



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 2007

ENVIRONMENTAL APPEALS BOARD

Re: Final Decision – Donald Cutler, EAJA Appeal No. 05-01

To whom it may concern:

Enclosed is a corrected version of the first two pages of the above-referenced order. The original version erroneously stated January 4, 2007 as the date the decision was decided. The correct date should be January 3, 2007, as reflected in the amended copy.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eurika Durr", is positioned above the printed name and title.

Eurika Durr
Clerk of the Board

Enclosure

Via Certified Mail

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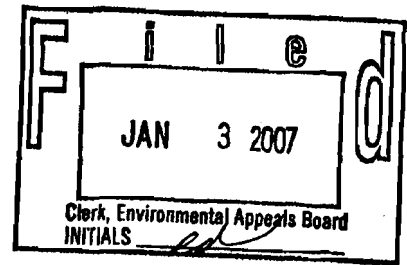
Via EPA Pouch Mail

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Via Inter-office Mail

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(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, of any typographical or other formal errors, in order that corrections may be made before publication.

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

Donald Cutler

Docket No. CWA-10-2000-0188

EAJA Appeal No. 05-01

[Decided January 3, 2007]

FINAL DECISION

*Before Environmental Appeals Judges Scott C. Fulton,
Edward E. Reich, and Kathie A. Stein.*

DONALD CUTLER

EAJA Appeal No. 05-01

FINAL DECISION

Decided January 3, 2007

Syllabus

This case concerns a petition for an award of attorneys' fees and other expenses under sections 504(a)(1) and (a)(4) of the Equal Access to Justice Act ("EAJA" or "Act"), 5 U.S.C. §§ 504(a)(1), (a)(4), filed by Donald Cutler ("Cutler" or "Respondent"). The EAJA claims derive from an administrative complaint filed by Region 10 of the Environmental Protection Agency (the "Region") against Cutler alleging violations of sections 301(a) and 404 of the Clean Water Act, 33 U.S.C. §§ 1311(a), 1344, and proposing a \$25,000 penalty for the alleged violations. Administrative Law Judge ("ALJ") Spencer T. Nissen found Cutler liable for the violations alleged in the complaint, but assessed a \$1,250 penalty. The ALJ's penalty assessment turned in part on his determination that Cutler lacked the ability to pay the proposed penalty. The Region appealed the ALJ's decision to the Environmental Appeals Board ("Board") on several grounds, including the ALJ's ability-to-pay analysis. In its decision, the Board concluded that the ALJ had properly determined that Cutler lacked the ability to pay a penalty of \$25,000, but found several errors in the ALJ's penalty calculation and assessed a \$5,548 penalty.

Following the issuance of the Board's decision, the ALJ considered Cutler's EAJA petition. In his petition, Cutler claims to be entitled to EAJA recovery because he is a "prevailing party" within the meaning of EAJA section 504(a)(1). He also claims that, even if found not to be a prevailing party, he should be awarded costs and fees because the proposed penalty was "unreasonably excessive," within the meaning of EAJA section 504(a)(4). The ALJ denied Cutler's petition. The Board undertook review of the ALJ's decision pursuant to its *sua sponte* review authority under 40 C.F.R. § 22.30(b). While the Board agrees with the ALJ's determination that Cutler is not entitled to a reimbursement of expenditures, the Board disagrees with certain aspects of the ALJ's legal analysis, and undertook review out of concern that these analytical issues may serve both to discourage meritorious appeals in enforcement cases and to encourage non-meritorious fee petitions under EAJA.

Held: The Board upholds the ALJ's decision not to award fees but reverses that portion of his analysis concluding that Cutler was a prevailing party on the ability-to-pay issue, as well as his finding that the Region's penalty demand was substantially excessive and unreasonable. The Board's rationale follows: