IN RE HOOSIER SPLINE BROACH CORPORATION

EAJA Appeal No. 96-2

FINAL DECISION

Decided July 2, 1998

Syllabus

This case concerns an application for attorneys' fees filed under the Equal Access to Justice Act ("the EAJA"), 5 U.S.C. § 504, by Hoosier Spline Broach Corporation ("Hoosier"), a manufacturer of steel broaches. The application was granted, in part, in a proceeding before a presiding officer, and U.S. EPA Region V ("the Region") appeals that decision to the Environmental Appeals Board. The Board reverses the decision of the presiding officer, ruling that the Region's position in the underlying enforcement proceeding against Hoosier was substantially justified. Therefore, Hoosier is not entitled to attorneys' fees.

Between 1990 and 1992 Hoosier discarded its "grinding sludge" waste in a pile at its Kokomo, Indiana plant. In October 1991, Hoosier applied to the Indiana Department of Environmental Management ("IDEM") for a "special waste permit" to enable it to dispose of its grinding sludge as nonhazardous waste. As part of its application, Hoosier submitted test results from four samples taken from the waste pile. The test results showed that two of the four waste pile samples contained chromium levels in excess of the 5.0 milligrams per liter regulatory threshold. In January 1992, IDEM denied the special waste application, concluding from its independent statistical analysis of the four waste pile samples that the waste was hazardous for chromium.

Based on IDEM's January 1992 determination and a February 1992 inspection of the Kokomo facility, the Region filed a four-count complaint against Hoosier in June 1993 under the Resource Conservation and Recovery Act ("RCRA"), which alleged that: (1) Hoosier had failed to make a timely hazardous waste determination, to notify EPA of regulated hazardous waste activities, or to obtain an EPA identification number; (2) Hoosier had failed to apply for or obtain interim status or a RCRA permit; (3) Hoosier had failed to comply with specified operating standards applicable to persons who treat, store or dispose of hazardous waste; and (4) Hoosier had failed to comply with standards pertaining to waste pile management. The complaint sought injunctive relief in the form of a compliance order requiring Hoosier to make a hazardous waste determination, cease all hazardous waste activities for which neither a permit nor interim status had been obtained, comply with standards applicable to owners of hazardous waste piles, and submit a closure plan for the waste pile. The Region proposed a civil penalty of $825,509 for the alleged violations.

Immediately after the February 1992 inspection was completed, Hoosier dismantled the waste pile by shipping its contents offsite for disposal as a hazardous waste. For approximately the next two and a half years, Hoosier continued to dispose of its grinding sludge waste as hazardous.

In September 1994, based on a new application from Hoosier and new sampling results (not specified in the record of this proceeding), IDEM issued a special waste permit to Hoosier which allowed Hoosier to dispose of its grinding sludge waste as nonhazardous.

After settlement negotiations that had been ongoing between Hoosier and the Region apparently reached an impasse, the case was scheduled for hearing on July 26, 1995. Approximately two weeks before the hearing the case settled, based on an amended complaint in which the Region dismissed three of the hazardous waste counts, modified the fourth to allege only that Hoosier had failed to make a hazardous waste determination, and limited the compliance order to require only that Hoosier submit its most current hazardous waste determination. As part of the settlement agreement, Hoosier agreed to pay a civil penalty of $3,000.

In August 1995, Hoosier filed an application for attorneys' fees under the EAJA, a federal fee-shifting statute which enables parties that prevail against federal agencies in certain contested administrative proceedings and that meet additional requirements to obtain attorneys' fees incurred in the action unless the agency can show that its position in the action was "substantially justified." In November 1996 the presiding officer assigned to the EAJA proceedings issued a "recommended decision" in which he found that although the Region was substantially justified in filing the action and pursuing it initially, it was not substantially justified in continuing to pursue the action after the special waste permit was issued by IDEM in September 1994. Consequently, the presiding officer made a "partial award" of EAJA fees in the amount of $16,891.35, covering attorneys fees incurred by Hoosier in the action after September 1994.

The Region appealed from the recommended decision, raising the sole issue of whether its position in the underlying action was "substantially justified" after September 1994.

Held: Even if an agency's position was substantially justified when the underlying action began, a partial award of EAJA fees may nonetheless be proper if based on a finding that the agency's position subsequently lost substantial justification. However, in this case, the partial award of fees to Hoosier was error because the Region's position was substantially justified throughout the course of the underlying action, including during the period after September 1994. Thus, the claim for EAJA fees is denied. In particular:

Hazardous waste claims:

1. The Region was not required to settle or dismiss its hazardous waste claims after the special waste permit was issued in September 1994, because the Region's claims concerned waste generated between 1990 and 1992 that Hoosier placed in the waste pile. The special waste permit, which established that waste generated in and after September 1994 could be disposed of as nonhazardous, did not negate the evidence of record indicating that the waste *in the waste pile* was hazardous. Thus, the Region had a reasonable basis in fact and in law for both filing and continuing to prosecute its complaint.

2. When the agency's position in an action 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 (had the case gone to hearing), outweigh the evidence upon which the agency's position is based, provides no basis for an award of EAJA fees. Here, although there were facts of record that arguably supported Hoosier's view that the waste in the waste pile was not hazardous, the Region was "entitled to choose between permissible, though conflicting, views of the available evidence."

Settlement Terms:

1. In EAJA cases, a trier of fact may not presume that the agency lacks substantial justification merely because it settles a case on unfavorable terms. Further, in EAJA cases that settle before the merits of the underlying action have been adjudicated, the agency's reasons for settlement must be analyzed and may play a critical role in the substantial justification determination. Based on these principles:

    a. The presiding officer's conclusions that (1) the Region was "holding out" for more favorable settlement terms with respect to the counts ultimately dis-

missed, and (2) that in the August-September 1994 time frame Hoosier was "proposing or would have accepted" settlement on the terms ultimately agreed to, are both erroneous, as the record contains no evidence supporting either conclusion; and

b. the Region's reasons for the timing and terms of the settlement— (1) that an adverse administrative enforcement decision indicated that it would not be able to recover much of the approximately $200,000 economic benefit component of its proposed penalty, and (2) that a new Agency policy adopted one month before settlement was reached gave the Agency discretion to reduce or eliminate civil penalties against qualifying small businesses— provided a plausible explanation for those events. In any event, the timing and terms of the settlement did not *diminish* the Region's substantial justification for continuing to pursue its hazardous waste claims after the special waste permit was issued.

2. The presiding officer's conclusion that the Region unreasonably delayed settlement was erroneous because the course of events in the underlying action does not demonstrate either that the Region was solely responsible for any "delay" in the proceedings, or that the "delay," if any, warranted an award of fees. Instead, the evidence indicates that there was a mutual abatement of case activity while the parties awaited assignment of a hearing date. Awarding EAJA fees based solely on such a lull in case activity is improper.

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

Opinion of the Board by Judge Stein:

U.S. EPA Region V ("the Region") has appealed a "supplemental" recommended decision[1] issued on November 13, 1996, by Senior Administrative Law Judge Gerald Harwood (the "EAJA Presiding Officer"),[2] which awarded Respondent Hoosier Spline Broach ("Hoosier") $16,891.35 in attorneys' fees and expenses under the Equal Access to Justice Act (the "EAJA"), 5 U.S.C. § 504. The fee award was based on the EAJA Presiding Officer's determination that the

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[1] A presiding officer who considers a fee petition brought under the 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.

The original recommended decision in the underlying action was issued on September 17, 1996; however, it contained no dollar award to Hoosier. The Region's appeal from that decision, filed on October 7, 1996, was therefore dismissed by the Board as premature. *See* Order Dismissing Appeal Without Prejudice (October 11, 1996).

[2] Administrative Law Judge Frank W. Vanderheyden presided over the underlying RCRA enforcement action until it was concluded by settlement in September 1995. After Hoosier filed its EAJA petition in August 1995, ALJ Spencer Nissen was assigned to preside over the EAJA proceedings (Order of Designation (January 31, 1996)), but the matter was later "redesignated" to ALJ Harwood (Order of Redesignation (July 11, 1996)). Thus, we shall refer to ALJ Vanderheyden as the "Prehearing Presiding Officer" and to ALJ Harwood as the "EAJA Presiding Officer."

Region's position in the underlying action was not "substantially justified" after September 1994. Recommended Decision ("Rec. Dec.") at 15-16. Accordingly, the EAJA Presiding Officer awarded attorneys' fees and expenses incurred by Hoosier after that date. *Id.*; Supplemental Recommended Decision ("Supp. Rec. Dec.") at 1-3.

The central issue raised in this appeal is whether the EAJA Presiding Officer erred in determining that the Region's position in the underlying action was not substantially justified after September 1994. For the reasons set forth below, we hold that he did err, and therefore reverse his decision to award fees to Hoosier.

I. *BACKGROUND*

A. *Plant Operations*

At its plant in Kokomo, Indiana, Hoosier manufactures steel "broaches," which are precision cutting tools used in the airline and automobile industries. Rec. Dec. at 1.[3] Hoosier's manufacturing process produces two different wastestreams: a "grinding sludge" from a "Blanchard" machine; and "dry grinding dust" from machines using dust collection.[4] During the period February 1990 to February 1992, Hoosier discarded its waste[5] in a pile at its Kokomo facility. Rec. Dec. at 2.

In October 1991, Hoosier applied to the Indiana Department of Environmental Management ("IDEM") for a special waste permit to enable it to dispose of its grinding sludge as nonhazardous waste.

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[3] Many of the background facts are undisputed, and are summarized in the Recommended Decision.

[4] According to one of Hoosier's consultants, the grinding sludge from the Blanchard machine was grey in coloring, somewhat moist, and consisted of medium-sized particles. Respondent's Exhibit ("RX") 21 at 1. By contrast, the dry grinding dust was finer in particle size than the sludge from the Blanchard machine, was also grey, but was very dry. *Id*.

[5] Counsel for Hoosier stated during oral argument that only the Blanchard sludge was discarded in the pile, and that the dry grinding dust was stored in drums and was not part of the pile. *See* Transcript of Oral Argument at 70-71 (July 22, 1997)("Oral Arg. Tr."). Although counsel for the Region did not dispute this at oral argument, there is nothing in the record to indicate whether only Blanchard sludge was deposited in the pile. Additionally, we note that the inspection reports indicate that some sort of coolant, which Hoosier believed was nonhazardous, was poured over the waste pile. Complainant's Exhibit ("CX") 1 at 2; CX 2 at 3, 5.

RX 1.[6] As part of its application, Hoosier included the results of TCLP tests[7] conducted by its technical consultants on four samples taken from the waste pile on October 17, 1990, April 11, 1991, September 11, 1991, and September 24, 1991. CX 5. The test results revealed that two of the four samples contained concentrations of chromium in excess of regulatory hazardous waste limits.[8] Rec. Dec. at 2-3. Consequently, in January 1992, after conducting an independent statistical analysis of the TCLP sampling results, IDEM denied Hoosier's special waste application, concluding that the waste in the pile was hazardous:

> Approval is hereby denied for disposal of grinding sludge as Special Waste. This denial is based on the analysis of chromium submitted with the application, which shows the sludge to be a D007[9] characteristic hazardous waste according to 329 IAC 3-5-5. The upper confidence level * * * for the chromium is in excess of the hazardous waste level.

CX 7 (Letter from George E. Oliver, Chief, Special Projects Section, IDEM, to Gilbert Larison, president of Hoosier Spline Broach (Jan. 9, 1992)).[10] Further, although Hoosier contended that the sampling

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[6] Under the State of Indiana's special waste regulations, waste may qualify for storage and disposal as a "special waste" only if it is shown to be nonhazardous. *See* CX 9, Ind. Admin. Code tit. 329 r. 2-21-10. The special waste regulations provide, in pertinent part: "If the information submitted indicates that the material proposed for certification is a hazardous waste * * *, the request for certification shall be disapproved and the waste shall not be disposed of at a * * * facility permitted under this article. The waste must be disposed of in accordance with the hazardous waste rules, * * *." *Id*.

[7] "TCLP" refers to EPA's toxicity characteristic leaching procedure, which is a chemical test to determine whether a solid waste is toxic (and therefore hazardous) for certain specified metals. Under the TCLP, a waste is toxic for chromium if a sample or extract of the waste contains a chromium concentration in excess of 5.0 milligrams per liter (mg/l). *See* 40 C.F.R. § 261.24.

[8] The chromium content of the waste pile sample taken on October 17, 1990 was 5.8 mg/l. RX 9. The chromium content of the waste pile sample taken on April 11, 1991 was 10.0 mg/l. RX 11.

