

ORIGINAL

Jim Jones (ISB #1136)
JIM JONES & ASSOCIATES
1275 Shoreline Lane
Boise, Idaho 83702-6870
Telephone: (208) 385-9200

Attorney for Respondent

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

In the Matter of:)	Docket No. CWA-10-2000-0188
)	
Donald Cutler,)	
Custer County, Idaho,)	VERIFIED PETITION FOR
)	ATTORNEY FEES AND OTHER
Respondent.)	EXPENSES
)	

Respondent, Donald Cutler, acting through his counsel of record, hereby petitions for an award of attorney fees and other expenses pursuant to 5 U.S.C. § 504 and shows, in support of said petition, as follows:

- (1) Respondent was the prevailing party in this matter within the meaning of 5 U.S.C. § 504(a)(1) and (4) and (b)(1)(B). From the very start of this proceeding EPA demanded a \$25,000 penalty and was unwilling to accept anything less. EPA's demand was and is unreasonable and has been determined to be so. The penalty ultimately assessed against Respondent was \$1,250 or 95% less than EPA's demand.
- (2) All work expended by Respondent's counsel on this matter was necessitated by EPA's excessive demand. Had EPA made a demand of under

\$10,000 this matter could have been resolved without the necessity for the initial hearing or the reopened hearing. All of the controversies placed for decision before the Administrative Law Judge were related to the amount of the penalty and Respondent's ability to pay.

(3) As set forth above, the position of the EPA was not substantially justified, as substantiated by the decision which reduced the penalty to 5% of what EPA demanded.

(4) The attorney time expended by Respondent's counsel in representing Respondent in this matter is set forth on Exhibit A, which is attached and incorporated. The time set out on Exhibit A is reasonable and was necessary in the defense of EPA's complaint. Respondent's billing rate at the time of the proceedings was \$165 per hour, which is reasonable in the State of Idaho, County of Ada, for work of this nature. The attorney fee, based on the hourly rate of \$165 per hour would be \$18,933.75 (114.75 hours x \$165/hr.). The attorney fee based on the statutory rate in 5 U.S.C. § 504(b)(1)(A), i.e. \$125 per hour, is \$14,343.75.

(5) Respondent necessarily incurred the following other expenses in defending against the Complaint:

(a) Expenses of Respondent's expert witness, Bruce Lium -- \$453.30

(b) Mileage of Respondent's counsel for round trip to

Salmon, Idaho, for reopened hearing (260 miles at 35¢ per

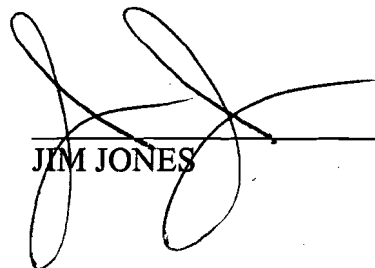
mile)-----\$ 91.00

(c) Cost for copies from EPA-----\$ 18.30

(d) Paid to Kinkos for copying----- \$ 38.76

(e) Transcript from Hedrick Court Reporting----- \$ 887.30

DATED this 17th day of January, 2003.

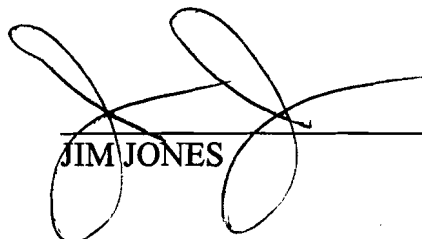


JIM JONES

STATE OF IDAHO)
 : ss
County of Ada)

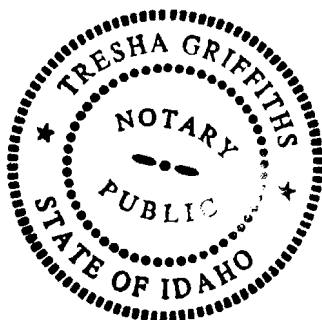
JIM JONES, being duly sworn, depose and say:

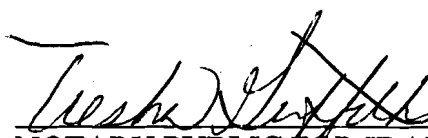
I am counsel for the Respondent in the above-entitled action; I have read the foregoing Petition; and the information contained in said Petition is true and correct to the best of my knowledge and belief.



JIM JONES

SUBSCRIBED AND SWORN to before me this 17th day of January, 2003.





NOTARY PUBLIC FOR IDAHO
Residing at Meridian, Idaho
My Commission Expires: 6/15/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2003, I caused to be served a true and correct copy of the foregoing VERIFIED PETITION FOR ATTORNEY FEES AND OTHER EXPENSES by depositing the same in the United States mail, postage prepaid, in an envelope addressed to the following:

Mark A. Ryan
Assistant Regional Counsel
U.S. EPA
Idaho Operations Officer
1435 N. Orchard Street
Boise, ID 83706

Mary A. Shillcutt
Regional Hearing Clerk
U.S. EPA, Region 10
1200 6th Avenue
Seattle, WA 98101

Honorable Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judge
U.S. EPA
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

