UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR



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| **IN THE MATTER OF:** | ) | |
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| **Lowell Vos** | ) | **Docket No. CWA-07-2007-0078** |
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| **d/b/a Lowell Vos Feedlot** | ) | |
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| **Woodbury County, Iowa** | ) | |
| | ) | |
| **Respondent.** | ) | |

**Recommended Decision Denying Application for Attorneys' Fees and Costs Under the Equal Access to Justice Act**

## I. Introduction

On August 20, 2009, Lowell Vos, doing business as Lowell Vos Feedlot, Woodbury County, Iowa, ("Respondent") initiated the present proceeding by filing an application for reimbursement of attorneys' fees and other expenses under the Equal Access to Justice Act ("EAJA" or "Act").[1] Respondent's application derives from an administrative enforcement action brought by EPA under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), in which EPA alleged that Respondent failed to apply for a National Pollutant Discharge Elimination System ("NPDES") permit for his animal feeding operation ("feedlot") in violation of Sections 301, 308, and/or 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and/or 1342,

[1] The EAJA is codified under two statutes: 5 U.S.C. § 504, which authorizes a federal agency to award to a party who prevails against the agency in an adversary administrative adjudication the fees and other expenses incurred by the party in connection to that adjudication; and 28 U.S.C. § 2412, which authorizes a court to award to a party who prevails against the United States in a civil action the fees and other expenses incurred by the party in connection to that action. Although 5 U.S.C. § 504 governs the proceeding at hand, Respondent filed his application pursuant to 28 U.S.C. § 2412. In its Answer to Application for Attorney Fees and Costs under the Equal Access to Justice Act, the United States Environmental Protection Agency ("Complainant" or "EPA") argues that Respondent's failure to file his application under the appropriate statutory authority is grounds for dismissing the application. The Court addresses this contention in the Discussion below.

and 40 C.F.R. §122.21(a).[2] Respondent contested the allegations against him, and the Court subsequently conducted a six day administrative hearing in Des Moines, Iowa.

On June 8, 2009, the Court issued its Initial Decision. The Court stated that, in order to prove Respondent's liability for failing to apply for an NPDES permit, EPA was required to establish that Respondent had a duty to apply. Initial Decision at 21 n.23. The Court reasoned that EPA could establish that such a duty had been triggered only by demonstrating by a preponderance of the evidence each element necessary to prove a violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a): that Respondent (1) was a person; (2) who discharged a pollutant; (3) from a point source; (4) into waters of the United States; and (5) without an NPDES permit or other authorization under the CWA. Initial Decision at 21 n.23. While a number of these elements were undisputed, the critical element at issue was whether Respondent had in fact discharged pollutants from his feedlot into waters of the United States. Initial Decision at 3-5. Upon consideration of the evidence presented at the hearing, the Court concluded that EPA had failed to demonstrate this element by a preponderance of the evidence, and accordingly, the Court dismissed the Complaint. Initial Decisions at 25.

The Court's decision to dismiss the Complaint became final on July 23, 2009.[3] Respondent subsequently filed his Application for Attorney Fees and Costs under the Equal Access to Justice Act ("Application"), in which he argues that he is entitled to an award of $66,736.86 on the grounds that EPA's position in the underlying enforcement action – namely, that Respondent had discharged pollutants from his feedlot into waters of the United States – was not "substantially justified."

The regulations promulgated by EPA to govern the submission and consideration of claims under the EAJA, set forth at 40 C.F.R. Part 17, require EPA to file an answer within thirty (30) calendar days after service of an EAJA application. 40 C.F.R. § 17.22(a). In the present proceeding, however, EPA filed a Motion to Toll Time to File Answer and Motion for

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[2] This allegation was designated as "the permit violation" or "Count 2" in the Initial Decision issued by the Court. In the Complaint as originally filed, EPA also alleged in a separate count that Respondent had discharged pollutants, in the form of wastewater from his feedlot, into waters of the United States without an NPDES permit. This allegation was designated as "the discharge violation" or "Count 1" in the Initial Decision. Following the administrative hearing, EPA sought to withdraw Count 1 from the Complaint. By an Order dated December 2, 2008, the Court granted EPA's request with prejudice. Therefore, the Court did not adjudicate Count 1 in the underlying proceeding. In his Response to EPA's Answer to Application for Attorney Fees and Costs Under the Equal Access to Justice Act, Respondent cites EPA's decision to withdraw Count 1 as support for his contention that the position advanced by EPA in the underlying proceeding was not substantially justified. The Court addresses this argument in the Discussion below.

[3] Neither of the parties appealed the Initial Decision, and the Environmental Appeals Board elected not to review it *sua sponte*. Accordingly, the Initial Decision became final forty-five (45) days after service on the parties pursuant to 40 C.F.R. § 22.27(c).