[9] The EPA hazardous waste number for chromium is "D007." *See* 40 C.F.R. § 261.24.

[10] A hazardous waste determination is not made based upon the number of passes and fails of the samples of waste submitted for testing. To determine whether a solid waste qualified for disposal as "special waste," the special waste rules required IDEM to follow the test methods and procedures set forth in an EPA guidance document, SW 846, "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods." *See* CX 9, (Ind. Admin. Code tit. 329, r. 2-21-14(c): "All waste sampling and analyses required or requested pursuant to these rules must be performed

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results were inaccurate and unreliable due to quality control problems,[11] IDEM reviewed the quality control data submitted by Hoosier to support those claims and concluded that the quality control was "ok" and that the waste "will have to be handled as hazardous waste." RX 3.

On or about February 21, 1992, IDEM conducted a RCRA compliance inspection of Hoosier's Kokomo plant, during which IDEM observed and photographed the waste pile. Oral Arg. Tr. at 23. The very next day, Hoosier dismantled the pile by placing its contents in eighty-five 55-gallon drums, marking the drums with hazardous waste stickers, and shipping them offsite for disposal as hazardous waste. Rec. Dec. at 3. After the inspection, Hoosier ceased its practice of storing its waste in a waste pile, and continued to manifest and ship the waste offsite for disposal as a hazardous waste. Answer to EAJA Application for Award of Fees and Expenses Under Equal Access to Justice Act at 7 (Dec. 15, 1995)("EAJA Ans."); Oral Arg. Tr. at 29-30.[12]

During the period July 1992 to December 1993, Hoosier conducted TCLP tests on seventeen additional samples of its waste. *See* RX 9-19, and 21. Since the waste pile had been dismantled, the additional samples were collected at the point of generation—that is, from Hoosier's grinding machines. *Id*. Of the seventeen additional samples, two collected in July 1992 showed chromium levels of 7.7 mg/l and 48.1 mg/l. RX 13, 15. A sample collected on May 12, 1993 is reported

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in accordance with the applicable procedures required by 329 IAC 3-6-5 through 329 IAC 3-6-7 * * *."); *see also* Ind. Admin. Code tit. 329, r. 3-6-6(d) (noting that procedures for analyzing extract of waste for chromium were those in SW-846). EPA's SW-846 provided, in pertinent part: "The contaminant of concern is not considered to be present in the waste at a hazardous level if the upper limit of the CI [confidence interval] is less than the applicable RT [regulatory threshold]. *Otherwise, the opposite conclusion is reached*." SW 846, Chapter Nine-3, note a (emphasis added).

IDEM's statistical analysis worksheet showed that the upper limit CI for the four waste pile samples was 8.14 mg/l. CX 7. Since the upper limit CI was in excess of the 5.0 mg/l RT for chromium, the waste was determined to be hazardous. *Id*.

[11] *See, e.g.*, RX 3 (IDEM worksheet reflecting Hoosier's belief that there were quality control problems); RX 4 (letter from Hoosier's consultant attempting to allay Hoosier's quality control concerns); and Answer to Complaint and Request for Hearing at 10 (August 31, 1993)("Ans.")(alleging laboratory analyses of samples were inaccurate due to improper quality control, among other things).

[12] At oral argument, counsel for the Region stated, and counsel for Hoosier did not dispute, that Hoosier continued to barrel, ship and manifest its grinding sludge for disposal as a hazardous waste until September 1994, when it obtained a special waste permit from IDEM. Oral Arg. Tr. at 30.

to have contained a TCLP chromium level of "27.8 ppm." RX 16.[13] The chromium content for the remaining fourteen samples was below the 5.0 mg/l regulatory threshold. RX 14, 15, 17-19 & 21.[14]

B. *Enforcement Action*

1. *Pleadings*

Based on the test results from the waste pile samples, the IDEM determination that the waste was hazardous, and the IDEM inspection, the Region filed a RCRA enforcement action against Hoosier in June 1993. The four-count complaint alleged violations in connection with Hoosier's failure to identify and manage the waste in the pile[15] as a hazardous waste. Specifically, count one of the complaint alleged violations of 40 C.F.R. § 262.11 and RCRA § 3010 during the period September 1990 to May 1992, in connection with Hoosier's alleged failure to make a timely hazardous waste determination, to properly notify EPA of regulated hazardous waste activities, and to obtain an EPA identification number. Count two alleged violations of 40 C.F.R. § 270.10 and RCRA § 3005 during that same period, in connection with Hoosier's alleged failure to apply for or obtain interim status or a RCRA permit covering storage and disposal of the hazardous waste generated at its facility. Count three alleged continuing violations of 40 C.F.R. part 265, subparts B, C, D, E, G, and H from September 1990 onward for Hoosier's alleged failure to comply with certain operating

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[13] Since the results for this sample were not reported in milligrams per liter, the EAJA Presiding Officer ignored this sample in his analysis. Rec. Dec. at 14 n.42. However, a "ppm" reading is equivalent to milligrams per liter, which means the sample contained a chromium level of 27.8 mg/l, which was well above the 5.0 mg/l regulatory threshold.

[14] Notably, of the two July 1992 samples which contained levels of chromium above the 5.0 mg/l regulatory threshold, at least one was from the Blanchard machine. *See* RX 15 (showing chromium content of 48.1 mg/l). We cannot determine whether the other sample, taken on July 7, 1992, was also Blanchard sludge, as it is identified merely as "sludge grab." RX 13 (showing chromium content of 7.7 mg/l). The May 12, 1993 sample, which had a chromium content of 27.8 mg/l, is identified only as "grinding sludge."

[15] The complaint refers to Hoosier's waste as "grinding baghouse dust." Although at oral argument Hoosier claimed that this description misidentified the waste in the pile (Oral Arg. Tr. at 71), Hoosier *accepted* this description in its answer to the original complaint. *See* Answer to Complaint and Request for Hearing at ¶ 11 (August 31, 1993)("Ans.")("Respondent admits that grinding baghouse dust generated by Respondent was collected in a pile at Respondent's facility * * *."). In any event, the parties knew and understood that the term "grinding baghouse dust" referred to the waste in the waste pile. *See*, *e.g.*, Oral. Arg. Tr. at 28-29 (counsel for the Region admitting to being confused about source of waste in pile); *id*. at 66-67, 70-71 (counsel for Hoosier pointing out that the complaint misidentified the source of the waste in the pile, but acknowledging that the waste in the pile was the focus of the complaint).

standards applicable to facilities which treat, store or dispose of hazardous waste.[16] Count four alleged violations of 40 C.F.R. part 265, subpart L,[17] during the period September 1990 to February 1992, for Hoosier's alleged failure to comply with standards pertaining to waste pile management.

The complaint also contained a compliance order requiring Hoosier to: (1) determine if each solid waste generated at the Kokomo facility was a hazardous waste; (2) cease all hazardous waste treatment, storage or disposal activities which required a RCRA permit and for which neither a permit nor interim status had been obtained; (3) comply with the standards applicable to owners and operators of hazardous waste piles; and (4) submit a closure, and if necessary, post-closure plan for the waste pile. The complaint recommended a civil penalty of $825,509, computed according to the applicable penalty policy. *See* Attachment 1 to Complaint and Proposed Compliance Order (June 30, 1993)("Compl.").[18]

2. *Prehearing Activities*

Following the filing of Hoosier's answer in August 1993, the parties made several attempts to settle the case. The first such attempt was made at an informal settlement conference on December 13, 1993. Rec. Dec. at 12. Before the settlement conference, Hoosier provided the Region with the TCLP results from the four waste pile samples, as well as the results from the seventeen additional samples taken after the waste pile was dismantled. Respondent's Reply to EAJA Answer ("Reply to EAJA Ans.") at 8 n.2. After the settlement conference, the Region noted in a December 17, 1993 joint status

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[16] Subpart B covers general facility standards including requirements for notices that must be submitted by the facility operators to the Regional Administrator, and waste analyses which must be performed by operators prior to acceptance of waste for storage. Subpart C covers maintenance, testing and security requirements which must be followed at treatment, storage and disposal ("TSD") facilities. Subpart D sets forth the requirements for contingency and emergency plans which apply to all TSD facilities. Subpart E sets forth the record keeping and reporting requirements for TSD facilities. Subpart G sets forth the closure and post-closure requirements for TSD facilities. Subpart H covers the financial requirements which TSD facilities must satisfy prior to closure.

[17] Subpart L covers requirements for the management of waste piles.

[18] According to the Attachment, the $825,509 penalty amount was comprised of: (1) a gravity-based penalty of $627,000, made up of $90,000 for the first day of the violations, plus $537,000 for "additional days of violations"; and (2) an economic benefit component of $198,509. *See* CX 8 at 12-25 (computation of gravity-based penalty); *id*. at 27-30 (computation of economic benefit component of penalty).

report that it was "reconsidering" the allegations in the complaint and the calculation of the penalty, that Hoosier had agreed to provide additional documentation regarding the samples, and that the parties would continue to explore the possibility of settlement by telephone call or meeting.

In January 1994, the parties requested and were granted an extension of time to file their prehearing exchanges in order to continue settlement discussions. Letter from Marcie R. Horowitz, Counsel for Respondent, to Frank W. Vanderheyden, Administrative Law Judge (January 25, 1994). A further extension of time was granted in February 1994, to enable the Region to complete and present to Hoosier a settlement proposal then under "management review." Letter from John H. Tielsch, Assistant Regional Counsel, to Frank W. Vanderheyden, Administrative Law Judge (February 24, 1994). The parties filed prehearing exchanges in March 1994, exchanged discovery requests in April 1994, and continued to explore settlement of the case. Joint Status Report (May 25, 1994). In the May 25, 1994 status report, counsel for the Region reported: "Complainant continues to reconsider both the allegations of the complaint and the calculation of the penalty in light of the new information received. Complainant intends to present a new settlement proposal with modifications to the complaint and the penalty within two weeks. In addition, settlement discussions may be impacted on conclusion of Complainant's analysis regarding Respondent's claim of inability to pay the penalty." Counsel for the Region included a substantially similar statement in the parties' July 26, 1994 status report.

On August 10, 1994, the Region mailed a settlement proposal to Hoosier. Status Report at 1 (Sept. 23, 1994).[19] Sometime in September 1994, while the Region's settlement proposal was under consideration, IDEM granted Hoosier a special waste permit. Application for Award of Fees and Expenses Under Equal Access to Justice Act at 14 (Aug. 21, 1995)("EAJA App."). The record does not contain a copy of the September 1994 IDEM permit, nor of the application[20] or sampling results provided to IDEM in connection therewith. However, both parties represent in their EAJA filings that the permit was issued based on

[19] Neither this settlement proposal, nor any other settlement offers or negotiations exchanged between the parties, are included in the record.

[20] We do note, however, that the billing statements submitted in connection with Hoosier's EAJA application appear to indicate that the application for the 1994 special waste permit was prepared and submitted sometime in the June 1994 to July 1994 time frame. *See* EAJA App. Ex. 2 (time and expense reports for June and July 1994).

a new application and "new data." EAJA Ans. at 8; Reply to EAJA Ans. at 8. There is no mention of or reference to the special waste permit at all in the record of the underlying RCRA proceeding.[21]

Hoosier's counsel responded to the Region's settlement proposal in a September 23, 1994 telephone conversation, in which she informed counsel that the parties were quite far apart and that the matter should be scheduled for hearing. Status Report at 1 (Sept. 23, 1994). Between the months of September 1994 and the end of May 1995, the case was essentially inactive. This inactivity is evidenced by the absence of any documentation in the administrative record of the enforcement action for this period, with the single exception of a January 25, 1995 status report,[22] and is borne out by Hoosier's low attorney billings during this period. Specifically, it appears from the detailed time and expense statements filed with Hoosier's EAJA petition that during the period September 1994 to May 1995, Hoosier's attorneys billed only *1.5 hours* in this case. *See* EAJA App. Ex. 2 (Attachment 1-monthly billing records).

3. *Settlement*

On June 12, 1995, the Prehearing Presiding Officer scheduled the case for hearing on July 26, 1995. Prehearing Conference Report and Orders (June 12, 1995). On July 10, 1995, less than one month later, the parties notified the Prehearing Presiding Officer that the case was settled "in principle, pending an amended complaint." Order Canceling Hearing (July 13, 1995).[23] Shortly thereafter, in accordance with the settlement agreement reached between the parties, the Region dismissed with prejudice counts two through four of its original complaint and filed an amended complaint. Rec. Dec. at 13. The amended complaint consisted of a modified count one, which alleged that Hoosier had failed to make a timely hazardous waste determination of its Blanchard sludge as required under 40 C.F.R. § 262.11, a modified compliance order, which required Hoosier to make a

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[21] For a more detailed description of the parties' references to the special waste permit, *see infra* Part II.A.