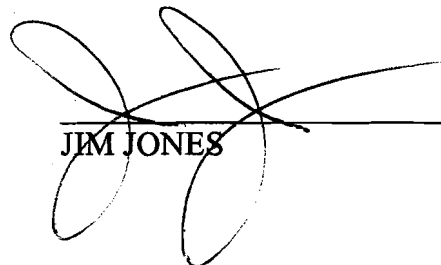

JIM JONES

EXHIBIT A

9/6/00	Review file -----	1 hr. 25 mins.
9/7/00	Answer/letters-----	1 hr. 45 mins.
10/11/00	Letter to EPA-----	25 mins.
10/11/00	Letter to Cutlers-----	10 mins.
10/19/00	Phone call/Bruce Lium-----	10 mins.
10/19/00	Letter to Bruce Lium -----	15 mins.
10/23/00	Phone call/Bruce Lium-----	10 mins.
10/25/00	Phone call/Bruce Lium-----	10 mins.
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10/26/00	Phone call/fax/Bruce -----	15 mins.
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11/2/00	Phone call/Bruce-----	10 mins.
11/6/00	Phone call/Sharon -----	5 mins.
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11/8/00	Meeting with EPA attorney -----	50 mins.
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11/5/01	Research-----	1 hr. 30 mins.
11/6/01	Brief-----	3 hrs. 15 mins.
11/7/01	Revise findings-----	1 hr. 20 mins.

TOTAL: 114.75 hours

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ENVIR. APPEALS BOARD

JIM JONES & ASSOCIATES
Attorneys at Law
1275 Shoreline Lane
Boise, Idaho 83702-6870

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EPA--REGION 10

September 9, 2004

Fax: (208) 385-9599

The Honorable Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Docket No. CWA-10-2000-0188 (CWA Appeal No. 02-01)

Dear Judge Nissen:

Enclosed is a copy of an Amended Verified Petition for Attorney Fees and Other Expenses that I am filing with respect to the above-noted matter. The amended petition includes the fees incurred on appeal by Mr. Cutler.

With best wishes, I am,

Sincerely,

Jim Jones

JTJ/tg

Enclosure

cc Carol Kennedy
Regional Hearing Clerk
U.S. EPA, Region X
1200 6th Avenue
Seattle, WA 98101

Mark A. Ryan, Esq.
Assistant Regional Counsel
U.S. EPA
Idaho Operations Officer
1435 N. Orchard Street
Boise, ID 83706

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Jim Jones (ISB #1136)
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Telephone: (208) 385-9200

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HEARINGS CLERK
EPA--REGION 10

Attorney for Respondent

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

In the Matter of:)	Docket No. CWA-10-2000-0188
)	(CWA Appeal No. 02-01)
Donald Cutler,)	
Custer County, Idaho,)	AMENDED VERIFIED PETITION
)	FOR ATTORNEY FEES AND
Respondent.)	OTHER EXPENSES
_____)	

Respondent, Donald Cutler, acting through his counsel of record, hereby petitions for an award of attorney fees and other expenses pursuant to 5 U.S.C. § 504 and shows, in support of said petition, as follows:

(1) Respondent was the prevailing party in this matter within the meaning of 5 U.S.C. § 504(a)(1) and (4) and (b)(1)(B). From the very start of this proceeding EPA demanded a \$25,000 penalty and was unwilling to accept anything less. EPA's demand was and is unreasonable and has been determined to be so. The penalty assessed against Respondent by the Administrative Law Judge was \$1,250 or 95% less than EPA's demand. The penalty, as revised by the Environmental Appeals Board, was \$5,548 or 78% less than EPA's demand.

(2) All work expended by Respondent's counsel on this matter was necessitated by EPA's excessive demand. Had EPA made a demand of under \$10,000 this matter could have been resolved without the necessity for the initial hearing, the reopened hearing or the appeal. All of the controversies placed for decision before the Administrative Law Judge were related to the amount of the penalty and Respondent's ability to pay. This was the primary issue on appeal.

(3) As set forth above, the position of the EPA was not substantially justified, as substantiated by the decision which initially reduced the penalty to 5% of what EPA demanded and ultimately resulted in a penalty that was 22% of what EPA insisted upon.

(4) The attorney time expended by Respondent's counsel in representing Respondent in this matter is set forth on Exhibit A, which is attached and incorporated. The time expended on the appeal is set out under that separate heading. The time set out on Exhibit A is reasonable and was necessary in the defense of EPA's Complaint and appeal. Respondent's billing rate at the time of these proceedings was \$165 per hour, which is reasonable in the State of Idaho, County of Ada, for work of this nature. The attorney fee for the pre-appeal stage, based on the hourly rate of \$165 per hour, would be \$18,933.75 (114.75 hours x \$165/hr.). The attorney fee for the appeal stage, based on the same hourly rate, would be \$7,053.75. That amounts to an attorney fee of \$25,987.50, based on the hourly rate I was charging during the time of this proceeding. The attorney fee based on the statutory rate in 5 U.S.C. §

504(b)(1)(A), i.e. \$125 per hour, would be \$19,687.50 for the proceeding to date.

