of February 24 and March 22, 2000, and its motion to dismiss, dated September 23, 2002, with the Regional Hearing Clerk as required by Rule 22.5 of the Consolidated Rules of Practice, the RJO emphasized that Complainant had notice thereof because these documents were filed with its enforcement officer (Order at 11, note 5). Additionally, the RJO noted that Complainant had not alleged nor would the record support a finding that Complainant was prejudiced by Respondent's failure to comply with the cited rule. This was deemed to be especially true, because Complainant had elected to engage in settlement negotiations extending over a period of years rather than to litigate the matter. For all of these reasons, the RJO concluded that it was inappropriate to issue a finding of default (Id).

Next, the RJO addressed Complainant's arguments advanced in the Status Report (supra note 10) that Respondent's motion to dismiss was not an answer [to the complaint] and was irrelevant. While he agreed that the motion to dismiss, which he found was a response to Complainant's motion for default, was not an answer [to the complaint], the RJO rejected the argument that the motion to dismiss was irrelevant, pointing out that in order to prevail on liability Complainant bore the burden of proving by preponderant evidence that Respondent had

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[11]. For these propositions, he cites Lacy v. Sitel Corp., 227 F.3d 290 (5th Cir.2001) and Ackra Direct Marketing v Fingerhut Corp., 86 F.3d 852, 856 (8th Cir.1996).

discharged a pollutant or pollutants from a point source to waters of the United States without authorization (Order at 12, 13).

The RJO alluded to the fact that the Consolidated Rules of Practice did not contain a provision comparable to Rule 12(b) of Fed..R.Civ. P., which provides, inter alia, that when matters outside the pleadings are considered in reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the motion be treated as one for summary judgment and disposed of as required by Rule 56 (Order at 14; note 7). Although it does not appear that a formal order was entered, the RJO asserts that on December 16, 2002, he accepted Respondent's motion to dismiss, dated September 23, 2002, which contained Respondent's (Mr. Taylor's) sworn statement (Id.). This statement is discussed infra. The RJO elected to consider Agronics' motion to dismiss under both the accelerated decision and motion to dismiss standards of Consolidated Rule 22.20(a). The former requires a finding that no genuine issue of material fact exists and that the prevailing party is entitled to judgment as a matter of law. The motion to dismiss standard provides that, upon motion of the respondent, the presiding officer may at any time dismiss a proceeding without further hearing or upon such limited evidence as he may require, on the basis of failure to establish a prima facie case or other grounds which show no right to relief upon the part of the Complainant.

. The caption of Respondent's motion to dismiss refers to NPDES Nos. NMRO5A678, NMU000328 and CWA Docket No.-6-1631-99. The motion itself states in pertinent part: "Respondent, Agronics, Inc., hereby files this motion in [which] respondent is held liable for presumed contamination of Waters of the United States. The complainant has failed to state a case of which this has potentially occurred and has repeatedly ignored the terrain of the area which precludes any such contamination. Statements made in the Section I-9 state(s) that [at all relevant times, the facility was a "point source" of a "discharge" of " pollutants"] with its storm water discharges to the receiving waters of an unclassified tributary, thence to the Rio Puerco (east), thence to the Rio Grande in Segment 2105 of the Rio Grande Basin, which are " waters of the United States" within the meaning Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2."[12]

The motion asserts that the foregoing is not true as the waters are stopped by a large irrigation water control dam directly in the western portion of this area which in effect acts as a pollution settling basin, therefore the waters never become "Waters of the Unites States" as defined. This dam is so large as to ever [even] prevent water discharge to the tributaries (Id.). The motion argues that without a specific link of the waters which may be coursing through the property to the waters of the United States at issue, Complainant has no jurisdictional authority to bring this complaint. Further, Complainant [must] prove that the waters have a potential to enter into waters of the United States, which is allegedly impossible at this site due to natural and man-made boundaries. According to Respondent, statements regarding [made during] earlier

[12]. The reference to Section I-9 is unclear as neither the complaint nor the Administrative Order contains such a section.

site visits and a lack of complete analysis have led to erroneous conclusion[s]. As noted supra, these statements were sworn to by Mr. Taylor on September 24, 2002.