[22] In this status report, the Region informed the Prehearing Presiding Officer that the parties wished to proceed to hearing, as it appeared that further negotiations "would not be productive." Status Report at 1 (Jan. 25, 1995).

[23] The settlement agreement was not fully executed until September 29, 1995. *See* Consent Agreement and Final Order at 10 (Sept. 29, 1995)("CAFO").

hazardous waste determination within a certain time frame, and a proposed penalty of $3,000.[24]

C. *EAJA Proceedings*

1. *Pleadings*

Hoosier filed its verified EAJA petition in August 1995, seeking to recover in excess of $67,000 of the attorneys' fees allegedly incurred in defense of the enforcement action. *See* EAJA App. at 4, 14. In its petition Hoosier contended that the Region's filing and prosecution of the enforcement action lacked substantial justification, chiefly because the data upon which the Region based its hazardous waste claims were unreliable and contained errors which should have been apparent to the Region before the complaint was filed. *Id.* at 3. Further, Hoosier contended that in December 1993, when the parties first made efforts to settle the case, Hoosier had presented EPA with "new, compelling data," consisting of "carefully documented analyses of [Hoosier's] waste" which "confirmed unambiguously" that the waste was not hazardous for chromium. *Id.* at 13. Hoosier pointed out that it had also advised the Region that, according to Hoosier's investigation into the "RCRA status" of similar facilities, no other broach manufacturer had been identified as a generator of chromium hazardous waste. *Id.* Additionally, Hoosier stated that it had immediately informed the Region when it succeeded in having its waste certified by IDEM as a nonhazardous, special waste in September 1994. *Id.* Despite all of this, the Region, in Hoosier's view, "remained unmoved, and [Hoosier] was forced to continue incurring significant attorneys' fees to prepare its defense." *Id.* at 14. Hoosier noted that it was not until four weeks before the hearing, when Hoosier "pleaded one last time for EPA to reconsider its position," that the Region finally relented. According to Hoosier, the Region's willingness at that time to voluntarily dismiss counts two, three, and four of the complaint, and to "vastly reduce[] the scope of count I," demonstrated that the Region's position in and pursuit of the case lacked substantial justification. *Id.*[25]

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[24] From the statements made by counsel for Hoosier at oral argument, which were not disputed by counsel for the Region, we gather that the amended complaint focused only on Blanchard sludge because the Region had been informed that the waste pile contained only Blanchard sludge. Oral Arg. Tr. at 70-71.

[25] Hoosier's EAJA petition contained only two references to the special waste permit, and those references merely noted that the permit had been issued, that the Region had been informed of that fact, and that despite this knowledge the Region refused to change its settlement position. *See* EAJA App. at 5, 8.

To demonstrate that its filing of the action was well-founded, the Region's answer to the petition highlighted several facts which it claimed indicated that the waste produced between 1990 and 1992 was hazardous, such as the two waste pile samples showing levels of chromium in excess of the 5.0 mg/l regulatory threshold, IDEM's 1992 determination that the waste was hazardous for chromium, and Hoosier's shipment of the waste for disposal at a hazardous waste landfill. *See* EAJA Ans. at 6-7. Further, the Region contended that evidence which developed as the case progressed, such as levels of chromium above the regulatory threshold reported in samples taken *after* the waste pile was dismantled, substantiated the Region's continued prosecution of the case. *Id*. at 8.[26]

Additionally, to refute Hoosier's claim that the terms of settlement indicated that the Region lacked justification for continuing to pursue the action, the Region offered the following reasons for the terms and timing of the settlement: (1) that an administrative enforcement decision issued in December 1994 diminished the likelihood that EPA would be able to recover substantial penalties for the economic benefit of a company's noncompliance with TSD requirements;[27] and (2) that in June 1995, in response to an April 1995 executive order from President Clinton urging government agencies to be more "flexible" in dealing with small businesses,[28] the Agency had issued a new small business policy which, among other things, allowed RCRA penalties against small businesses to be reduced or completely eliminated in appropriate cases.[29] EAJA Ans. at 12-13. The Region also indicated that

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[26] The Region also acknowledged that the special waste permit had been issued in September 1994. EAJA Ans. at 8, 11, 12. However, in the Region's view, the permit established only that waste generated in and after September 1994 could be disposed of as nonhazardous. *Id*. at 11; Oral Arg. Tr. at 11-12. *See infra* note 44.

[27] The Region refers to *In re Harmon Electronics*, Dkt. No. RCRA-VII-91-H- 0037 (ALJ, December 12, 1994), 1994 RCRA LEXIS 31 (December 12, 1994). In *Harmon*, the administrative law judge reduced the economic benefit component of the Agency's recommended penalty from $618,914 to $6,072, holding that the economic benefit was required to be calculated based on the cheapest mode of compliance. *Id.*, slip op. at 64-65, 1994 RCRA LEXIS at *41-*43. Although respondent Harmon subsequently appealed the decision to this Board on other grounds, (*see In re Harmon Electronics*, 7 E.A.D. 1 (EAB 1997), the Agency did not appeal the reduction in the economic benefit component of the penalty.

[28] *See* Regulatory Reform—Waiver of Penalties and Reduction of Reports Memorandum for [directors of 27 federal agencies], 60 Fed. Reg. 20621 (April 26, 1995)("Executive Memorandum"). Under the Executive Memorandum, each federal agency was required to submit by June 15, 1995, a plan showing how it would implement the policies set forth in the Executive Memorandum. *Id*. at 20622.

[29] *See* Interim Policy on Compliance Incentives for Small Business (June 1995)("Interim Policy"). *See infra* Part II.B.2 for a more detailed discussion of the Agency's Interim Policy.

it dismissed the hazardous waste claims in recognition of the fact that EPA had achieved its goals in bringing the enforcement action:

> In this settlement [Hoosier] has agreed to make a new hazardous waste determination satisfactory to EPA and to pay a penalty. EPA therefore has achieved its goals in bringing the suit, namely, deterring further RCRA violations by imposing a civil penalty and assuring that [Hoosier] correctly identified and handled its industrial waste streams.

Id. at 4.[30]

2. *Recommended Decision*

In his September 17, 1996 recommended decision,[31] the EAJA Presiding Officer rejected Hoosier's arguments about the unreliability of the initial sampling results, and determined that "the fact that the waste initially tested hazardous, and continued to test hazardous on some of the early subsequent tests" provided adequate support for the Region's filing and initial prosecution of its enforcement action. Rec. Dec. at 14. He therefore concluded that the Region's position in the action was substantially justified at the outset. *Id.*

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[30] Hoosier contended in its EAJA petition that it was a "prevailing party." *See* EAJA App. at 6-8. The Region, on the other hand, alleged in its answer to the petition that Hoosier was not a "prevailing party" for purposes of the EAJA. *See* EAJA Ans. at 2-4. The EAJA Presiding Officer found in favor of Hoosier on this issue (Rec. Dec. at 6-7), and the Region did not appeal this finding.

Since the Region did not appeal this issue, we do not decide whether Hoosier was a "prevailing party" under the EAJA. However, in declining to address this issue, we do not suggest that the "prevailing party" requirement may be ignored in determining whether a party is entitled to the payment of EAJA fees; indeed, the statute provides that "prevailing party" status is one of several threshold prerequisites to an award of fees under the EAJA. *See* 5 U.S.C. § 504(a)(1), (2). We further note that the issue of "prevailing party" status in the context of this case is a complicated one, and that the EAJA Presiding Officer's determination that Hoosier was a "prevailing party" is not beyond dispute. *Cf. In re Pivirotto*, 3 E.A.D. 96, 100 (CJO 1990)(defendant who admitted TSCA violations and paid a penalty in settlement thereof was not a "prevailing party" under the EAJA). However, in light of our conclusion on the substantial justification question, which was the sole issue raised to us on appeal, a finding that Hoosier was *not* a "prevailing party" would not, in any event, change our conclusion that Hoosier is *not* entitled to an award of EAJA fees. For the foregoing reasons, we do not address the "prevailing party" issue.

[31] Hoosier's EAJA petition was decided by the EAJA Presiding Officer based on the written record and EAJA filings only, without any evidentiary hearing or oral argument. *See* 40 C.F.R. § 17.25(b)(allowing "adjudicative officer" deciding EAJA petition to permit additional filings or proceedings, such as an evidentiary hearing or oral argument).

The EAJA Presiding Officer then concluded that the special waste permit was a significant event that marked a turning point in the action: "I find, however, that the EPA's case became considerably weaker once IDEM had approved the waste for disposal as nonhazardous." *Id*. at 15. Based on this reasoning, the EAJA Presiding Officer concluded that the Region should have settled the case soon after issuance of the special waste permit. *Id*. at 15-16. The EAJA Presiding Officer rejected the Region's explanation for why the case had not settled in that time frame, because, in his view, neither the ALJ's *Harmon* decision nor the promulgation of the Agency's new policy on small businesses adequately explained why the Region had dismissed its hazardous waste claims. *Id*. at 16. The EAJA Presiding Officer then presumed that the Region had unreasonably delayed settlement in the hopes of achieving more favorable settlement terms, and therefore concluded, apparently based on the perceived significance of the special waste permit and his presumption that the Region had unreasonably delayed settling the case after it was issued, that the Region lacked substantial justification after September 1994:

> I am assuming that Respondent in September 1994, was either proposing or would have accepted the settlement relating to Count I which was incorporated in the amended complaint, and that it was because the EPA either refused to dismiss the other counts with prejudice or was simply holding out in the expectation of a settlement more favorable to its position on those Counts that the final settlement was not reached until September 1995. I find that the EPA was not substantially justified in delaying settlement for either reason. Respondent, accordingly, is entitled to fees and expenses incurred after September 1994.

Id.

3. *Appeal*

Following issuance of the EAJA Presiding Officer's November 13, 1996 supplemental recommended decision,[32] the Region filed the instant appeal, contending that the EAJA Presiding Officer's substan-

[32] In this decision the EAJA Presiding Officer specified the $16,891.35 award to Hoosier, after reviewing Hoosier's modified declaration in support of its fees which reflected only the fees incurred after September 1994, which were computed utilizing the $75 per hour attorney billing rate prescribed by the statute and regulations. *See* 5 U.S.C. § 504(b)(2); 40 C.F.R. § 17.7(b)(2).

tial justification determination was improperly based on matters outside of the record and on "impermissible inferences from the terms of settlement," and further, did not consider the record as a whole. Appeal from a Recommended and Supplemental Recommended Decision by Administrative Law Judge Harwood at 3 (Dec. 3, 1996)("Reg. App. Br.").[33] In its reply brief, Hoosier claims that the award *was* based on an examination of the record as a whole, and that the Presiding Officer's inferences regarding settlement were permissible, indeed inescapable, from the evidence contained in the record. Reply Br. at 10, 15. After reviewing the parties' appellate briefs, we requested supplemental briefing on issues relating to the extent to which settlement evidence may properly be considered in making an EAJA award, and the propriety of a "partial" fee award covering the portion of an action where the government's position is alleged to lack substantial justification. *See* Order Scheduling Oral Argument (May 16, 1997). Following the parties' submission of supplemental briefs, the Board heard oral argument on these issues on July 22, 1997.

D. *The EAJA*

The Equal Access to Justice Act ("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 proceeding is not "substantially justified." *See* 1980 Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325.[34] The broad purpose of the statute

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[33] In its opening brief on appeal the Region also claimed that the award was error because there was a split among the federal circuit courts of appeal as to "whether fees may be apportioned and awarded for [discrete] segments of the litigation on which the government's position is not substantially justified." Reg. App. Br. at 10. However, in its supplemental brief and also at oral argument, the Region appears to have abandoned its challenge to the award on this basis. *See, e.g.*, Supplemental Brief of U.S. EPA at 22 (June 18, 1997)("Reg. Supp. Br.")("It is appropriate—and not inconsistent with either EAJA or the *Jean* decision [*INS v. Jean*, 496 U.S. 154 (1990)]—to award a party only those fees relating to the portion of the action in which they prevailed and the government was not substantially justified.").

[34] The EAJA is codified under two statutes covering two distinct types of proceedings: 5 U.S.C. § 504 *et seq*., which governs adversary administrative adjudications; and 28 U.S.C. § 2412 *et seq.*, 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.