(5) Respondent necessarily incurred the following other expenses in defending against the Complaint and appeal:

(a) Expenses incurred for Respondent's expert witness, Bruce

Lium-----\$ 453.30

(b) Mileage of Respondent's counsel for round trip to Salmon

Idaho, for reopened hearing (260 miles at 35¢ per mile) -----\$ 91.00

(c) Cost for copies from EPA-----\$ 18.30

(d) Paid to Kinkos for copying -----\$ 38.76

(e) Transcript from Hedrick Court Reporting -----\$ 887.30

(f) Payment to Nimbus 360 for videoconference the appearance

of Respondent's attorney at EAB argument-----\$ 357.75

TOTAL EXPENSES:-----\$1,846.41

DATED this 9th day of September, 2004.

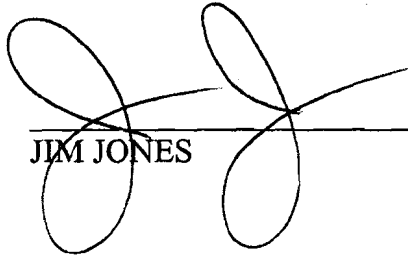


JIM JONES

STATE OF IDAHO)
 : ss
County of Ada)

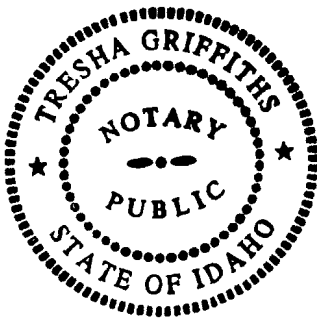
JIM JONES, being duly sworn, depose and say:

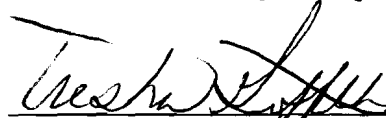
I am counsel for the Respondent in the above-entitled action; I have read the foregoing
Petition; and the information contained in said Petition is true and correct to the best of my
knowledge and belief.



JIM JONES

SUBSCRIBED AND SWORN to before me this 9th day of September, 2004.





NOTARY PUBLIC FOR IDAHO
Residing at Meridian, Idaho
My Commission Expires: 6/15/06

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of September, 2004, I caused to be served a true and correct copy of the foregoing AMENDED VERIFIED PETITION FOR ATTORNEY FEES AND OTHER EXPENSES by depositing the same in the United States mail, postage prepaid, in an envelope addressed to the following:

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Assistant Regional Counsel
U.S. EPA
Idaho Operations Officer
1435 N. Orchard Street
Boise, ID 83706

Carol Kennedy
Regional Hearing Clerk
U.S. EPA, Region X
1200 6th Avenue
Seattle, WA 98101

Honorable Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judge
U.S. EPA
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

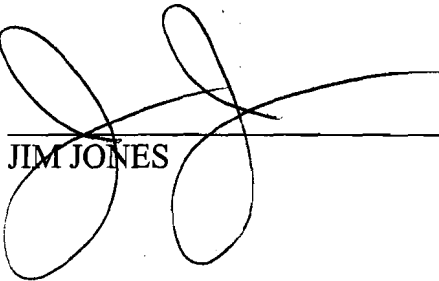

JIM JONES

EXHIBIT A

Pre-Appeal Proceedings

9/6/00	Review file-----	1 hr. 25 mins.
9/7/00	Answer/letters -----	1 hr. 45 mins.
10/11/00	Letter to EPA -----	25 mins.
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11/6/01	Brief -----	3 hrs. 15 mins.
11/7/01	Revise findings -----	1 hr. 20 mins.

TOTAL: 114.75 hours

Appeal Proceedings

3/13/03	Review EPA brief-----	2 hrs. 15 mins.
3/14/03	Finish review of EPA brief/research-----	2 hrs. 30 mins.

3/17/03	Review ALJ decision -----	2 hr. 20 mins.
3/17/03	Finish review of ALJ decision-----	2 hrs. 45 mins.
3/18/03	Research-----	2 hrs.
3/18/03	Work on Appellate brief -----	3 hrs. 20 mins.
3/19/03	Brief on appeal -----	3 hrs. 30 mins.
3/20/03	Brief on appeal -----	4 hrs. 45 mins.
3/21/03	Work on brief on appeal -----	4 hrs. 30 mins.
3/21/03	Finalize brief-----	2 hrs. 40 mins.
1/15/04	Prepare for argument -----	1 hr. 45 mins.
1/17/04	Prepare for argument -----	2 hrs. 30 mins.
1/19/04	Preparation for argument-----	2 hrs. 15 mins.
1/20/04	Preparation for argument-----	1 hr. 40 mins.
1/21/04	Preparation for argument-----	2 hrs.
1/22/04	Preparation/argument-----	2 hrs.

TOTAL: 42.75

**TOTAL TIME FOR ENTIRE PROCEEDING THROUGH
APPEAL -----**

157.50

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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ENVIR. APPEALS BOARD

HEARINGS CLERK
EPA--REGION 10

IN THE MATTER OF:

**Donald Cutler,
Custer County, Idaho,**

ANSWER TO PETITION FOR ATTORNEYS FEES

Docket No. CWA-10-2000-0188

Respondent.