Using Fed. R Civ. P. Rule 12(b)(6) as a guide in addressing Agronics' motion to dismiss, the RJO pointed out that in considering such a motion the material allegations of the complaint must be accepted as true and such allegations construed in the light most favorable to the non-movant (Order at 16). He also noted that motions to dismiss are viewed with disfavor and, because of liberal rules regarding the amendment of pleadings, the movant must show beyond doubt that the non-movant can prove no facts entitling it to relief. Here, he alluded to the sworn statement of Agronics' president, Leland Taylor, that natural and man-made boundaries, i.e., a large irrigation control dam, prevent storm water discharges into an unclassified tributary (a large arroyo) at its Cuba, New Mexico facility from entering waters of the United States, that is, the Rio Puerco and the Rio Grande (Order at 17). Therefore, Respondent argues that Complainant lacks jurisdiction over the storm water discharges at issue and that the complaint should be dismissed. The RJO noted, however, that the complaint alleged that Respondent's facility discharged pollutants to: the receiving waters of an unclassified tributary, thence to the Rio Puerco (east), thence to the Rio Grande in segment 2105 of the Rio Grande Basin, which are waters of the United States. He determined that the Complainant had pled a prima facie case of jurisdiction and that Respondent had failed to prove beyond doubt that it was impossible for storm water discharges from its facility to reach waters of the United States (Order at 18-20).

In reaching the conclusion that Respondent had failed to prove that it was impossible for storm water discharges from its facility to reach waters of the United States, the RJO relied on findings of the Compliance Inspection Report conducted by the New Mexico Environment Department on November 24, 1998, but apparently not distributed until January 22, 1999 (Second Affidavit of Taylor M. Sharpe, Attachment C). The Report, from which the language recited above from the complaint was obtained, states that it is based upon review of files maintained by both the facility and NMED, on-site observation by NMED personnel and verbal information provided by the facility's representatives, Mr. Tom Taylor, President and Mr. Ernest Yazie, Foreman. The Report also states in pertinent part: As stated above, an unnamed arroyo (which is a water of the United States) flows through this site.[13] Adjacent to the maintenance

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[13]. Whether this unnamed or unclassified arroyo is a water of the United States is questionable indeed. See, e.g., United States v. Needham, 354 F.3d 340, 2003 U.S.App. LEXIS 25318 (5TH Cir.2003), a decision under the Oil Pollution Act, 33 U.S.C. §§ 2701-2720, which defines "navigable waters" as waters of the United States, including the territorial sea (33 U.S.C.§ 2701(21). The court said that this definition was co-extensive with that under the Clean Water Act and, relying on Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers ("SWANCC"), 531 U.S. 159, 121 S.Ct 675 (2001), and Rice v. Harken, 250 F.3d 264 (5th Cir. 2001), held that in order to be subject to regulation a body of water must actually be navigable or adjacent to an open body of navigable water. See also Shoreacres v. Waterworth, _____LEXIS_____ (D.C. So..Dist., Texas, May 4, 2004) (connection to wetlands caused

(continued...)

shop area, this arroyo is impounded and some of the site drainage is directed into this stock tank Discharges from this impoundment, and runoff from the majority of the site drains into the arroyo below the impounding structure. The arroyo then flows approximately ½ mile to the west where it is again impounded. This downstream impoundment, which is also used for stock watering and is accessible to wild life, is equipped with a spillway structure.

Comparing the quoted language from the Inspection Report with Agronics' sworn statement that it was impossible for storm waters from its facility to discharge to waters of the United States, the RJO held that Respondent had failed to demonstrate beyond doubt the existence of substantially uncontroverted material facts showing no right to relief on the part of Complainant (Order at 21, 22). For this reason, he denied Respondent's motion to dismiss. Reviewing the foregoing evidence, he held that a reasonable fact finder could find for either Respondent or Complainant and accordingly, ruled that the conditions for an accelerated decision were not present (Id.24, 25) Complainant's motion for default was therefore denied.