The 1980 EAJA became effective on October 1, 1981, and applied to all adversary adjudications and civil actions pending on or commenced after that date. Pub. L. No. 96-481, § 208, 94 Stat. 2330 (1980).

is to ensure that private litigants will not be deterred from challenging questionable government decisions due to the burden and expense of litigating against the government. As Congress explained:

> [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. 1418, 96th Cong., 2d Sess., at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991 ("1980 House Report").

Under 5 U.S.C. § 504, a party that prevails in an adversary adjudication against an administrative agency and that 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 in the action was "substantially justified" or that special circumstances make the award unjust. 5 U.S.C. § 504(a)(1). Although the private litigant has the burden of proving that it is otherwise entitled to an award of fees (*i.e.*, that it is a prevailing party, meets the size and income thresholds and has timely filed its EAJA application),[35] the government bears the burden of proof on the issue of substantial justification. *See* 1980 House Report at 10-11 ("The Committee believes that it is far easier for the Government, which has

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[35] In order to demonstrate entitlement to an EAJA award in *this* case, Hoosier was required to show that at the time the underlying action was filed its net worth did not exceed $7 million, and it employed 500 or fewer employees. 5 U.S.C. § 504(b)(1)(B)(1985). Hoosier averred in its verified EAJA application that it met these threshold criteria (*see* EAJA App. at 8), and the Region did not challenge this.

Part 17 of 40 C.F.R. makes the EAJA applicable to EPA enforcement proceedings. Although some of the Agency's regulations relating to the threshold eligibility requirements have not been updated to reflect the new size and income requirements created by the 1985 amendments to the statute, such as the $7 million ceiling mentioned in the preceding paragraph, (*see, e.g.*, 40 C.F.R. § 17.5 (1997)(erroneously stating that businesses must have net worth of less than $5 million in order to be eligible for EAJA award)), these discrepancies appear to be inadvertent and do not affect the overall applicability of part 17 to EAJA claims brought under the 1985 EAJA statute, such as the one at issue here. *See In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 924 n.39 (EAB 1993).

control of the evidence, to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable."). *See also Green v. Bowen*, 877 F.2d 204, 207 (2d Cir. 1989) and *In re Biddle Sawyer Corp.*, 4 E.A.D. 912, 935 (EAB 1993)(citing *Green v. Bowen*).

It is now well-settled that the term "substantially justified" means that the government's position in the adjudication must have a "reasonable basis both in law and fact." *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 568 (1988)("substantial justification" means "justified in substance or in the main," which is no different from having a reasonable basis in law and fact); *U.S. v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996)(government position is substantially justified if it has a reasonable basis both in law and in fact); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 137 n.4 (4th Cir. 1993)(citing *Pierce*); and *Kuhns v. Board of Governors of the Federal Reserve System*, 930 F.2d 39, 43 (D.C. Cir. 1991)(citing *Pierce*).[36]

Further, the statutory requirement that the substantial justification determination be based on 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)), has been consistently interpreted to mean that a trier of fact must 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.[37] *See, e.g., INS v. Jean*, 496 U.S. 154, 161-62 (1990)("[T]he

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[36] Initially, there was a split among the federal circuit courts of appeal as to the meaning of the term "substantial justification." Although a majority of circuits held that the government needed only to show that its position was "reasonable in both law and fact" (*see, e.g., U.S. v. Yoffe*, 775 F.2d 447, 449 (1st Cir. 1985); *Hanover Building Materials, Inc. v. Guiffrida*, 748 F.2d 1011, 1015 (5th Cir. 1984); *Foster v. Tourtellote*, 704 F.2d 1109, 1112 (9th Cir. 1983)), the D.C. Circuit insisted that the government had to show something "slightly more" than reasonableness in order to avoid an award of fees (*see, e.g., Spencer v. NLRB*, 712 F.2d 539, 558 (D.C. Cir. 1983)). The Supreme Court resolved this dispute in *Pierce*, confirming that the government needed only to show that its position was reasonable in law and fact. 487 U.S. at 568.

[37] The 1985 amendments which reenacted and also substantially revised the statute added the sentence "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." *See* Pub. L. No. 99-80, 99 Stat. 183 (codified as amended at 5 U.S.C. § 504 and at 28 U.S.C. § 2412). The 1985 amendments, among other things, clarified the meaning of the phrase "position of the government" in the context of the substantial justification analysis. Prior to the amendments, courts had construed the phrase "position of the government" to be confined to the government's position in the litigation only, excluding the government agency's pre-litigation acts or omissions. *See* H.R. Report No. 120,

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EAJA * * * favors treating a case as an inclusive whole, rather than as atomized line-items."); *Rubin*, 97 F.3d at 375 (citing *Jean*); *Roanoke River*, 991 F.2d at 139 (same); and *Kuhns*, 930 F.2d at 44 (same).

II. *DISCUSSION*

We now turn to the issue before us in this appeal: was the Presiding Officer's determination that the Agency lacked substantial justification after September 1994 error? We review a presiding officer's recommended 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 or other applicable legal authority. *See Biddle Sawyer Corp.*, 4 E.A.D. at 913 n.2.[38]

99th Cong., 1st Sess., pt. 1, at 11 (1985), *reprinted in* 1985 U.S.C.C.A.N 132, 140 ("1985 House Report"). The 1985 amendments thus make explicit that the phrase "position of the agency" includes the government's position in the adversary adjudication, as well as any acts or omissions of the agency preceding the filing of the action which cause or form the basis of the adjudication. 1985 House Report at 9, 11.

The EAJA was substantially revised again in 1996. *See* Pub. L. No. 104-121, 110 Stat. 862 (1996). However, those amendments do not affect this case, as they apply only to cases commenced on or after March 29, 1996. *Id*. § 233, 110 Stat. 864.

[38] Although a federal district court's EAJA determinations are reviewed by the federal circuit courts of appeal under an abuse of discretion standard (*see, e.g., Pierce v. Underwood*, 487 U.S. 552, 559 (1988)), an EAJA determination made by a presiding officer is treated, for purposes of review by this Board, the same as an initial decision, which is subject to *de novo* review. *See Biddle Sawyer*, 4 E.A.D. at 913 n.2 ("A 'recommended decision' on attorney's fees is treated as an 'initial decision' for purposes of appeals from EAJA decisions under 40 C.F.R. Part 22."). *See also* 40 C.F.R. § 17.27 (providing that a recommended decision is reviewed in accordance with Agency procedures for the type of substantive proceeding involved); 40 C.F.R. § 22.31 (Board's review of penalty adjudications, including RCRA proceedings, is *de novo*); and *In re Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 184 (EAB 1992)(Board conducts *de novo* review of presiding officer's factual and legal findings).

Although this Board typically gives some deference to a presiding officer's factual findings with respect to findings where credibility of witnesses is at issue (*see In re Ocean States Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998), we do so where the presiding officer has superior knowledge of or familiarity with witnesses or evidence. S*ee, e.g., Port of Oakland*, 4 E.A.D. at 193 n.59 (noting that Board will give weight to a presiding officer's factual findings where presiding officer had the opportunity to evaluate witness credibility). Thus, we decline to accord any such deference to the EAJA Presiding Officer's factual findings in this case, since there was no hearing or other proceeding where evidence was introduced or witnesses testified, and moreover, the EAJA Presiding Officer was assigned only after the EAJA proceedings were well under way (*see supra* note 2), and had no role in the underlying proceedings.

The fact that the underlying case settled before hearing adds a layer of complexity to our analysis.[39] In particular, it is more difficult for us to evaluate the reasonableness of the Region's position in the enforcement action than it would be if the case had been tried, since the alleged violations were never adjudicated and as a result, evidence bearing on the strength or weakness of the Region's claims was not as fully developed as it might have been if a hearing had been held.

Additionally, in this case we consider for the first time the correctness of a *partial* award of EAJA fees, based on a finding that the agency's position in the underlying proceeding lacked substantial justification after a particular point in the case. Prevailing case authorities recognize that such partial fee awards are proper,[40] so long as the government's conduct is examined "as a whole."[41]

Since the EAJA Presiding Officer found that the Region's position in the underlying action was substantially justified from the time the action was commenced in June 1993 up until September 1994 and Hoosier did not appeal this finding, in order to avoid an award of fees the Region has the burden of proving that its conduct in the case as a whole, including its continued prosecution of the case after September 1994, had a reasonable basis both in fact and in law. *Biddle* Sawyer, 4 E.A.D. at 935 (government has burden of proof on

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[39] We note that the Agency's Chief Judicial Officer has evaluated an EAJA case in such a posture. *See In re Pivirotto*, 3 E.A.D. 96 (CJO 1990)(affirming denial of fees in TSCA penalty case where respondent was not a "prevailing party" as defined under the EAJA, and where Agency's position throughout settlement negotiations was substantially justified because respondents had admitted the violations, and the penalty sought was "presumptively substantially justified").

[40] *See, e.g., U.S. v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996)(fees may be awarded for "unjustified portion of [government's] conduct"); *Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545-546 (7th Cir. 1992)(fees awarded for post-trial portion of action, where government's defense was found to be "unsupportable"); *Leeward v. Auto Wreckers, Inc.*, 841 F.2d 1143, 1149 (D.C. Cir. 1988)(fees awarded from conclusion of hearing onward, since at that point government lost "protective mantle of 'substantial justification'"); *Public Citizens Health Research Group v. Young*, 909 F.2d 546, 552 (D.C. Cir. 1990)(case remanded for finding as to whether government's position in latter portion of action was substantially justified); and *Porter v. Heckler*, 780 F.2d 920, 925 (11th Cir. 1986)(fees awarded where government's position was initially justified but became unjustified when government "needlessly delayed resolving the case on the merits" through extensive litigation involving four appeals).

[41] *See, e.g., Jean*, 496 U.S. at 161-62 (case should be viewed as an "inclusive whole, rather than atomized line-items"); *Roanoke*, 991 F.2d at 139 (court must look "behind the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation"); and *Utu Utu Gwaitu Paiute Tribe v. Dep't of Interior*, 773 F. Supp. 1383, 1388 (E.D. Cal. 1991)(substantial justification analysis "contemplates a view of the entire proceedings rather than an issue-by-issue analysis").

issue of substantial justification); *Pierce*, 487 U.S. at 568 (term "substantially justified" means having a reasonable basis in law and fact). Although we deal here with a rather abbreviated administrative record, we are nonetheless persuaded, for the reasons discussed below, that the Region's conduct throughout the underlying proceeding, including the period from September 1994 until the case settled in July 1995, was substantially justified. We shall now address the Region's contentions on appeal and the arguments raised by Hoosier in response thereto.

A. *Significance of Special Waste Permit*

The Region alleges that the issuance of the special waste permit was "the only fact of record on which the Presiding Officer makes his determination that EPA was not substantially justified" (Reg. App. Br. at 5), and contends that the EAJA Presiding Officer's determination was in error because the special waste permit, standing alone, did not "remove the EPA's substantial justification for its position." *Id*. at 5. Specifically, the Region claims that the special waste permit, which was based on tests of Hoosier's waste taken at the point of generation in 1994, was not dispositive as to whether waste sitting in a pile on the ground in 1992 was hazardous. *Id*. at 6.

We agree with the Region that the EAJA Presiding Officer appears to have placed a great deal of weight on the issuance of the special waste permit, and in fact, appears to have concluded that soon after issuance of the permit the Region should have settled or dismissed its case:

> I find * * * that the EPA's case became considerably weaker once IDEM had approved the waste for disposal as nonhazardous. It is true * * * that the certification was for the "current" wastestream as distinguished * * * from what had been generated at the time of the inspection. The EPA does not point to any evidence in the record, independent of the test results, indicating that the waste now being generated should not also be considered representative of the waste generated at the time of the inspection. It should, then, have become clear to the EPA that it was unlikely to prevail on the merits.

Rec. Dec. at 15. *See also id*. at 15 n.44 ("[U]ntil IDEM had analyzed the waste as nonhazardous, the EPA would have been substantially justified in going to hearing on the question of whether the waste found

during the inspection was hazardous, or, at least, holding out for a settlement other than the dismissal with prejudice of the counts related to the mismanagement of hazardous waste.").