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<i>In re Hoosier Spline Broach Corp.</i> , 7 E.A.D. 665 (EAB 1998), <i>aff'd</i> , 112 F. Supp. 2d 763 (S.D. Ind. 1999)	n.15, 17, 19
<i>In re Reabe Spraying Serv., Inc.</i> , 2 E.A.D. 54 (CJO 1985)	n.18
<i>Secretary v. L&T Fabrication & Construction, Inc.</i> , 22 F.M.S.H.R.C. 509, 2000 WL 687693 (2000)	n.23, 36, 42
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40 C.F.R. Part 17	n.56
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Other Authorities

142 Cong. Rec. S 2148 (daily ed. March 15, 1996) n.30, 43

INTRODUCTION

Respondent is not entitled to his attorney fees or costs under §§ 504(a)(1) or (a)(4) of the Administrative Procedure Act because he was not the prevailing party. Complainant won on liability. Respondent was found to have a prior history of violations, to have discharged to an environmentally sensitive area and to be culpable. He was assessed a significant penalty. For these reasons, Complainant's case was substantially justified and Respondent's § 504(a)(1) claim should be denied. Respondent also cannot prevail under § 504(a)(4) because he committed a willful violation of the law and the proposed penalty was reasonable. The proposed penalty was *per se* reasonable because the Environmental Appeals Board held that Complainant proved all of the statutory penalty factors and met its *prima facie* case on ability to pay. For these reasons, and as more fully explained below, Respondent's Amended Petition for Attorney Fees and Other Expenses should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

In 2000, Region 10 initiated this enforcement action against Respondent alleging unlawful filling of wetlands on his property in Stanley, Idaho. In his Answer to the Complaint, Respondent denied paragraphs 6, 7, 8, 9, 10, 11, 12, 14, 15, 16 and 18 of the Complaint, and in so doing, denied almost all wrongdoing. He denied liability, culpability, environmental harm, jurisdiction, and ability to pay. He admitted being issued prior cease and desist orders and notices of violations, but implied they were not significant.¹

¹See Respondent's Answer to Complaint, ¶¶ 4, 5, 6, 8, 9, 10, 11, 12.

Two evidentiary hearings were held in 2001 that addressed all issues of liability and penalty including jurisdiction, liability, prior history of violations, culpability, environmental harm and ability to pay. At these hearings, Respondent disputed that the area he filled was wetlands. In his post-hearing brief, he argued that EPA had failed entirely to prove its penalty because EPA did not put on a penalty witness.² He also argued he did no harm to the environment,³ his prior history of violations was meaningless,⁴ and EPA had not proved how much fill Respondent placed into wetlands.⁵ Most of the hearing was devoted to issues other than ability to pay. The hearing was reopened on October 11, 2000, for the purpose of revisiting Respondent's claim of good faith efforts to comply, and to hear the testimony of Mr. Bruce Lium, a stream biologist.

On December 31, 2002, the Presiding Officer issued his Initial Decision. In that Initial Decision, the Presiding Officer found Respondent liable for the wetlands violations alleged in the Complaint, and assessed a penalty of \$1,250. On January 17, 2003, Respondent submitted a "Verified Petition for Attorney Fees and Other Expenses" under § 504 of the Administrative Procedure Act ("APA"), also known as the Equal Access to Justice Act ("EAJA").⁶ The Region subsequently appealed the Initial Decision to the Environmental Appeals Board ("EAB"). The

²Respondent's Post-Hearing Brief at 2, 3, 23-24.

³*Id.* at 12-13.

⁴*Id.* at 13-15.

⁵*Id.* at 16-22.

⁶5 U.S.C. § 504.

Region's appeal raised five issues regarding prior history of violations, culpability, ability to pay, environmental harm, and the admissibility of expert testimony. In an Order dated March 6, 2003, the Presiding Officer stayed the EAJA claim pending the appeal.

On September 2, 2004, the EAB issued its Final Decision and Order.⁷ The EAB held that Respondent's significant prior history of noncompliance "reflects a pattern of disregard for the regulatory requirements at issue in this case."⁸ The EAB also held that the area affected by the unlawful fill material was endangered species critical habitat, making the environmental harm high.⁹ Finally, the EAB ruled that Respondent was culpable. He knew or should have known that the area he was filling was jurisdictional wetlands that required a permit from the U.S. Army Corps of Engineers to fill.¹⁰ Ultimately, the EAB increased the penalty by more than 400 percent. "Because we regard both the violations and the conduct at issue more serious than suggested by the ALJ, we are inclined towards a more significant penalty."¹¹ The Board did not rule on the fifth issue regarding Mr. Lium's testimony. Accepting that Respondent had some inability to pay, the Board assessed a penalty of \$5,540.

On September 9, 2004, Respondent filed an Amended Verified Petition for Attorney Fees and Other Expenses ("Amended Petition"). In his Amended Petition, he requests additional fees

⁷*In re Donald Cutler*, ___ E.A.D. ___, CWA Appeal No. 02-01, Final Decision and Order (EAB 2004).

⁸*Id.* at 36.

⁹*Id.* at 43.

¹⁰*Id.* at 44.

¹¹*Id.* at 45.

and costs that were not listed in the original Petition. In an Order dated September 9, 2004, the Presiding Officer lifted the stay of the EAJA claim, and set a due date of October 12, 2004, for Complainant to file an answer to Respondent's Amended Petition. Complainant submits the following response under 40 C.F.R. §§ 17.22 and 22.16(b).