Pointing out that under Rule 12(a)(4)(A) Fed. R. Civ. P, the filing of a motion to dismiss for failure to state a claim upon which relief can be granted extends the time for filing an answer, the RJO ordered Respondent to file an answer and request for hearing complying with Consolidated Rule 22.15 within ten days of the receipt of the instant order (Order at 26, 27).

In an answer and request for hearing filed under date of May20, 2003, Respondent essentially reiterated its motion to dismiss upon the ground EPA lacked jurisdiction and contested the amount of the penalty as extraordinarily high.

On September 17, 2003, the undersigned was designated to preside in the subject proceeding and on October 21, 2003, the ALJ issued an order directing the parties to exchange pre-hearing information in accordance with Rule 22.19(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.19(b), on or before November 14 , 2003. Among other things, Complainant was directed to state the basis for the conclusion that Respondent can pay the proposed or, indeed, any penalty, in view of the fact its operation had been shut down by the State of New Mexico, Respondent did not own the property upon which the facility was located, [14] its corporate tax

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[13](...continued)
solely by overland sheet flow, that is, rainfall that flows over land, but not in a discernable channel, is not subject to CWA jurisdiction). Cases such as Quivira Mining Company and Homesteak Mining Company v. U.S. EPA, 765 F.2d 126 (10th Cir.1985), cited by Complainant, were based on the premise that Congress, in the CWA, had intended to extend the Act's coverage to the maximum extent possible under the Commerce Clause. According to the court in Needham, this premise was rejected by the Supreme Court in SWANCC, and also by the Fifth Circuit in Rice.

[14]. While a pleading or brief filed in a proceeding which has been dismissed can have no
(continued...)

returns for the years 1999-2001 showed substantial operating losses and the D & B in the record showed many outstanding and unpaid obligations. On November 10, 2003, Complainant moved to withdraw the Complaint on the grounds that the information and financial documentation reviewed by Complainant to date demonstrated that Petitioner lacked the ability to pay a civil penalty beyond a de minimis amount. On November 12, 2003, the ALJ granted Complainant's motion, and accordingly, dismissed the complaint.

By an undated application, filed in the RHC's Office on November 28, 2003, Petitioner (Agronics or Respondent) applied for fees and costs in the amount of $3,016.17 pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504. The Application alleged, inter alia, that Agronics was the prevailing party, and that I [Leland T. Taylor] am the petitioner, appearing pro se in this case. Over $2,100 of the sum claimed in the Application represents Mr. Taylor's time and expenses allegedly incurred in attending the "Show Cause" meeting (supra note 2) with Mr.

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[14](...continued)
effect, Agronics, under date of May 12, 2004, served a document entitled "Respondent's Answer to Order Submission of an Answer", which was apparently intended as an [additional] response to the RJO's Order, dated May 7, 2003., directing Agronics to file an answer. Among other things, this "Answer" alleges that the Complainant has not carried its burden, recognized by the RJO, of proving jurisdiction, i.e., that the discharges are to waters of the United States. Additionally, the Answer alleges that there are no resources to pay the penalties sought, compliance with any requirements is barred by the State and continued prosecution of this case merely consumes resources which will not be recovered even to a de minimis amount. Of interest, however, are exhibits to the Answer which indicate that the property upon which Agronics' facility is or was located may be owned by the U.S. Government and administered by the Bureau of Land Management. Exhibit 3 is a copy of an Order, issued by the Bankruptcy Court for the District of New Mexico in a proceeding entitled "Agronics Incorporated, Debtor, No. 11-94-12819 MA; Agronics Inc. and Leland T. Taylor, Plaintiffs v. U.S. Department of the Interior, Bureau of Land Management, Defendant, Adv. No. 98-1105 M". The Order, apparently issued on March 31, 2003, or shortly thereafter, resulted from a hearing on Plaintiffs' motion for an order requiring Defendant to show cause why it should not be held in contempt. The court found that the delay in recognizing the three mining claims that were litigated in the captioned bankruptcy cases was inexcusably long, and that the BLM was in contempt of court until the claims were reinstated on March 12, 2003. The court ordered that the maintenance fee on the three mining claims waived for the period from 1995 through August 31, 2003. Exhibit 4 to the Answer is a copy of a "Complaint for Declaratory Judgment" filed in the United States District Court for the District of New Mexico on April 30, 2004, in a proceeding entitled "Leland B. Taylor, Mineral Claimant v. United States Department of Interior, Bureau of Land Management, et al.," No CIV-04-0473 MCA RLP. Relief requested includes an order directing the Secretary to rescind the withdrawal of notices of locatability for the mineral humate under the Mining Act of 1872 (30 U.S.C. §§ 22-42). The withdrawal of the notices, which is alleged to be illegal, apparently meant that the BLM could sell the humate as a common material rather than it being "locatable"as a mineral and subject to being located and mined by private individuals.