We do not quarrel with the fact that the EAJA Presiding Officer apparently made inferences about the impact of the special waste permit, even though the permit was not included in the record. Inferences may properly be drawn so long as they are based on evidence contained in the record. *See, e.g.,* 2 *McCormick On Evidence* § 342 (John W. Strong ed., 4th ed. 1992)(trier of fact may infer the existence of a fact not in the record based on a fact contained in the record).[42] In EAJA cases, the record includes "the filings required or permitted by [the EAJA regulations]." *See* 40 C.F.R. § 17.25(b). Here, the evidence in the EAJA filings regarding the special waste permit contains three undisputed facts: (1) that the special waste permit was issued in September 1994 (EAJA App. at 14; EAJA Ans. at 8); (2) that the special waste permit was based on "new" but unspecified sampling data (EAJA Ans. at 8; Reply to EAJA Ans. at 8);[43] and (3) that the special waste permit established that waste generated by Hoosier in September 1994 and afterwards could be disposed of as nonhazardous (EAJA Ans. at 11; Oral Arg. Tr. at 12).[44] Therefore, any infer-

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[42] Professor McCormick provided the following example: "[A]ssume that a party having the burden of producing evidence of fact A, introduces proof of fact B. The judge, using ordinary reasoning may determine that fact A might reasonably be inferred from fact B, and therefore that the party has satisfied its burden * * *. The judge has not used a presumption in the sense of a standardized practice, but rather has simply relied upon a rational inference." *Id.*

[43] Hoosier contends in its reply brief on appeal that the data submitted in connection with the September 1994 special waste permit constituted "virtually the same information that HSB [Hoosier] provided to EPA in December 1993." Reply Brief of Appellee Hoosier Spline Broach Corporation at 6 (Dec. 20, 1996)("Reply Br."). However, this statement cannot be verified because there is no evidence in the record specifying exactly what samples were submitted in connection with the 1994 special waste permit.

[44] At oral argument counsel for the Region stated the following with respect to the significance of the special waste permit:

> Q [Judge Stein]:
>
> > Did the [EPA] consider itself to be [b]ound by the [IDEM] determination in September 1994 that at least with respect to future-generated waste that the waste was non-hazardous?
>
> A [Carolyn Dick, Esq., EPA counsel]:
>
> > [W]e * * * respect the findings of the [IDEM] when they are the ones implementing the program * * *.

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ences about the impact of the special waste permit upon the Region's claims were required to have been based on these three undisputed facts. As will be shown below, none of these facts, either singly or in combination with the others, supports the EAJA Presiding Officer's conclusion that the Region lost substantial justification for failing to settle the case promptly after issuance of the special waste permit.

1. *Loss of Substantial Justification*

There does not appear to be any uniform or established standard for determining when and under what circumstances an agency's initially justified position becomes unjustified. However, we note that in at least two cases where EAJA fees were awarded based on a loss of substantial justification, the loss of justification was marked by evidence which virtually eliminated the agency's chief claims or defenses. For example, in *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143 (D.C. Cir. 1988), the NLRB's continued prosecution of an unfair labor practice claim after the company presented an "incontrovertible defense" to the claim at the hearing, was determined to lack substantial justification. As the Court of Appeals for the D.C. Circuit noted in affirming fees from the conclusion of the hearing onward: "[I]t should have been abundantly evident that the Board's 'case' against the company had been wrecked at trial." *Id.* at 1149.

Similarly, in *Quality C.A.T.V. v. NLRB*, 969 F.2d 541 (7th Cir. 1992), although the NLRB was determined to have been substantially justified in filing and pursuing its worker safety claim, the Court of Appeals for the Seventh Circuit held that it was not justified in continuing to pursue the claim after the hearing, where testimony revealed that workers were not in fact contesting unsafe working con-

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> But I think they have their own program in place to assure that if they're issuing a special waste permit on the basis that that waste is not hazardous * * * they can * * * assure themselves that [the] waste subsequently generated would not be hazardous.
>
> Q: So the Agency is not taking the position that Indiana made an erroneous determination in 1994? You're simply saying that that was prospective only?
>
> A Correct.

See also EAJA Ans. at 11: "Only in September 1994, when it finally obtained a Special Waste Permit, did HSB satisfy the regulatory agencies that its *current* waste stream was not hazardous."

ditions. Accordingly, the Court awarded fees from the conclusion of the hearing onward. *Id.* at 545.

In this case, unlike the evidence which caused the courts in *Leeward* and *Quality C.A.T.V.* to conclude that the government had lost substantial justification, the special waste permit did not "wreck" the Region's case because the issuance of the permit did not disprove the Region's chief claim that the waste *in the waste pile* was hazardous. This is because the issuance of the permit did not fundamentally negate the evidence indicating that the waste in the pile was hazardous.

2. *Evidence Regarding Hazardous Nature of Waste*

In order to more fully explain our conclusion that the issuance of the permit did not require the Region to settle its enforcement case immediately, we discuss the significance of the permit in the context of the other evidence in the record bearing on the hazardous nature of the waste in the waste pile. We begin with an outline of the allegations contained in the complaint and the evidence upon which they were based. As we noted earlier, counts one, two and four of the Region's complaint alleged hazardous waste violations confined to the 1990 to 1992 time frame. *See supra*, Part I.B.1. Although count three alleges violations extending beyond 1992,[45] Hoosier's liability for the violations alleged in that count (covering failure to comply with certain operating standards applicable to TSD facilities) is predicated upon its alleged failure to comply with notification and application requirements within the *1990 to 1992 time frame*. *See* Compl. ¶¶ 42-44. Further, the penalty which the Region sought for count three was based on 180 days (six months) of the alleged violation, a period which clearly fell within the 1990 to 1992 period. *See* Compl. Attachment 1; CX 8 (1980 RCRA Penalty Policy) at 12-25 (describing method for computing gravity-based penalty). Thus, with the exception of the injunctive relief sought in the compliance order, the Region's complaint is based on acts and/or omissions within the 1990 to 1992 period.[46]

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[45] The complaint alleges that Hoosier failed to comply with certain operating standards applicable to owners and operators of TSDs "from September 29, 1990, onward." Compl. ¶ 44.

[46] Generally, the compliance order required Hoosier to manage its waste as hazardous prospectively, after making a hazardous waste determination. Compl. at 11-12. The Region admitted during oral argument that after issuance of the special waste permit this injunctive relief was no longer "a major part of what the Agency was seeking." Oral Arg. Tr. at 36. In our view, this admission did not diminish the Region's justification for continuing to pursue its hazardous waste claims after the permit was issued, because, as we have illustrated, the majority of

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In order to prevail on its claims that Hoosier treated, stored and/or disposed of hazardous waste, the Region would have had to prove that a representative sample of Hoosier's waste was hazardous. 40 C.F.R. § 261.24 (outlining TCLP procedures for determining whether a "solid waste" is hazardous). A "representative sample" of waste is a "sample of a universe or whole (e.g. waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole." *Id*. § 260.10. IDEM analyzed the waste pile samples, concluded they were hazardous, and thus determined that they were sufficient to disqualify all of Hoosier's grinding sludge from disposal as "special waste." CX 7 ("Approval is hereby denied for disposal of grinding sludge as Special Waste. This denial is based on the analysis of chromium * * * which shows the sludge to be a D007 characteristic hazardous waste * * *.") Therefore, in January 1992 when it originally denied Hoosier's request to dispose of its waste as a special waste, IDEM clearly was convinced that the samples were "representative" of Hoosier's waste.

However, Hoosier contended that any sample of its waste with chromium levels exceeding the 5.0 mg/l regulatory threshold was not representative of its waste (Ans. at 11).[47] The EAJA Presiding Officer rejected this contention, observing that the waste pile samples were "unqualifiedly submitted [by Hoosier] as data which IDEM could rely upon in making this [hazardous waste] determination." Rec. Dec. at 10.

We agree. Under the State of Indiana special waste regulations, Hoosier was *required* to show that waste samples submitted to support disposal of waste as a "special waste" were representative of that waste. *See* CX 9, Ind. Admin. Code tit. 329, r. 2-21-14(c).[48] Furthermore, it is evident from Hoosier's October 1991 special waste

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the complaint focused on the waste in the waste pile. Consequently, even though the permit weakened the Region's injunctive relief claims, the Region's continued pursuit of a penalty for the alleged violations flowing from Hoosier's failure to manage the waste in the pile as hazardous was entirely proper and consistent with the RCRA statute. *See* RCRA § 3008(a)(1)(permitting Agency to assess a civil penalty for any past or current violation of the statute).

[47] In its answer to the complaint Hoosier alleged: "To the extent any waste generated by Respondent may have failed the TCLP test * * *, such waste was not representative of waste generated by Respondent."

[48] That regulation provided in pertinent part: "Waste analyses submitted to the commissioner for review must be accompanied by sufficient documentation of representative sampling and quality assurance/quality control (QA/QC) information to establish that the applicable procedure was utilized correctly."

application[49] and from IDEM's denial letter that Hoosier submitted the *waste pile samples* in an effort to qualify *all* "grinding sludge" for disposal as "special waste." In light of this, the Region had a reasonable basis for believing that the waste pile samples were "representative" of the waste produced by Hoosier during the 1990 to 1992 time frame. The Region further had a reasonable basis for contending, based on the January 1992 IDEM determination, that Hoosier's waste was hazardous for chromium.

Additional evidence in the record supports the Region's hazardous waste claims and its continued prosecution of the enforcement action, including but not limited to: (1) the February 1992 inspection reports verifying the existence of a 40 cubic yard waste pile at Hoosier's facility, samples of which tested hazardous for chromium (CX 1 at 2); (2) Hoosier's barreling and shipment for disposal as hazardous the waste in the waste pile *as well as* all other "grinding sludge" generated between February 1992 and September 1994 (EAJA Ans. at 7; Oral Arg. Tr. at 29-30); (3) Hoosier's admissions in the transportation manifests accompanying the waste pile shipments that the contents were "hazardous waste solid,* * * (D007)" (CX 4B); and (4) the fact that between July 1992 and May 1993, three additional samples of Hoosier's waste tested hazardous for chromium (RX 13, 15, 16).

The special waste permit, which established that waste generated in September 1994 and afterwards could be disposed of as nonhazardous (*see supra* note 44), simply does not override the substantial evidence outlined above which supports the Region's claims that the waste *in the waste pile* was hazardous. In other words, since the hazardous character of the waste in the pile was the focus of the Region's complaint, and since it is undisputed that the special waste permit applied to waste generated at a much later time, the permit did not, standing alone, disprove that the waste in the waste pile was hazardous.

Hoosier contends that the special waste permit, together with other evidence in the record, "point[s] to the logical conclusion that * * * something was amiss with the 1991 test results and the waste pile in issue was not in fact hazardous." Reply Br. at 8-9. The "other evidence" identified by Hoosier consists of: (1) the alleged inconsistency in the test results for the waste pile samples, despite the "undisputed" fact that Hoosier's waste was homogeneous; (2) "questions surround-

[49] In its October 1991 special waste application, Hoosier identified the waste for which the special waste permit was sought as "grinding sludge" and in a brief description noted: "Excess from grinding wheels and metal."

ing the accuracy of how the samples were handled and tested;" (3) the absence of evidence that Hoosier's operations had changed in any material way; and (4) the fact that "no other broach manufacturer had ever identified its grinding waste as hazardous for chromium." *Id*.

In our view, these facts do not lead inescapably to the conclusion that the waste in the waste pile was *not* hazardous. We note that IDEM was aware of the alleged "inconsistency" in the sampling results from the waste pile and was also aware of Hoosier's quality control claims. Yet IDEM was convinced, after conducting an independent statistical analysis of the results and after investigating the alleged quality control problems, that the waste was hazardous. Since IDEM is the agency charged with implementing and enforcing the State of Indiana's special waste program, as well as its hazardous waste program, this pronouncement by IDEM carries significant weight.

Second, even assuming (for the sake of evaluating Hoosier's argument) that Hoosier's operations did not materially change between IDEM's original hazardous waste finding in 1992 and its issuance of the special waste permit in 1994 (an allegation which was never proven),[50] this still does not foreclose the possibility that waste generated by Hoosier in 1992 and earlier may have been hazardous, while waste generated in 1994 and later may have been nonhazardous. Any number of circumstances might account for this change, including, as the Region postulates, the fact that the waste in the pile had been sitting on the ground for a period of two years, whereas the later waste had not; variability in the wastestreams; or possibly, fluctuations in the chromium levels contained in the steel from which the waste was generated. *See* Reg. Supp. Br. at 25, 31.[51]

Finally, evidence of how other broach manufacturers may have identified their waste is irrelevant. It is Hoosier's waste, not that of other manufacturers, which is at issue.

At best, the four "facts" alleged by Hoosier merely illustrate that the issue of when and whether Hoosier's waste was hazardous was a

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[50] The EAJA Presiding Officer merely observed that there was no evidence in the record affirmatively showing that there had been any material change in Hoosier's operations. Rec. Dec. at 15. Hoosier's counsel purported to confirm this observation by repeating it in its reply brief on appeal. Reply Br. at 9. However, these statements do not constitute evidence.