ARGUMENT

I. COMPLAINANT WAS THE PREVAILING PARTY.

In his Petition, Respondent cites § 504(a)(1) of the APA as a basis for an award of fees and costs.¹² He argues that he was the prevailing party and that Complainant's penalty was not substantially justified because the penalty assessed by the EAB was 22 percent of the amount proposed in the Complaint.¹³ This cursory allegation fails to meet the standard for an award of fees and costs under EAJA.

Section 504(a)(1) allows Respondent to recover attorney fees and costs where he is held to be a "prevailing party" and the government was not "substantially justified" in bringing its case.¹⁴ Although the petitioner has the burden of proving that it is entitled to attorney fees and costs under EAJA (i.e., it is the prevailing party and meets the size and income thresholds), the government bears the burden of showing that its case was substantially justified.¹⁵

¹²Amended Verified Petition for Attorney Fees and Other Expenses, ¶ (1).

¹³*Id.*, ¶ (3).

¹⁴5 U.S.C. § 504(a)(1).

¹⁵*In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 680 (EAB 1998), *aff'd*, 112 F. Supp. 2d 763 (S.D. Ind. 1999).

Respondent's petition for fees and costs fails for two reasons. First, Respondent cannot show he was the prevailing party in this case. Complainant won on liability and a penalty was assessed against Respondent for his willful violations of the law. The Presiding Officer held that Respondent unlawfully filled jurisdictional wetlands. The EAB held that Respondent had a prior history of violations, that he filled wetlands in endangered species critical habitat, and that he was culpable. The EAB also increased the amount of the penalty, as requested by Complainant in its appeal.¹⁶

When the EAB has looked at the prevailing party issue, it has held that the Presiding Officer, in awarding fees, must not only look at the reduction in the proposed penalty but all of the facts of the case. In *Hoosier Spline*, the EAB held that EPA was substantially justified even though it dropped three and modified a fourth of six counts and reduced the penalty from \$825,509 to \$3,000 in settlement. It denied the EAJA claim because the Region's proposed penalty was reasonable at the time it was made.¹⁷ Similarly, in *In re Reabe Spraying Serv., Inc.*,¹⁸ the Chief Judicial Officer held that EPA was substantially justified even though six charges were dismissed and a penalty of only \$600 was assessed. Here, no counts were dropped, and the government prevailed on all allegations in the Complaint.

Second, EPA must show that its case was substantially justified. The EAB has held that "substantially justified" means that the "government's position in the adjudication must have a

¹⁶Complainant's Appellate Brief at 1.

¹⁷7 E.A.D. at 694.

¹⁸2 E.A.D. 54 (CJO 1985).

“reasonable basis both in law and fact.”¹⁹ At the time the Complaint was filed, the proposed penalty was reasonable given Respondent’s prior history of violations, culpability, environmental damage, and his known finances.

With respect to ability to pay, the government’s case was well grounded in fact and law. Region 10 proposed a penalty of \$25,000 in the Complaint, which was only 18 percent of the maximum penalty available at the time.²⁰ The EAB held that EPA met its *prima facie* case on ability to pay.²¹ Thus, at the close of Complainant’s case at hearing, Complainant had met all of the legal and factual burdens necessary to show ability to pay. The government’s ability-to-pay case, in other words, had a reasonable basis in fact and law. It was substantially justified.

The proposed penalty did not lose its reasonableness even after the hearing because substantial evidence existed in the record to support an ability to pay the proposed penalty. For example, the record shows that Respondent owned two homes worth approximately \$350,000, a business worth approximately \$340,000, and he annually did approximately \$140,000 in business in the six months out of the year he worked.²² That the EAB ultimately found that Respondent could not afford to pay the proposed penalty does not render the proposed penalty unreasonable under the circumstances. As the Commission held in *Secretary v. L&T Fabrication & Construction, Inc.*, “as a matter of law . . . the reduction in the penalty after hearing ‘does not

¹⁹*Hoosier Spline*, 7 E.A.D. at 681.

²⁰33 U.S.C. § 1319(g).

²¹*Cutler*, slip op. at 25.

²²Tr. 23:5-6; 307:22-24; 351:20-21; 354:3-7; 414:4-12; 416:9-15.

establish that the [complainant's] assessment was unreasonable,' but rather 'only that the judge viewed it differently based on the hearing evidence.'"²³

The EAB decision in this case shows that the government's case was substantially justified, i.e., it had a reasonable basis in law and fact. The government prevailed on liability and obtained a significant penalty against a respondent who the EAB concluded was culpable, had a prior history of violations, and who engaged in unlawful filling of endangered species critical habitat. For these reasons, Respondent's § 504(a)(1) claim should be denied.

II. RESPONDENT DOES NOT QUALIFY FOR FEES AND COSTS UNDER § 504(A)(4).

In addition to § 504(a)(1), Respondent cites 5 U.S.C. § 504(a)(4), as a basis for an award of attorney fees and costs. Section 504(a)(4) sets up a four-part test for the payment of attorney fees to Respondent: (1) the demand by the agency must be "substantially in excess of the decision of the adjudicative officer," (2) it must be unreasonable when compared with such decision, under the facts and circumstances of the case, (3) the underlying violation cannot be willful, and (4) Respondent cannot have acted in bad faith. If Respondent fails any of these four requirements, he does not qualify for attorney fees under this subsection. Respondent fails three of the four parts of this test.