Sharpe on September 18, 1999. Other substantial sums claimed were for Mr. Taylor's time in conference calls, drafting motions and drafting the answer and request for hearing.

Complainant answered the Application under date of December 22, 2003, asserting that the Application should be denied, because, inter alia, Petitioner had not shown it was a prevailing party within the meaning of the EAJA, that Complainant's position in bringing the action was substantially justified and that, in any event, the expenses claimed were not allowable.

II. FINDINGS OF FACT

1. Petitioner, Agronics, Inc., is a corporation incorporated in the State of New Mexico.

2. From at least January 1, 1997, until or through September, 2001, Petitioner operated a soil conditioner manufacturing/formulating operation, sometimes referred to as the "Clod Buster Mine", located at Old Highway 44, 8.5 miles southeast of Cuba, Sandoval County, New Mexico.

3. The "facility" referred to in finding 2 is alleged to be a point source of pollutants with its storm water to the receiving waters of an unclassified tributary (arroyo), thence to the Rio Puerco (east), thence to the Rio Grande in Segment 2105 of the Rio Grande, which are "waters of the United States" within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2.

4. The described activity is "industrial activity" within the meaning of Section 402(p) of the Act and 40 C.F.R. §§ 122.1 and 122.36(b)(14).

5. Pursuant to Section 301(a) of the Act any discharge of a pollutant [to waters of the United States] except in accordance with the terms of a permit (issued in this case under Section 402) is unlawful.

6. At the time of an inspection of Petitioner's facility by the New Mexico Department of Environment on November 24, 1998, Petitioner had not obtained an NPDES storm water permit and had not prepared and implemented a Storm Water Pollution Prevention Plan (SWPPP).

7. On March 30, 1999, EPA issued an Administrative Order finding that Agronics' facility was a point source subject to a discharge of pollutants with storm water discharges to an unclassified tributary (arroyo), thence to the Rio Puerco (east), thence to the Rio Grande in Segment 2105 of the Rio Grande Basin, which are waters of the United States.

8. The Administrative Order directed that within 30 days of the effective date of the Order, which is the date received by Petitioner, Petitioner make a complete and correct

application for coverage under the permit described above, that is, NPDES Storm Water Multi-Sector General Permit for Industrial Activities (60 Fed. Reg. 5084, September 29, 1995), and submit to EPA a copy of the Notice of Intent or permit application, and a copy of the returned confirmation of coverage, showing the NPDES permit number assigned.

9. Petitioner had not complied with the AO by December 30, 1999, and on January 18, 2000, Complainant issued the complaint which is the genesis of this proceeding, seeking a penalty of up to $137,000, later reduced to $131,445.

10.Although the Petitioner did not file an answer to the complaint denominated as such, the RJO found that letters from Petitioner, dated February 24 and March 22, 2000, which raised jurisdictional, due process and ability to pay arguments were intended as responses to the complaint.

11.Petitioner's president, Mr. Leland Taylor, also asserted that it could not afford a penalty in several telephone conversations with Taylor Sharpe, EPA's enforcement officer, and in a letter, dated May 14, 2002, wherein he asserted that EPA's proposed settlement of $45,000 was above his company's ability to pay.

12. Substantiation that Petitioner lacked the ability to pay a penalty is provided by the fact that the Petitioner had been shut down since September of 2001 and was no longer operational, that Petitioner did not own the land upon which the facility was located.[15], by the fact that Petitioner's corporate tax returns for the years 1999, 2000 and 2001 showed substantial operating losses and by the Dun & Bradstreet Report, dated December 11, 2002, showed out-of-time payments on several supplier accounts, numerous unpaid judgments, liens and UCC filings. The corporate tax returns were received by Complainant on November 14, 2002, and the D &B was presumably available to Complainant shortly after its date.