[51] We note, however, that the evidence of record shows very little fluctuation in the chromium content of the steel from which the waste was generated. *See* RX 23-25 (showing chromium levels of steel consistently between 3-4%).

matter about which reasonable minds could differ. When the government's position in an action 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 Jackson v. Chater*, 94 F.3d 274, 279 (7th Cir. 1996)(government's denial of social security benefits based on expert's opinion was substantially justified, even though expert's opinion was contradicted by other evidence). As the Court of Appeals for the Seventh Circuit observed in *Jackson:*

> The government may have been incorrect in advocating the position advanced by Klein [the expert] with respect to the existence of suitable work in light of the conflicting information in [two vocational publications]. However, being incorrect on one point does not translate into lacking substantial justification for one's litigation position in the entirety of a civil action. There was other evidence in the record that supported Klein's assessment of the marketplace, and the government was * * * entitled * * * to choose between permissible, though conflicting, views of the available evidence.

94 F.3d at 279-80. *See also Williams v. Bowen*, 966 F.2d 1259, 1261 (9th Cir. 1992)(government was substantially justified for EAJA purposes, although ultimately incorrect in denying disability benefits, where evidence was in conflict as to impact of alleged mental impairment on claimant's ability to perform work).

Here, as has been shown, the record contained evidence supporting the Region's views on when and whether Hoosier's waste was hazardous, as well as evidence upon which Hoosier could base its conflicting position on this issue. Further, both parties were apparently prepared to extensively litigate these issues, largely through expert testimony. *Compare* Complainant's Prehearing Statement (March 25, 1994)(listing five witnesses, including a statistician, scientist, and environmental protection expert, who were to testify on behalf of the Region with respect to the waste pile sampling evidence) *with* Respondent's Pre-Hearing Exchange (March 24, 1994)(listing several witnesses, including an engineer and a scientist, who were to testify on behalf of Hoosier regarding the waste pile sampling evidence). Since resolution of these disputed issues of fact likely would have been resolved only after a "battle of the experts," the Region cannot properly be penalized for pressing forward with its case after the special waste

permit was issued in September 1994. In the words of the *Jackson* court, the Region was entitled to choose between "permissible, though conflicting, views of the available evidence." 94 F.3d at 280.

3. *Representative Nature of "1994 Waste"*

Having reviewed the evidence relating to the hazardous nature of Hoosier's waste, we now evaluate the EAJA Presiding Officer's conclusion that the Region was not justified in continuing to pursue the case after September 1994. Apparently, this conclusion rests on the presumption that the waste samples upon which the special waste permit was based (hereafter the "1994 waste")[52] were "representative" of waste in the waste pile. Rec. Dec. at 15.[53] We agree with the Region that this presumption lacks foundation and does not support the EAJA Presiding Officer's finding that the Region lacked substantial justification after September 1994.

First, as we have already noted, there is no evidence in the record about the date, source of, test results for, or any other defining characteristics associated with the 1994 waste. *See supra* Part II.A and notes 43 and 52. Therefore, there is no evidence in the record upon which to make a determination as to whether the 1994 waste "exhibited the average properties of" the waste in the waste pile (which was disposed of in 1992). For this reason alone, the EAJA Presiding Officer's presumption lacks foundation.

Moreover, the EAJA Presiding Officer's presumption completely ignores the sampling evidence contained in the record, which tends to support the conclusion that the 1994 waste was *not* representative of the waste in the waste pile. Specifically, of the twenty-one test results made part of the record,[54] *five* of the first ten samples—all obtained between October 1990 and May 1993—yielded TCLP test

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[52] While we use the defined term "1994 waste" for purposes of brevity, there is no evidence in the record as to when the waste samples submitted to IDEM in connection with the September 1994 special waste permit actually were taken, or, for that matter, any other information about those samples (*i.e.* where they were taken, what wastestream they were taken from, the number of samples submitted, or the TCLP test results associated therewith).

[53] The EAJA Presiding Officer stated: "The EPA does not point to any evidence in the record, independent of the test results, indicating that the waste now being generated should not also be considered representative of the waste generated at the time of inspection. It should then, have become clear to the EPA that it was unlikely to prevail on the merits." Rec. Dec. at 15.

[54] This number is comprised of the four original samples taken from the waste pile during the 1990-1991 time frame, plus the seventeen additional samples taken from the point of generation after the waste pile was dismantled in 1992.

results above the regulatory hazardous waste threshold. In contrast, none of the remaining eleven samples—obtained between July 1993 and October 1993—yielded TCLP results exceeding the regulatory threshold. These results suggest that there may have been a change in the hazardous character of Hoosier's waste after May 1993, and thus reasonably lead to the inference that waste generated after May 1993 was *not* representative of waste generated before that time.

Additionally, the test results reveal that the chromium levels for Hoosier's Blanchard sludge were consistently higher than the levels reported for dry grinding dust. *See, e.g.*, RX 21 (four Blanchard samples show chromium levels higher than four grinding dust samples taken on same day). Further, at least three of the five test results with chromium levels above the 5.0 mg/l regulatory threshold were from "Blanchard" sludge. *See* RX 9, 10, 15.[55] Since the parties agree that the waste in the pile was comprised only of Blanchard sludge (Oral Arg. Tr. at 70-71), then samples of dry grinding dust arguably would not be "representative" of the waste in the waste pile. Therefore, if the 1994 waste contained dry grinding dust, that waste cannot be deemed to be "representative" of the waste in the waste pile.

Finally, Hoosier disclosed that it discarded some sort of coolant into the waste pile. *See* CX 1 at 2; CX 2 at 3, 5. Without more information as to the nature or quantities of coolant that were poured over the waste pile, there is a reasonable possibility that the coolant may have affected the chromium levels of the waste in the waste pile. Since there is no evidence in the record identifying the source of the 1994 waste, it cannot be determined whether the 1994 waste contained the same coolant that was poured over the waste pile. In the absence of such evidence, the 1994 waste cannot properly be deemed "representative" of the waste in the waste pile.

To summarize, there is simply too little evidence contained in the record about the 1994 waste to make a dispositive conclusion about whether those samples were "representative" of the waste in the waste pile. What is more, there was at least some evidence in the record tending to show that the 1994 waste probably was *not* representative of the waste in the waste pile. Under these circumstances, we find that the EAJA Presiding Officer's conclusion that the 1994 waste was representative of the waste in the waste pile is not well-

[55] It is not possible to determine from the record whether the remaining two samples were from the "Blanchard" machine. The sample contained in RX 13 is described only as "sludge grab." Likewise, the sample contained in RX 16 is described only as "grinding sludge."

founded. Therefore, to the extent that the EAJA Presiding Officer's finding that the Region was not substantially justified in the case after September 1994 rested on this conclusion, that finding was error.

As we have demonstrated, the Region's position that Hoosier's waste was hazardous is supported by ample evidence contained in the record, including: (1) test results of waste pile samples which showed that the waste contained chromium levels in excess of the regulatory threshold; (2) a finding by the agency charged with implementing and enforcing the State of Indiana's special waste and hazardous waste programs that the waste in the waste pile was hazardous; (3) three test results from samples of waste taken *after* the waste pile was dismantled which showed that the waste contained chromium levels in excess of the regulatory threshold; and (4) Hoosier's own treatment of its waste as hazardous between February 1992 and September 1994. Although there were other facts of record that arguably support Hoosier's view that its waste was *not* hazardous (*see supra* Part II.A.2), the Region nevertheless had a reasonable basis in fact for believing that the waste in the pile *was* hazardous, and for continuing to pursue those hazardous waste claims even after the special waste permit was issued. Since it is undisputed that if the waste in the waste pile was hazardous Hoosier would have been subject to the requirements for management and disposal of hazardous waste outlined in the complaint,[56] then the Region also had a reasonable basis in law for pursuing its hazardous waste claims after the special waste permit was issued. For these reasons, we are persuaded that the Region had a reasonable basis both in fact and in law for continuing to pursue its hazardous waste claims after the permit was issued.

B. *Timing and Terms of Settlement*

The Region makes a cluster of arguments which essentially allege that the EAJA Presiding Officer's award of fees is based on improper inferences and conclusions regarding the terms and timing of the settlement. Specifically, the Region alleges: "The Presiding Officer improperly based his decision on the terms of settlement, should have considered EPA's reasons for seeking a settlement in the spring of 1995, and should have concluded that EPA's conduct in the months preceding the settlement was reasonable and therefore substantially

[56] As the EAJA Presiding Officer recognized, since the Region had a sound factual basis for believing the waste in the pile was hazardous, it had a reasonable basis in law for requiring Hoosier to manage the waste as outlined in the complaint: "The legal basis for Complainant's position that this waste, if hazardous, is subject to the requirements cited in the complaint, is not really questioned." Rec. Dec. at 8.

justified." Reg. App. Br. at 6. As discussed below: (1) the record does not support the EAJA Presiding Officer's inferences that the terms of settlement indicate the Region lacked substantial justification; (2) the Region's proffered reasons for the timing and terms of settlement provide a plausible rationale for those events, and in any event, the timing and terms of settlement do not *diminish* the Region's substantial justification for continuing to pursue its hazardous waste claims; and (3) the record does not support the finding that there was any unreasonable delay in reaching settlement in this case, or that the Region was responsible for any such delay. However, before evaluating the substance of the Region's claims of error, we begin with a brief summary of the law relative to settlement in EAJA cases.

In EAJA cases, a trier of fact may not presume that the government lacks substantial justification merely because it settles a case. *See, e.g., Pierce*, 487 U.S. at 568; *Kuhns*, 930 F.2d at 43; *One Parcel of Real Property*, 960 F.2d 200, 208 (1st Cir. 1992)("The mere fact that the government settles a case on unfavorable terms, or loses at trial, does not create a presumption that it operated without substantial justification."). Therefore, although evidence relating to settlement generally is not admissible to prove liability for or the validity of a claim (Fed. R. Evid. 408; 40 C.F.R. § 22.22(a)), courts have recognized that in EAJA cases the government's reasons for settlement are admissible for the purpose of determining whether the government's position in the litigation was substantially justified. *Pierce*, 487 U.S. at 568.

Further, since no adverse presumptions may be drawn from the fact of settlement alone, courts recognize that the government's reasons for settlement may be critical in the ultimate decision of whether an award of fees should be made. As the Supreme Court explained in *Pierce*: "The unfavorable terms of a settlement agreement, without inquiry into the reasons for settlement, cannot conclusively establish the weakness of the government's position. To hold otherwise would not only distort the truth but penalize and thereby discourage useful settlements." *Id*. at 568. Emphasizing the important role that the government's reasons for settlement play when a case is settled before any adjudication of its merits, the Court of Appeals for the D.C. Circuit observed:

> Restricting the [substantial justification] inquiry to the record would make little sense where there is, in effect, no record. The government has the burden of proving substantial justification for bringing the action. To confine the inquiry to the pleadings when the matter is brought to a close by a voluntary dismissal would

> be to place the government at a disadvantage Congress could not have intended.

Kuhns, 930 F.2d at 42-43 (citations omitted).

In settling the underlying case, the Region dismissed three of the counts alleging that Hoosier generated and managed hazardous waste, modified a fourth count to allege only that Hoosier had failed to make a hazardous waste determination, reduced the penalty from $825,509 to $3,000, and required Hoosier to provide its most recent hazardous waste determination. Rec. Dec. at 13; EAJA Ans. at 13; CAFO at 4-6. Hoosier contends and the EAJA Presiding Officer implies that these settlement terms somehow constitute an acknowledgment by the Region that its hazardous waste claims lacked merit, and therefore should be viewed as evidence of a loss of substantial justification. *See* EAJA App. at 14;[57] Rec. Dec. at 16 (*see infra* part II.B.2).

We reject this characterization of the significance of the terms of settlement. It is universally recognized that a settlement is a *compromise* of disputed claims. Although there was conflicting evidence in this case as to when and whether Hoosier generated hazardous waste, the Region nevertheless had a reasonable basis in fact and in law for believing Hoosier's waste was hazardous during the 1990 to 1992 time frame, and for continuing to pursue its hazardous waste claims beyond September 1994. *See supra* part II.A. The fact that the Region *compromised* its disputed hazardous waste claims, by dismissing some of the counts in its original complaint, modifying others, and by, among other things, accepting a substantially reduced penalty for alleged hazardous waste violations, does not in itself establish that the Region lacked substantial justification. To find otherwise would be to squarely repudiate the settled case authorities discussed in the preceding paragraphs (*see Pierce*, 487 U.S. at 568; *Kuhns*, 930 F.2d at 43), and would also fly in the face of the legislative intent of the EAJA statute,[58] both of which preclude a fact finder from concluding that the government lacks substantial justification merely because it settles a case on "unfavorable terms."