A. Respondent Willfully Violated the Clean Water Act.

Section 504(a)(4) states a party who can show that the "demand by the agency is substantially in excess of the decision" of the ALJ is entitled to attorney fees, "*unless the party*

²³22 F.M.S.H.R.C. 509, 516, 2000 WL 687693 (2000).

has committed a willful violation of law or otherwise acted in bad faith."²⁴ Respondent acted willfully when he filled the wetlands next to his house to increase the size of his yard. The facts show that Respondent intended to expand his backyard whatever the consequences. In 1999, when his most recent violation was discovered, the U.S. Army Corps of Engineers asked him to remove the fill. He replied that he wanted a yard, and if the government wanted to stop him they could buy his property.²⁵

Respondent also testified that he knew his property was surrounded by wetlands.²⁶ Despite this knowledge, he made no effort to verify whether the land into which he placed fill for more than 15 years was wetlands or not.²⁷ He did not check with the Corps before placing the fill that is the basis of the present enforcement action.²⁸ Although he had access to a consultant, he never asked any professional with knowledge in wetlands identification to verify whether he was filling wetlands or not.²⁹

These facts show that Respondent knowingly and willfully violated the law when he placed fill material into wetlands in endangered species critical habitat. Senator Bumpers, a co-sponsor of the amendment that added subsection (a)(4) to the APA, stated that, "[i]t is certainly

²⁴5 U.S.C. § 504(a)(4).

²⁵Exhibit 6; Tr. 439: 23-440:2.

²⁶ Tr. 428:3-5; 429:3-7.

²⁷Tr. 427:10-16; 428:3-9; 439:1-6.

²⁸Tr. 437:20-24.

²⁹Tr. 436:16-437:9; 438:3-6.

not our intention to pay the lawyers for people who are essentially bad actors but who escaped punishment by the grace of Almighty God. Many circumstances . . . can be imagined where it would be wrong for the taxpayers to reimburse someone's attorneys fees, and the courts are empowered to show some reasonable discretion."³⁰

Such discretion is warranted here. In ruling on Respondent's culpability, the EAB held that Respondent's prior history of violations "reflects a pattern of disregard for the regulatory requirements at issue in this case."³¹ Respondent's pattern of unlawful behavior, the EAB stated, "further suggest[s] that [Respondent] should have been sufficiently aware that his activities might affect wetlands to have at the very least consulted with relevant officials prior to engaging in the violative activity."³² The EAB rejected Respondent's excuses: "his claims that he lacks culpability because he believed the areas filled were not wetlands, or because he had attempted after-the-fact to restore at least some of the filled areas, simply ring hollow."³³ Respondent's filling of the wetlands next to his house after several prior citations for unauthorized fills, the EAB concluded "suggests a *willful* disregard for the law."³⁴ Respondent's willful violation of the law makes him ineligible for an award of fees and costs under § 504(a)(4).

³⁰142 Cong. Rec. S 2148 (daily ed. March 15, 1996) (statement of Sen. Bumpers)

³¹*Cutler*, slip op. at 36.

³²*Id.*

³³*Id.* at 44 (citations omitted).

³⁴*Id.* (emphasis added).

B. The Proposed Penalty Was Reasonable Under the Facts and Circumstances of the Case.

An award of fees and costs under § 504(a)(4) is allowed only upon a showing that “the demand by the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision, under the facts and circumstances of the case.” Respondent cannot meet this two-part test. First, the written demand for a penalty on appeal was that it be “increased from the \$1,250 [the Presiding Officer] assessed.”³⁵ The final penalty assessed by the EAB was more than 400 percent greater than the penalty assessed in the Initial Decision. Second, given the facts and circumstances known to Region 10 prior to hearing, the proposed penalty was reasonable.

In *L&T Fabrication*,³⁶ the Federal Mine Safety and Health Review Commission held that a 50 percent reduction in the proposed penalty, under the circumstances of the case, did not meet the test for an award of fees. The test for an award of fees under this subsection of EAJA should “not be a simple mathematical comparison” of the proposed penalty to the actual assessment. Rather, the Commission held, it should be “applied in such a way that identifies and corrects situations where the agency’s demand is so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears the agency’s assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.” Whether an applicant meets the “substantially in excess” test will depend on the facts

³⁵Complainant’s Appellate Brief at 1.

³⁶22 F.M.S.H.R.C. 509.

and circumstances of the case.³⁷

The facts and circumstances of this case show that Complainant's proposed penalty was reasonable. As noted in more detail above, the proposed penalty was a small percentage of the maximum penalty that was available, and it was justified under the statutory penalty criteria of § 309(g)(3) of the Clean Water Act.³⁸ It was justified because Respondent unlawfully discharged fill material to wetlands in endangered species critical habitat. He had a prior history of such violations and he was aware that a permit was required. He had substantial financial assets and he refused to provide Complainant with a full disclosure of his finances. The EAB confirmed that the proposed penalty was reasonable when it held that Complainant met at hearing its initial burden regarding ability to pay. These facts, taken as a whole, show the proposed penalty was reasonable at the time the Complaint was filed and at the time the case went to hearing.