13. By an Order, dated May 7, 2003, the RJO denied Complainant's motion for default upon the ground that Respondent had not filed an answer to the complaint and Respondent's motion to dismiss for failure to state a claim upon which relief could be granted for the reason that whether Respondent's discharges were to waters of the United States involved a dispute as to a material fact. Respondent was ordered to file an answer to the complaint within ten days of the receipt of the RJO's order.

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[15]. See Agronics, Inc., IBLA 96-88, Interior Board of Land Appeals, 143 IBLA 301; 1998 IBLA LEXIS 239 (1998), which indicates that Agronics filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Code on October 25, 1994, and that certain of its mining claims were held to be forfeited for failure to timely pay maintenance fees. It is not clear whether any of the forfeited claims involved the property at issue here.

14. Respondent's answer to the complaint under date of May 20, 2003, reiterated its contention that EPA lacked jurisdiction over the discharges or potential discharges at issue and asserted that the penalty appears to be extraordinarily high.

15.By an Order, dated October 21, 2003, the ALJ directed the parties to exchange specified prehearing information on or before November 14, 2003. Information Complainant was directed to provide included a statement of the basis for the conclusion that Respondent can pay the proposed or, indeed any, penalty in view of the fact that Respondent's operation had been shut down by the State of New Mexico, Respondent does not own the property upon which its facility was or is located., corporate tax returns for the years 1999, 2000 and 2001 show net operating losses, and the D & B Report in the record showed many outstanding and unpaid obligations.

16. By a motion, served on November 10, 2003, Complainant moved to withdraw the complaint upon the ground that Respondent lacked the ability to pay a penalty beyond a de minimis amount. This motion was granted by an order, dated November 12, 2003, which dismissed the complaint.

17. By an undated Application, filed in the RHC's Office on November 28, 2003, Respondent applied for fees and costs totaling $3,016.17 under the Equal Access to Justice Act, 5 U.S.C. § 504. The Application alleged, inter alia, that Agronics was the prevailing party as evidenced by Complainant's motion to withdraw the complaint [and the grant thereof]. The Application asserted that I [Leland B. Taylor] am the petitioner and pro se in this case.

18. Explaining sums claimed, the Application asserted that Mr. Taylor's time spent in meetings or conference calls would be billed at $125 an hour, clerical costs would be charged at $20 an hour and accounting costs would be charged at $25 an hour. Itemized time and costs claimed concerning Mr. Taylor's meeting with Mr. Sharpe in Dallas on September 28, 1999, were 12 hours of Mr. Taylor's time at $125 per hour totaling $1,500, $343 for air fare, hotel costs of $85, car rental of $78.65, and meals at $126 totaling $2,132.65. Other costs claimed were: $250 for Mr. Taylor's time in eight conference calls estimated at 20 minutes each and supported by a portion of Mr. Sharpe's telephone log; $480 for 8 hours of clerical time spent in drafting and filing motion [to dismiss], 8 hours in drafting and filing motion for default and 8 hours drafting and filing [answer] and request for hearing for a total of 24 hours at $20 an hour; $137.50 representing 5.5 hours at $25 an hour for research of financial documents requested by Lauretta Scott [EPA financial analyst]; and $16.02 for the cost of certified mail.

19. Complainant filed an Answer to Petitioner's EAJA Application under date of December 22, 2003, asserting that the Application should be denied because: 1) the receiving waters at issue are "waters of the United States" within the meaning of Section

502 of the Act, 33 U.S.C. § 1362 and 40 C.F.R. § 122.2; [16] 2) the Applicant has failed to show that it is a "prevailing party' within the meaning of the EAJA;[17] 3) Complainant's institution of the action and its position therein were substantially justified; and 4) the fees and costs claimed are not allowable.

III. CONCLUSIONS

1. Agronics, Inc. was the prevailing party within the meaning of the Equal Access to Justice Act (5.U.S.C.§ 504) in this administrative proceeding, Docket No. CWA-06-99-1631.