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[57] Hoosier there stated: "The mere fact that the EPA voluntarily dismissed Counts II, III, and IV, and vastly reduced the scope of Count I, suggests the lack of substantial justification for EPA's position in this case."

[58] For example, a congressional committee observed: "The [substantial justification] standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require that the Government establish that its decision to litigate was based on a substantial probability of prevailing." 1980 House Report at 11. We think it safe to surmise that if Congress did not intend for the government to be wrongly penalized for *losing* a case outright, it clearly did not intend for the government to be improperly penalized for *settling* a case.

1. *Inferences Based on Settlement Terms*

Turning to the Region's first claim of error, the Region contends that the EAJA Presiding Officer's partial award of fees was based on unfounded presumptions about the content of settlement offers and about the parties' positions during settlement negotiations. Reg. App. Br. at 4, 6. Specifically, the Region claims: "Judge Harwood coupled [his] unsupported assumption about the nature of the waste with a further assumption 'that Respondent in September 1994, was either proposing or would have accepted the settlement relating to Count I which was incorporated in the amended complaint.' Because of this unsupported assumption, the Presiding Officer concluded that if EPA had tendered a settlement offer in September 1994 similar to the one finally entered in June 1995, the case would have ended eight months earlier." *Id.* at 4 (citation omitted).

The Region's contentions appear to be well-founded. In explaining the basis for the fee award the EAJA Presiding Officer admitted that he "assumed" Hoosier was proposing or would have accepted the settlement ultimately incorporated into the amended complaint, and further stated that the reason settlement was not reached until September 1995 was "because the EPA either refused to dismiss the other Counts with prejudice or was simply holding out in the expectation of a settlement more favorable to its position on those counts." Rec. Dec. at 16. As the Region correctly points out, both assumptions are unfounded and do not provide a basis for an award of fees.

As we noted *supra* part II.A, inferences must be based on evidence contained in the record. 2 McCormick, supra, § 342. The "record" in EAJA cases consists of "the written record of the underlying proceeding and the filings required or permitted by [the EAJA regulations]." 40 C.F.R. § 17.25(b). In this case, neither the terms of any of the settlement proposals, nor the substance of any of the settlement negotiations, were included in the written record of the underlying proceedings. Nor, with one exception discussed below, were they included in any of the filings permitted by the EAJA regulations. Thus, the EAJA Presiding Officer had no evidence upon which to base his assumptions as to what the parties' settlement positions or postures were during the September 1994 time frame.

We are aware that in its EAJA petition Hoosier made a veiled reference to the Region's settlement position after Hoosier obtained the special waste permit in September 1994, observing, "[s]till EPA refused to listen, holding fast to its insistence that HSB pay a six-figure penalty to settle the case." EAJA App. at 3. However, this solitary statement,

even if true, does not support the EAJA Presiding Officer's inferences regarding settlement. The statement offers no support for the assumption that Hoosier was at that time "proposing settlement on the terms ultimately agreed to"—presumably upon terms containing a $3,000 penalty. With the exception of the fact that Hoosier rejected the Region's August settlement offer, the record discloses nothing else about Hoosier's settlement activities during that period. Thus, it cannot be discerned whether Hoosier made a counter-offer, or if so, what the contents of such an offer might have been. Therefore, the Presiding Officer's assumption that Hoosier was then proposing or would have accepted the terms ultimately agreed to is nothing more than speculation.

Likewise, Hoosier's statement referencing a "six-figure" settlement offer does not support the EAJA Presiding Officer's inference that the Region was "holding out [for] a settlement more favorable to its position" on the counts dismissed. In the absence of other evidence as to the substance of the Region's settlement proposal, or of the parties' negotiations up to that point, the fact that the Region's offer may have contained a six-figure penalty is not, without more, very meaningful. Since the Region had a reasonable basis for believing that Hoosier's waste was hazardous during the period 1990 to 1992, it does not seem unreasonable that the Region's penalty demand may have remained in the six figures in the August-September 1994 time frame, especially since the economic benefit component of the penalty proposed in the complaint was nearly $200,000,[59] and recovering the full economic benefit for a violator's noncompliance is a fundamental part of the Agency's enforcement program. *See* CX 8 at 25-26.

Finally, even if it were true that the Region was "holding out" for a settlement more favorable to its position on the counts ultimately dismissed (and, as we have shown, there is no evidence indicating that the Region was doing this), this does not mean that the Region lacked substantial justification in the proceeding as a whole. As we have demonstrated, the Region had a reasonable basis in fact and in law for continuing to pursue the action after the special waste permit was issued.

In sum, the EAJA Presiding Officer's inferences about the parties' settlement positions are not supported by any evidence in the record. Further, if the EAJA Presiding Officer's inferences were drawn from

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[59] Notably, at the time the settlement offer was made, the administrative law judge's decision in *Harmon* had not yet been issued.

Hoosier's statement hinting that the Region's August 1994 settlement proposal contained a "six-figure" penalty, that statement still does not substantiate the inference that the Region was attempting to force Hoosier to accept an unreasonably high settlement demand, since a six-figure penalty would not have been unreasonable in light of the nature of the claims at issue, and the fact that a penalty of that magnitude was clearly authorized under the statute and the applicable penalty policy.[60]

2. *Reasons for Timing and Terms of Settlement*

We turn now to the Region's claim that the EAJA Presiding Officer did not adequately consider the two reasons offered by the Region to explain the timing and the terms of the settlement, namely: (1) that the likelihood that the Region would be able to recover a substantial portion of the economic benefit component of the penalty (which alone totaled nearly $200,000, *see supra* note 18), was drastically reduced in the wake of the ALJ's decision in *Harmon*; and (2) that the Agency's new small business policy (the "Interim Policy") "provided greater leeway to consider the special circumstances of small businesses when determining the imposition of penalties for RCRA and other regulatory violations." EAJA Ans. at 12-13.[61]

After noting these reasons for settlement, the EAJA Presiding Officer stated:

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[60] If the EAJA Presiding Officer's inferences regarding the parties' settlement positions were in fact based on Hoosier's statement, we feel compelled to note that reliance on this kind of statement illustrates the dangers of utilizing "settlement evidence" in the substantial justification analysis. Although the government's reasons for settlement clearly can be useful in the substantial justification analysis, the policy behind Rule 408 and the back and forth nature of settlement negotiations militate against the drawing of negative inferences about the reasonableness of the government's position based on its stance at one particular point during settlement negotiations. As one court observed: "Courts are * * * traditionally hesitant to inquire into the give and take of negotiations leading to a settlement." *Bailey v. U.S.*, 721 F.2d 357, 361 (Fed. Cir. 1983)(case remanded for determination as to whether government's delay warranted award of EAJA fees).

[61] During oral argument, counsel for Hoosier made a belated motion to exclude the Region's stated reasons for settling the case in the time and manner that it did, contending that these reasons were not properly introduced into the record, as required under 40 C.F.R. § 17.22(c). Oral Arg. Tr. at 43. We reject this belated objection.

Under § 17.25(b), the "record" to be examined in making a substantial justification determination includes the government's answer to the EAJA petition, which is a required filing under § 17.22(a). Although § 17.22(c) requires "facts" in the answer to be under oath or approved under additional proceedings, this provision is not strictly applicable here because the Region's

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> None of the reasons advanced by the EPA for finally agreeing to the settlement demonstrate that the EPA's position that Respondent had been generating hazardous waste at the time of the inspection was justified after IDEM had approved the waste for disposal as nonhazardous waste. [The ALJ's] stand on how the economic benefit of a Respondent's noncompliance should be calculated and the EPA's policy with respect to small businesses may have persuaded the EPA to moderate its stand on the penalties it should seek, but I do not see that they are relevant to the question of whether Respondent had generated hazardous waste, which was the issue on which Respondent ultimately prevailed on the merits.

Rec. Dec. at 16. It is apparent from the remarks quoted above that the EAJA Presiding Officer *did* consider the Region's reasons for settlement, but rejected them because he did not find them sufficiently persuasive.

In our view, the Region's reasons for settlement provide a plausible explanation for the timing and terms of the settlement. While the reasons for settlement are not essential to our finding that the Region was substantially justified throughout the course of the underlying action, those reasons are certainly sufficient to make inappropriate any finding that, by agreeing to such a settlement, the Region somehow conceded that it lacked substantial justification for filing its complaint and continuing to pursue its hazardous waste claims after the special waste permit was issued.

Evaluating the impact of the *Harmon* decision on the settlement, we note that the Region states that it viewed *Harmon* as an indication that it was not likely to recover much of the nearly $200,000 economic benefit component of its penalty. EAJA Ans. at 11. Based on this admission by the Region, we think it likely that the *Harmon* decision would have made the Region more willing to substantially reduce the economic benefit component of the penalty, and, concomitantly, the

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rationale for settlement is not a "fact," but is instead counsel's *explanation* for why the matter settled when it did. Further, as we discussed *supra*, the government's reasons for settlement may play a key role in the substantial justification determination in cases such as this one, where the matter was resolved before any adjudication of the merits. *See, e.g., Pierce*, 487 U.S. at 568. For all of these reasons, and also because Hoosier's motion is untimely, we hold that it was not improper for the EAJA Presiding Officer to have considered the Region's reasons for settlement, even though they were not under oath or approved under additional proceedings.

overall penalty that it was seeking for the alleged violations, than it might have been willing to do in the absence of that decision. This is especially so since *Harmon* was decided by ALJ Vanderheyden, the administrative law judge who presided over the underlying case and would have heard *this* case had it gone to hearing. *See supra* note 2; *see also* Conference Report and Orders (June 12, 1995)(scheduling July 26, 1995 hearing). In short, we have no reason to doubt that the *Harmon* decision may have figured into the Region's overall calculus in deciding to settle the case.

As for the impact of the Interim Policy on the settlement, that policy, created and implemented in response to a presidential executive order which required federal agencies to adopt a "more flexible, effective, and user friendly approach to regulation" involving small businesses (Executive Memorandum, 60 Fed. Reg. 20621 (Apr. 26, 1995)), may well have been a motivating factor in the Region's overall decision to settle the case. Among other things, the Interim Policy gave the Agency discretion to completely eliminate civil penalties against small businesses that satisfied certain stated criteria. Interim Policy at 4-5.[62] As a small business that had no prior record of environmental violations, was not charged with criminal conduct, and that had, *according to the Region*, made good faith efforts to comply with the hazardous waste regulations after the February 1992 IDEM inspection (EAJA Ans. at 13), Hoosier satisfied some of the stated criteria (*see supra* note 62) and thus arguably was the type of small business that the Interim Policy was designed to benefit. Since that is the case, the Region's substantial reduction of its penalty—from $825,509 to $3,000—might well have been the result of the Region's exercise of its discretion under the Interim Policy to "eliminate or mitigate" civil penalties. This seems probable because it does not appear that such a drastic reduction in the penalty would otherwise have been autho-

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[62] The Interim Policy allowed reduction or elimination of civil penalties if a small business as defined under the policy met some or all of the following criteria: (1) had made good faith efforts to comply with applicable environmental requirements while participating in a compliance assistance program, and the violations were detected while the business was participating in the program; (2) had no prior violations of the environmental requirement(s) alleged; (3) was charged with violations that did not cause serious harm to public health or safety, imminent or substantial danger to the environment or present a significant health, safety or environmental threat; (4) was not charged with violations involving criminal conduct; and (5) had corrected the alleged violations within ninety (90) days from detection of the violations, or within the additional time periods allowed under the Interim Policy. Interim Policy at 4-5.

Further, the Interim Policy provided that the Agency could: (1) eliminate the civil penalty in cases where the business had satisfied all of the above criteria, or (2) "mitigate its demand for penalties to the maximum extent appropriate" if the business had not satisfied all of the above criteria, but had nonetheless made a good faith effort to comply. *Id.* at 5.

rized under the applicable Agency penalty policy.[63] Further, the proximity in timing between the adoption of the Interim Policy on June 15, 1995, and the "settlement in principle" in this case which was reached less than one month later on July 10, 1995, also suggests that the Interim Policy may have impacted or affected the terms of settlement in this case.[64]

The EAJA Presiding Officer appears to have been dissatisfied with the Region's reasons for settlement primarily because they did not, in his view, explain why the Region had dropped its hazardous waste claims. Rec. Dec. at 16. However, we are not troubled by this. As we noted earlier, this settlement, like any other, was a *compromise* of disputed claims. We are persuaded that the Region's decision to dismiss certain of its hazardous waste counts and modify others, particularly in the wake of the ALJ's decision in *Harmon* and the promulgation of the Interim Policy, reflects nothing more than the results of a compromise. Indeed, this case may well portray the circumstances described in *Kuhns*, where "[c]hanges in agency policies or priorities * * * rather than the absence of evidence or legal support * * * caus[ed] the government to drop a proceeding it reasonably expected to win." 930 F.2d at 43.