After the hearing, on appeal, Complainant dropped the request for a penalty of \$25,000. The Region requested the EAB to increase the amount of the penalty, but made no particular demand. The EAB agreed to an increase in the penalty, "reject[ing] as insufficient the \$1,250 penalty assessed by the ALJ."³⁹ The EAB agreed with Complainant's assessment of prior history of violations, environmental harm, and culpability. The Board looked afresh at the ability to pay issue, and concluded that Respondent's testimony at hearing showed he had limited ability to pay

³⁷*Id.* at 513-14.

³⁸33 U.S.C. § 1319(g)(3).

³⁹*Cutler*, slip op at 27.

a penalty.⁴⁰ Moreover, at oral argument, the Board learned that he had incurred substantial attorney fees, a fact which it considered in its ability-to-pay analysis.⁴¹

The final penalty assessed by the EAB relied on information unavailable to Complainant at the start of the hearing. It was Respondent's testimony at hearing and Respondent's attorney fees, which were disclosed only after the Initial Decision, that convinced the Board about Respondent's ability to pay. The proposed penalty here was reasonable given the facts known to Complainant prior to hearing, even though it was reduced by the Presiding Officer.⁴²

While the EAB ultimately assessed a penalty that was less than the original penalty proposed by Complainant, the final penalty was not so dramatically different that an award of attorney fees is warranted under § 504(a)(4). The Commission in *L&T Fabrication* held that a 50% reduction was not enough, and the legislative history supports that holding. It shows that Congress envisioned penalty demands that were wildly disproportionate to the final judgment. Senator Bumpers stated, "[o]ur bill changes [the old EAJA standard] and makes it possible for the business owner to recover his fees by showing that the Government's final judgment was disproportionately less than an express demand by the Government during the course of the suit. *So, if the Government sought \$1 million to settle the case, and the judge or jury awarded, for example, \$1,000 or \$5,000, the defendant should be able to recover fees.*"⁴³

⁴⁰*Id.* at 25.

⁴¹*See Id.* at 27 n. 20.

⁴²*See L&T Fabrication*, 22 F.M.S.H.R.C. at 516.

⁴³142 Cong. Rec. S 2148 (daily ed. March 15, 1996) (emphasis added).

The size of the final penalty in this case relative to the proposed penalty was orders of magnitude greater than the example given by Senator Bumpers. In fact, on appeal, Complainant prevailed on all issues. With regard to penalty, Complainant asked for an increase in the penalty, and the Board increased it by over 400 percent. By any standard, the penalty Complainant sought in this case was reasonable.

III. RESPONDENT OVERSTATES HIS COMPENSABLE ATTORNEY FEES.

Complainant disputes that Respondent is entitled to any attorney fees or costs in this case. Nevertheless, should fees or costs be awarded here, the fees and costs to which Respondent may be entitled are substantially less than the \$27,834.25 he has claimed. First, Respondent only prevailed on part of the ability-to-pay issue, so he should not be compensated for all of his fees in this litigation. Second, all fees and costs of the appeal should be denied because Complainant dropped its proposed penalty of \$25,000 when it appealed. Third, the hourly rate claimed by Respondent's counsel exceeds the statutory maximum rate.

A. Fees and Costs Unrelated to Ability to Pay Should Not be Paid.

Respondent's main argument for fees and costs is that EPA's proposed penalty was excessive. "Had EPA made a demand of under \$10,000 this matter could have been resolved without the necessity for the initial hearing, the reopened hearing or the appeal. All of the controversies placed before the Administrative Law Judge were related to the amount of the penalty and Respondent's ability to pay."⁴⁴ First, this is not true. Most of the proceeding dealt with issues other than ability to pay. At the first hearing, only the testimony of one of

⁴⁴Amended Petition at 2, ¶ (2).

Complainant's witnesses, Beatrice Carpenter, and a small portion of Mr. Cutler's testimony was devoted to the ability to pay issue. At the second hearing, the ability-to-pay issue was never discussed. Respondent devoted approximately 16 of the 24 pages of his Post-Hearing Brief and virtually all of his 16-page Supplemental Post-Hearing Brief to discussion of issues other than ability to pay. Of the five issues appealed by Respondent, only one dealt with ability to pay.

Had ability to pay been the only issue in this case, the hearing would have been much shorter - - perhaps a half day - - with only two witnesses: Mr. Cutler and Ms. Carpenter. Therefore, even if attorney fees and costs were appropriate here, only a small portion of Respondent's demand would be compensable. Respondent's Petition lists attorney fees and costs for all of the work performed in this litigation. But Respondent was not the prevailing party on any of the issues in the case. He should not be compensated for time spent or costs incurred litigating issues on which he did not prevail.

The issues on which he did not prevail comprise the bulk of the case. He contested liability,⁴⁵ but the Presiding Officer held him liable for unauthorized discharges of fill material into jurisdictional wetlands.⁴⁶ Respondent contested his prior history of violations,⁴⁷ but the EAB found he had a significant prior history of violations.⁴⁸ He argued he was not culpable,⁴⁹ but the

⁴⁵ Answer to Complaint, ¶¶ 4, 5, 6.