2. Although Complainant was substantially justified in initiating the proceeding, it was not justified in continuing to pursue the action after mid-December 2002, when it received information establishing that the Petitioner could not pay a penalty. Hoosier Spline Broach Corporation, 7 E.A.D 665 (EAB 1998), distinguished..

3. Although the Equal Access to Justice Act (5 U.S.C. § 504(a)(4)(A)) does not limit fees incurred in an adjudication to attorneys, but allows agents' fees as well, fees claimed must have been incurred in a representative capacity and do not include employees of the petitioner. Moreover, the majority of the fees and expenses claimed by Petitioner were incurred prior to the initiation of this action and thus, are not allowable in any event.

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[16]. Answer at 5. Complainant acknowledges, however, that ultimate resolution of Petitioner's disagreement with that characterization would lie with a trier of fact (Id.).

[17]. Answer at 6-8. Section 504(a)(1) of the EAJA provides:

> An agency that conducts an adversary adjudication shall award, to a *prevailing party* other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be 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.

Section (a)(4(A)) provides in pertinent part: (A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees....

4 Because Petitioner has not shown that it is entitled to any allowance beyond a de minimis amount ($16.02 for the cost of certified mail), it is recommended that its application under the EAJA be denied..

IV DISCUSSION

The initial question is whether Petitioner is a "prevailing party" within the meaning of the Act, 5 U.S.C. § 504, and the regulation, 40 C.F.R. Part 17.[18]"Prevailing party" is not defined in the Act or regulation. [19] However, in Texas Teachers Association, et al. v. Garland Independent School District, 489 U.S. 782, 109 S. Ct. 1486 (1989), involving a claim for attorneys' fees under the Civil Rights Act (42 U.S.C. § 1988), cited by Petitioner, the court held that "[i]f the plaintiff has succeeded on any significant issue in litigation, which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold for an award of some kind[i.e., is a prevailing party]." The court quoted from Hewitt v. Helms, 482 U.S. 755 (1987) that " [r]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail" and went on to hold that, as a minimum, to be considered a prevailing party within the meaning of § 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. See also Buckhannon Board and Care Home, Inc. et al v. West Virginia Department of Health and Human Resources, et al. 532 U.S. 598, 121 S.Ct.1835 (2001), fee-shifting provisions of Fair Housing Act Amendments and Americans with Disabilities Act require party to secure either a judgment on the merits or court-ordered consent decree in order to qualify as "prevailing party."In a concurring opinion, Justice Scalia pointed out that "prevailing party" is not a new legal term invented for use in 20th-- century fee-shifting statutes, but has long been recognized as the [standard] by which a party may recover a judgment for costs and that costs are awarded as an incident of judgment.

Applying the foregoing principles here, there can be little doubt but that Petitioner was the prevailing party in an adversary adjudication and thus, has crossed the first hurdle to an

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[18]. Proceedings for the assessment of Class II administrative penalties under Clean Water Act § 309(g) for violations of the CWA are not included in the list of proceedings covered by the EAJA listed in 40 C.F.R. § 17.3. However, such proceedings are clearly made subject to the Administrative Procedure Act by CWA Section 309(g)(2)(B) and are thus "adversary adjudications" within the meaning of the EAJA.

[19]. In Hoosier Spline Broach Corporation, supra, the EAB noted that the question of whether Hoosier Spine was a prevailing party in the context of a settlement agreement wherein it agreed to pay a penalty of $3,000, as contrasted with the over $825,000 originally sought by the Agency, was a complex one and by no means free from dispute. Because the Agency had not appealed the ALJ's decision that Hoosier Spline was a prevailing party and the EAB determined that the Agency's position in the underlying litigation was substantially justified, the EAB found it unnecessary to address the prevailing party question.