For the foregoing reasons, we find that the reasons for settlement offered by the Region provide a plausible explanation for both the timing and terms of settlement. Further, the settlement terms do not disturb our conclusion that the Region was substantially justified for filing its case and continuing to prosecute its hazardous waste claims after the special waste permit was issued in September 1994. Consequently, to the extent the EAJA Presiding Officer used either the terms of settlement or the Region's proffered reasons for settlement to fortify his conclusion that the Region *lacked* substantial justification after September 1994, he committed error.

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[63] With exceptions for "litigative risk" and inability to pay, the 1990 RCRA Penalty Policy authorized a penalty reduction for purposes of settlement of up to 25% of the proposed penalty in "ordinary" circumstances, and up to 40% of the proposed penalty in "unusual" circumstances. *See* CX 8 at 32.

[64] We do not rule out the possibility that the timing of settlement in this case may also have been influenced by other factors, particularly the impending hearing date of July 26, 1995. As the Region acknowledged: "[A]s in any settlement, litigation considerations affect the final resolution * * *." EAJA Ans. at 13. *See also* part III.B.3 *infra*.

3. *Delay*

As its final claim of error relating to the EAJA Presiding Officer's analysis of the terms and timing of the settlement, the Region contends that the EAJA Presiding Officer's fee award is improperly based on assumptions that the Region unreasonably delayed the settlement. Reg. App. Br. at 4. As discussed *supra* part II.B.1, the EAJA Presiding Officer clearly did make this assumption as he stated: "[I]t was because the EPA either refused to dismiss the other Counts with prejudice or was simply holding out in the expectation of a settlement more favorable to its position on those Counts that final settlement was not reached until September 1995. *I find that the EPA was not substantially justified in delaying settlement for either reason*." Rec. Dec. at 16 (emphasis added). Hoosier also blames the Region for unreasonably delaying settlement in this case. *See* Reply Br. at 2, 12. However, the course of events in this proceeding does not demonstrate that the Region was solely responsible for any "delay" in the underlying proceedings, and further, case law shows that the "delay," if any, did not warrant an award of fees.

As a preliminary matter, it is improper to make a determination of substantial justification based solely on the length of time it takes to settle a case. *Bazaldua v. INS*, 776 F.2d 1266, 1270 (5th Cir. 1985)("The government's delay in settling the case is not by itself a sufficient ground for the award of attorney's fees * * * under the EAJA * * *."); *Essex Electro Engineers, Inc. v. U.S.*, 757 F.2d 247, 253 (Fed. Cir. 1985)("The reasonableness of the government's litigation position is determined by the totality of circumstances, and we eschew any single-factor approach."). A claim of delay must therefore be evaluated in light of all surrounding circumstances.

Second, it appears that even when delay is a factor in the substantial justification analysis, fees have been awarded where the delay was either unexplained or accompanied by other circumstances which indicated that the government's position was wholly without merit.[65]

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[65] *See, e.g., U.S. v. $12,248 U.S. Currency*, 957 F.2d 1513, 1518-1519 (9th Cir. 1992)(though seizure of property was justified, government's refusal to investigate case, and lengthy, unexplained delays in filing suit and bringing matter to trial supported award of fees); *Porter v. Heckler*, 780 F.2d 920, 925 (11th Cir. 1986)(fees awarded where government's protracted defense of unexplained suspension of employee, which involved three appeals, "needlessly delayed resolving the case on its merits."); *Environmental Defense Fund v. Watt*, 722 F.2d 1081 (2d Cir. 1983)(fees awarded in pesticide spraying case where it appeared that several month delay in concluding settlement was unnecessary and unwarranted, since government had acceded to plaintiffs' demands even before beginning settlement negotiations); and *Ward v. Schweiker*,

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Guided by the above cases, we conclude that the "delay" (if any) in this case did not warrant an award of fees. Although the Region clearly had a sound basis for pursuing its hazardous waste claims, it began efforts to settle this case within six months after the case was filed. Settlement discussions continued over the next six months, while the parties exchanged prehearing statements and discovery requests. In August 1994, just over a year after the case was filed, the Region sent a settlement proposal to Hoosier, the terms of which were not disclosed in the record. In September, after receiving a special waste permit, Hoosier rejected the Region's August 1994 settlement offer, and stated that it believed the case should be scheduled for hearing. It was not until four months later in January 1995 that the Region formally requested that the case be scheduled for hearing. Another five months elapsed before the Prehearing Presiding Officer actually scheduled the case for hearing. In the nine months between Hoosier's rejection of the settlement offer and the setting of the hearing date, neither party pursued the case. Indeed, Hoosier's attorneys billed less than two hours in connection with the case over that period. *See* EAJA App. Ex. 2 (Attachment 1-monthly billing records).

There is nothing in this chain of events, which traces a pattern followed in numerous contested civil actions, to support the notion that the *Region* was solely to blame for any settlement delay. At oral argument, counsel for Hoosier acknowledged that by September 23, 1994 "*both* parties were saying that they were so far apart in settlement that the matter needed to proceed to hearing." Oral. Arg. Tr. at 46 (emphasis added). Counsel for Hoosier further admitted that after Hoosier rejected the Region's settlement offer "things stopped * * * until about a month before the hearing." *Id*. Counsel for Hoosier did not allege that during the nine months between September 1994 and June 1995 Hoosier did anything to press for a speedy resolution of the case, and the record does not reflect that it did. Thus, we think it fair to conclude that both parties are equally responsible for the settlement "delay" in this case, if there was any delay at all.

Moreover, there is nothing in the fact pattern outlined above that suggests that either the length of or reasons for any "delay" were so wholly without merit as to support an award of EAJA fees. This was not a case where the government belabored a questionable defense through extensive litigation, as in *Porter*, or failed to investigate and prosecute its case over an extended period of time, as in *U.S. v.*

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562 F. Supp. 1173, 1179 (W.D. Mo. 1983)(fees awarded where eight month delay in finalizing settlement was viewed as inexplicable, since government had previously settled a similar matter using the identical stipulation).

$12,248 U.S. Currency. Instead, the Region pursued claims which it reasonably believed, and which the record confirmed, were valid, and at the same time continued to reevaluate those claims and to seek a negotiated resolution of the dispute.

When we consider the record of events as confirmed by Hoosier's admissions during oral argument, what appears to have occurred here is that after Hoosier rejected the Region's settlement offer, the parties reached an impasse in the September 1994 time frame, after which they *both* suspended further activity while awaiting assignment of a hearing date. Once the hearing date was assigned, the parties resumed case preparations and then, perhaps spurred on by the approaching hearing, were finally able to reach an accord and settle the case.

None of the above cases suggest that this type of mutual abatement of case activity while awaiting a hearing date, a common enough occurrence in numerous civil actions, should serve as the basis for an award of EAJA fees. It is well known that civil actions are marked by periods of activity and inactivity, and that a period of inactivity is especially common during and after settlement negotiations. Even Hoosier acknowledged that this case was not appreciably different from any other ordinary piece of civil litigation which settles on the eve of trial. Oral Arg. Tr. at 44.

Furthermore, at least one case demonstrates that awarding fees based solely on a lull in case activity is improper. In *Ashburn v. U.S.*, 740 F.2d 843 (11th Cir. 1984), a tax refund case ultimately conceded by the government, one of the deciding factors in the Eleventh Circuit's decision not to award fees was that during the eleven month period which plaintiff identified as constituting an unreasonable delay on the part of the government, the case had been "completely inactive" and plaintiff's attorneys had billed a total of only 2.2 hours during that period. 740 F.2d at 851. In this case Hoosier's attorneys billed *less than two hours* during a nine month period of inactivity.[66] *Ashburn* therefore fortifies our conclusion that an award of fees based on the Region's alleged delay in settling this case is unwarranted.

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[66] During the nine month lapse in case activity only a total of 1.5 hours were billed for a fee of $257.50 (excluding disbursements). *See* EAJA App. Ex. 2, Attachment 1. Notably, however, once the hearing date was assigned, a total of 65.7 hours were billed, totaling $10,134.00 in legal fees (excluding disbursements) for a single month's worth of hearing preparation. *Id.* Since the latter amount represents sixty per cent of the $16,891.35 ultimately awarded by the EAJA Presiding Officer, it appears that Hoosier's pursuit of fees is primarily an attempt to recapture its hearing preparation costs.

C. *Underlying Case "As a Whole"*

The Region's final claim of error is that the EAJA Presiding Officer failed to examine the case as a whole because if he had done so, he would have concluded that the Region was justified at all times during the litigation. Reg. App. Br. at 10.

As noted earlier, Hoosier's contention that it is entitled to an award of EAJA fees appears to be based at least in part on the fact that it incurred substantial legal fees in the course of achieving a settlement on favorable terms. *See supra* note 66. However, unlike other fee- shifting statutes, the EAJA does not enable a party to recover fees expended in trial preparation simply because it prevails in the action. As one court explained: "We cannot assume that the government must pay [plaintiff's] attorney's fees merely because it did not successfully defend against [plaintiff's] suit on the merits in its entirety. *The EAJA is not a 'loser pays' statute*." *Morgan v. Perry*, 142 F. 3d 670, 685 (3d Cir. 1998)(emphasis added) (footnote omitted). In a similar vein, the Court of Appeals for the Eleventh Circuit observed:

> The EAJA * * * does not adopt the position that the government should compensate all prevailing parties. Congress did not wish to inhibit the government's legitimate efforts to enforce the law; nor did it wish to impose the potentially high cost of an automatic fee-shifting position on the government. Instead, the Act provides for a compromise embodied in the standard of 'substantial justification' * * *.

Ashburn, 740 F.2d at 849 (citations omitted).

When we review the underlying case "as a whole," we are persuaded that the Region's position was substantially justified both before and after September 1994. As mentioned, the Region's filing and pursuit of the enforcement action was based upon evidence, supplied by Hoosier, that waste which accumulated in a waste pile during the period 1990 to 1992 was hazardous. Based on the sampling results and the IDEM determination, we find, as did the Presiding Officer, that the Region's actions in pursuing the matter were well-founded. However, in our view the issuance of the special waste permit did not require immediate settlement of the case because although the permit allowed Hoosier to dispose of its waste as nonhazardous in and after September 1994, it did not eliminate the reasonable basis in fact and in law for the Region's claims that waste generated between 1990 and 1992 was hazardous.

Furthermore, although the special waste permit weakened the Region's ability to obtain the injunctive relief sought in the complaint, the issuance of the permit still was not fatal to the Region's hazardous waste claims, since those claims were substantiated by evidence that the waste *in the waste pile* was hazardous. Additionally, although, as Hoosier contends, the special waste permit when combined with other evidence in the record may have raised questions as to whether the waste in the waste pile had been correctly identified as hazardous, this evidence was counterbalanced by the significant evidence, including IDEM's 1992 determination, that Hoosier's waste was hazardous during the period of time (1990-1992) upon which the allegations in the complaint were based. Since the ultimate issue as to when and whether Hoosier's waste was hazardous never was adjudicated, and further, clearly would have been contested by competing experts had the matter gone to hearing, an award of EAJA fees in the face of such disputed material facts would be improper.

We note as well that there is no evidence to support the EAJA Presiding Officer's inferences that in September 1994 Hoosier was proposing settlement on the terms ultimately agreed to in July 1995, or that *the Region* delayed the settlement. Instead, evidence in the record indicates that the lapse of time between the issuance of the special waste permit and the parties' agreement to settle may have been due, at least in part, to the parties' mutual abatement of activity while awaiting assignment of a hearing date. As we have shown, this circumstance does not support an award of fees under the EAJA.

For the above reasons, we conclude that application of the substantial justification standard to the facts of this case forecloses any award of fees. To award fees in this case, which traces a pattern of events that commonly occur in civil actions that settle before trial, would not only be improper, but would also discourage the government from settling cases under reasonable and appropriate circumstances, a result that is inimical to the purposes and objectives of the EAJA.

III. *CONCLUSION*

For all of the foregoing reasons, we find that the Region's position in the underlying RCRA enforcement proceeding continued to be substantially justified after September 1994, because its hazardous waste claims remained viable even after the special waste permit was issued. We thus hold that Hoosier is not entitled to any attorneys' fees under the EAJA, either for amounts incurred in defending the underlying action, or for amounts incurred in connection with this appeal.

So ordered.