⁴⁶ Initial Decision at 43.

⁴⁷ Respondent's Post Hearing Brief at 13-15; Respondent's Brief on Appeal at 4-10.

⁴⁸ *Cutler*, slip op. at 35-36.

⁴⁹ Respondent's Post Hearing Brief at 12-15; Respondent's Brief on Appeal at 25.

EAB found his claim that he did not know the area he was filling was wetlands to “ring hollow.”⁵⁰ Respondent argued there was no harm to the environment.⁵¹ The EAB, to the contrary, concluded that the harm was significant.⁵² The only issue on which Respondent had any success was ability to pay.

While agreeing that the evidence adduced at hearing showed that Respondent could not afford to pay the penalty proposed in the Complaint, the Board significantly raised the penalty assessed by the Presiding Officer based on factors other than ability to pay. For this reason, if any fees and costs are to be awarded to Respondent, those fees and costs should be limited solely to the fees and costs associated with the ability to pay issue.

B. Fees Incurred During the Appeal Should Be Denied.

Respondent’s petition for attorney fees and costs is premised on EPA’s \$25,000 proposed penalty. There is no dispute that EPA dropped that proposal after the initial decision. In the introduction to its appellate brief, EPA stated: “Region 10 respectfully requests that the Presiding Officer’s Initial Decision be reversed regarding liability for the fill in Area B near the driveway and that the penalty be increased from the \$1,250 he assessed.” At oral argument before the EAB, counsel for Region 10 reiterated that the Region would accept a penalty less than the penalty proposed in the Complaint.⁵³

⁵⁰Cutler, slip op. at 44.

⁵¹Respondent’s Post-Hearing Brief at 12-13; Respondent’s Brief on Appeal at 10-12.

⁵²Cutler, slip op. at 43-44.

⁵³EAB Oral Argument transcript (January 22, 2004) at 66.

Because Complainant dropped its request for a \$25,000 penalty in this from the inception of the appeal, Respondent cannot claim that Complainant's demand was excessive. As noted above, Respondent's petition for fees and costs is premised on the false claim that all of the litigation in this case revolved around ability to pay. Since four of the five issues on appeal dealt with issues other than ability to pay, and because EPA did not pursue the \$25,000 on appeal, Respondent's request for fees and costs associated with the appeal should be denied.

C. Respondent's Counsel's Billing Rate Exceeds the Maximum Allowed by Law.

In his petition, Respondent requests reimbursement of all of his attorney's time over the three years of litigation of this case at the rate of \$165/hr.⁵⁴ The maximum billing rate allowed under EAJA is \$125/hr.⁵⁵ The statute allows for fees to exceed the \$125/hr. maximum rate only where "the agency determines by regulation that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee." The EPA has issued no such regulation.⁵⁶ By using a bloated billing rate, Respondent is attempting to over bill the government by at least \$6,300. If any award of fees is allowed, it should be based on an hourly rate of no more than \$125/hr.

IV. RESPONDENT'S PETITION FOR FEES IS DEFICIENT.

Under 40 C.F.R. § 17.11(b), a petitioner for attorney fees must submit with his application a statement that the applicant's net worth at the time the proceeding was initiated did

⁵⁴Amended Petition at 2, ¶ (4).

⁵⁵5 U.S.C. § 504(b)(1)(A).

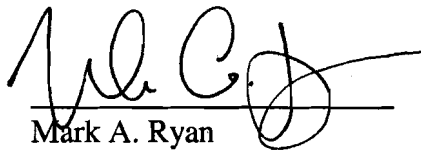
⁵⁶See 40 C.F.R. Part 17.

not exceed \$1 million. Section 17.12 further requires that the application contain "a detailed exhibit showing its net worth at the time the proceeding was initiated." Respondent's Petition lacks any statement of net worth of Respondent.

CONCLUSION

Respondent's petition for fees and costs should be denied because he was not the prevailing party. The proposed penalty was substantially justified and was not excessive in context of the facts of the case as a whole. Respondent also willfully violated the law, barring him from recovering under EAJA. Even if attorney fees and costs were available here, Respondent has overstated his fees and costs, and they should be substantially reduced. Respondent's Amended Petition for fees and costs should be denied.

RESPECTFULLY SUBMITTED this 12th day of October, 2004



Mark A. Ryan
Assistant Regional Counsel
Region 10

CERTIFICATE OF SERVICE

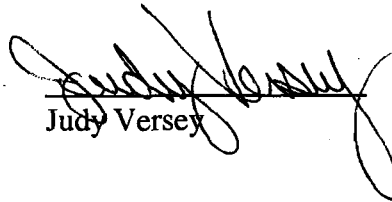
I hereby certify that copies of the Complainant's Answer to Respondent's Petition for Attorney Fees and Costs in the Matter of Donald Cutler, Docket No. CWA-10-2000-0188, were sent to the following persons in the manner indicated:

Mail: Carol Kennedy
Regional Hearings Clerk
EPA Region 10
1200 Sixth Avenue
Seattle, Washington 98101

Mail: Honorable Spencer T. Nissen
Chief, Office of Administrative Law Judges
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Dated: October 12, 2004


Judy Versey