award of fees and costs under § 504. While it might be argued that Agronics was not the prevailing party because the jurisdictional issue of whether its discharges were to waters of the United States was never decided, this is the "central issue" test rejected by the Supreme Court in Texas State Teachers Association, supra. The simple fact is that Petitioner prevailed on an issue, "ability to pay", a factor which CWA § 309(g)(3) specifically requires the Administrator to consider in determining a penalty and on which Complainant, as the proponent of an order under the Administrative Procedure Act, has the burden of production as well as the burden of persuasion. In the language of Consolidated Rule 22.24, "Complainant has the burden of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." In securing dismissal of the complaint upon the ground that it lacked the resources to pay a penalty beyond a de minimis amount, Agronics secured resolution of a dispute which changed the legal relationship of the parties because it was no longer Respondent in an administrative proceeding in which Complainant sought a substantial penalty. Moreover, it is clear that ability to pay was not an after-thought, but was an issue raised "early on", that is in Petitioner's letter, dated March 22, 2000, in several telephone conversations between Mr. Taylor of Agronics and Mr. Sharpe of EPA and in Agronics' letter, dated May 14, 2002.

The next question is whether Complainant's position in bringing the action was substantially justified. Here we have a facility which discharges into an unclassified arroyo (point source), which allegedly discharges into or has the potential to discharge into waters of the United States. Such discharges without an NPDES permit are a violation of CWA § 301(a). Although as indicated supra note 13, EPA's jurisdiction is open to question, this issue is the stuff of which litigation is made and the Agency was justified in seeking to remedy an apparent violation of the law. On a different footing is ability to pay, the issue upon which Agronics ultimately prevailed. As noted supra, Agronics contended that it lacked the ability to pay the penalty assessed no later than its letter to Mr. Sharpe, dated March 22, 2000, and continued to maintain it lacked the ability to pay a penalty in various subsequent conversations and communications with Mr. Sharpe. Although in accordance with EPA policy, Complainant may have been justified in assuming that Agronics could pay the penalty assessed at the time the complaint was issued, this assumption was no longer justified once the Agency received information unequivocally demonstrating to the contrary. This was no later than the receipt on November 13, 2002, of Agronics' corporation tax returns for the years 1999, 2000, and 2001, and, at a date not clear from the record, of the Dun & Bradstreet Report, dated December 11, 2002. It is therefore concluded that because Agronics had demonstrated its inability to pay, Complainant was no longer substantially justified in pursuing this action after mid-December 2002. In Hoosier Spline Broach Corporation, supra, the EAB reversed an ALJ's decision that the Agency's continuation of a RCRA action was no longer justified after the State of Indiana determined that certain waste produced by Hoosier Spline was not hazardous, upon the ground that there was no evidence to support the ALJ's decision, that is, that the waste determined to be non-hazardous by the State was identical to that involved in EPA's action. Here, ample evidence

supports the conclusion that Agronics had demonstrated that it lacked the ability to pay a penalty after mid- December 2002, if not before, and Hoosier Spline is readily distinguishable.[20]

Having determined that Petitioner was a prevailing party within the meaning of the EAJA and that Complainant's continuation of the action after mid-December 2002 was no longer substantially justified, it does not follow that Petitioner may be awarded the fees and costs claimed. This is because the great majority of the fees and expenses claimed were incurred prior to the issuance of the complaint and thus were not incurred in an "adversary adjudication"within the meaning of the EAJA.[21] See, e.g., Lane v. U.S. Department of Agriculture, 294 F. 3d 1001 (8th Cir. 2002) (although appeal of denial of delinquent loan servicing applications was an adversarial adjudication within the meaning of the Administrative Procedure Act, the Court upheld the determination that the adjudication did not commence until the applications were denied and that fees and expenses incurred prior to the denial were not allowable under the EAJA). It is also clear that only fees and expenses incurred after Complainant's continuation of the underlying action was no longer substantially justified. (mid-December 2002) are allowable. See American Wrecking Corporation v. Secretary of Labor, 364 F.3d 321 (D.C. Cir. 2004). Moreover, although the EAJA (5 U.S.C. § 504(b)(1)(A)) allows an award for reasonable agent's fees, the fees must be incurred in a representative capacity and do not include employees of the claimant.[22] Lane, supra. See also Fanning, Phillips and Molnar v West, 160 F.3d 717 (Fed. Cir, 1998) (partnership could not recover under EAJA time spent by its employees and principal in a successful contract claim against Department of Veterans Affairs, because "agents"within

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[20]. Hoosier Spline, was affirmed on appeal, sub. nom, Hoosier Spline Broach Corp v. U.S. EPA, 112 F.Supp 2d 763 (U.S. Dist Ct So. Dist Ind 1999).

[21]. 5 U.S.C. § 504(b)(1)(C). In its Answer to Petitioner's EAJA application, Complainant asserted that the Administrative [Compliance] Order was not an adjudication of rights or liabilities, did not impose any sanctions for the underlying violation or for violation of the Compliance Order, was not an essential component for final disposition of the complaint, and was not a condition precedent to issuance of the complaint (Id.13). The Clean Water Act, like the Clean Air Act, makes no provision for review or appeal of AOs, the only apparent condition to an AO becoming effective is an opportunity to confer with the Administrator (33 U.S.C. § 1319(a)(4)). In this regard, see TVA v. Whitman, 336 F.3d 1236 (11th Cir. 2003) (court lacked jurisdiction to review an administrative compliance order under Clean Air Act, because it was not final and because of due process concerns was without legal effect until EPA proved a violation in district court. The court pointed out that many of the provisions of the Clean Water Act [regarding compliance orders] are identical to those in the CAA (footnote 32).

[22]. It is not clear whether the 5.5 hours claimed for accountants costs in researching financial documents were incurred by employees of Petitioner. These costs, if incurred as part of fees and expenses of an agent representing Petitioner and not by employees of Petitioner , may well be recoverable. Because there has been no showing that an agent appeared in a representative capacity on Petitioner's behalf, no useful purpose would be served by further inquiry into the matter as permitted by the regulation, 40 C.F.R. § 17.25(b) and (c).

meaning of EAJA did not include mere employees or principals, but were limited to specialized non-attorney practitioners authorized to represent litigants in certain proceedings); and Demarest v. Manspeaker, 948 F.2d 655 (10th Cir.1991) and cases cited (attorney fees are not available to pro se litigants under the EAJA). It should be noted that over $630 of expenses claimed are for air fare, hotel, car rental and meals incurred in connection with Mr. Taylor's attendance at the Show Cause Meeting at Region 6 Headquarters on September 28, 1999. Although Mr. Taylor's attendance at this meeting was required by the AO, the AO is not part of the underlying adjudication (note 21 supra).In addition to the fact that these expenses were incurred prior to the initiation of the instant action and thus are not recoverable for that reason, mileage and toll fees have been held not to be reimbursable expenses under the EAJA. American Wrecking Corporation, supra.

The result of the foregoing analysis is that Petitioner has shown that, at most, it is entitled to reimbursement for $16.02 in costs of certified mail and even this expense has not been documented with copies of the receipts or a statement of the mailings for which the expense was incurred. Because this is a de minimis amount, it will be my recommendation that Agronics' EAJA application be denied. As no award is being made, it is unnecessary to consider whether special circumstances make an award unjust.

V. ORDER

It is recommended that the EAJA application filed by Agronics be denied.[23]

Dated this 3rd day of June, 2004.

_____
Spencer T. Nissen
Administrative Law Judge

[23]. Although, in accordance with 40 C.F.R. § 17.26, this is a recommended rather than an initial decision, § 17.27 provides that Agency review of the decision will be in accordance with the type of substantive proceeding involved. Therefore, this decision will become the final decision of the EAB and of the Agency in accordance with Rule 22.27(c) (40 C.F.R. Part 22), unless it is appealed to the EAB in accordance with Rule 22.30 or unless the EAB elects *sua sponte* to review the same as therein provided.

CERTIFICATE OF SERVICE

I certify that the foregoing **Recommended Decision on Application for Award of Fees and Expenses pursuant to the Equal Access to Justice Act**, dated June 3, 2004, was sent this day in the following to the addressees listed below:

_____
Nelida Torres
Legal Staff Assistant

Original and one copy Sent by Pouch Mail to:

Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

Sent by Pouch Mail to:

Yerusha Beaver, Esq.
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Sent by Certified Mail Return Receipt and Regular Mail to:

Leland T. Taylor
Agronics, Inc.
7100-E 2nd Street, N.W. #C
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