Additional Information on September 4, 2009, in which EPA requested that the Court compel Respondent to submit certain information, as required by the regulations.[4] EPA also requested that the thirty (30) days EPA has to file an answer pursuant to 40 C.F.R. § 17.22(a) be tolled, beginning the date of its Motion, until Respondent provided the foregoing information. In a conference call between the Court and the parties, Respondent informed the Court that it did not object to EPA's requests. Accordingly, by an Order dated September 16, 2009, the Court directed Respondent to provide the information sought by EPA and EPA to file its answer within three weeks of its receipt of that information.

On October 20, 2009, Respondent filed a Response to Complainant's Request for Additional Information ("First Response"), to which he attached most of the information requested by EPA. EPA subsequently filed a Motion to Toll Time to File Answer, Motion to Compel, and Motion to Dismiss, in which EPA notified the Court that Respondent had failed to provide all of the information that EPA had requested and that the Court had directed Respondent to provide in its Order of September 16, 2009. As a consequence, EPA moved that the deadline to file its answer continue to toll and that the Court compel Respondent to provide the remaining information. In the alternative, EPA moved for the Court to dismiss Respondent's claim for failure to file a "complete" application within thirty (30) days of the final disposition of the underlying adversary adjudication, which EPA argued Respondent was required to do pursuant to 5 U.S.C. § 504(a)(2). Respondent submitted a Response to Complainant's Motion to Toll Time to File an Answer, Motion to Compel, and Motion to Dismiss ("Second Response") on October 27, 2009, in which Respondent provided the remaining information sought by EPA and asserted that he had mistakenly omitted the information in his First Response. Respondent also asserted that he did not object to EPA's request that the deadline for its answer continue to toll until EPA received all of the information it had requested in its Motion for Additional Information. However, Respondent opposed EPA's Motion to Dismiss on the grounds that EPA was not prejudiced by Respondent providing the requested information after the thirty (30) day filing deadline.[5]

EPA subsequently filed an Answer to Application for Attorney Fees and Costs under the Equal Access to Justice Act ("Answer") on November 20, 2009. EPA argues, among other things, that it possessed sufficient evidence of a discharge of pollutants from Respondent's

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[4] Specifically, EPA sought 1) legible copies of net worth statements, as required by 40 C.F.R. § 17.12(a), since significant portions of the copies originally furnished by Respondent with his Application were unreadable; 2) the schedules referenced by those statements; 3) information concerning any transfer of assets from, or obligations incurred by, Respondent that reduced Respondent's net worth during the year prior to the date on which the underlying proceeding was initiated, as required by 40 C.F.R. § 17.12(b); and 4) information concerning any money Respondent received from third parties, including but not limited to the Iowa Cattlemen Association, to pay the expenses Respondent incurred in the underlying proceeding, as required by 40 C.F.R. § 17.13(c).

[5] The Court addresses the parties' arguments relating to the Motion to Dismiss in the Discussion below.

feedlot into waters of the United States to have been substantially justified in pursuing the underlying enforcement action. Respondent filed a Response to EPA's Answer to Application for Attorney Fees and Costs Under the Equal Access to Justice Act ("Response") on December 7, 2009, in which Respondent amended the amount requested and asserted that he was seeking an award of $72,379.49. On March 24, 2010, Respondent submitted a Supplemental Application for Attorney Fees and Costs Under the Equal Access to Justice Act, seeking an additional $8,169.50 in attorneys' fees. For the reasons set forth below, the Court holds that, while Respondent satisfied the filing and content requirements for an application under the EAJA, EPA was substantially justified in pursuing the underlying enforcement action against Respondent. Accordingly, the Court recommends that Respondent's Application be denied.

## II. Statutory Background

The EAJA is "a fee-shifting statute that enables private parties who prevail against the government in certain types of contested proceedings to recover attorneys' fees and expenses when the government's position in the proceedings is not 'substantially justified.'" *In re Bricks, Inc.*, 11 E.A.D. 796, 801 (EAB 2004) ("*Bricks*") (citing Equal Access to Justice Act, Pub. L. No. 96-481, tit. II, 94 Stat. 2321, 2325 (1980) (codified as amended at 5 U.S.C. § 504 and 28 U.S.C. § 2412)), *aff'd*, 426 F.3d 918 (7th Cir. 2005). The primary purpose of the Act is to ensure that private parties "will not be deterred from challenging questionable government decisions due to the burden and expense of litigation against the government." *In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 679-80 (EAB 1998), *aff'd*, 112 F.Supp.2d 763 (S.D. Ind. 1999).

As previously noted, the EAJA has been codified under two statutes that govern two distinct types of proceedings: 5 U.S.C. § 504, which covers adversary administrative adjudications, and 28 U.S.C. § 2412, which covers civil court actions. In the administrative context, the EAJA provides, in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). The Act also sets forth the filing and content requirements that an applicant must satisfy in seeking an award of attorneys' fee and other expenses:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under [5 U.S.C. § 504(b)(1)(B)], and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing and appearing in behalf of the party stating the actual time expended

> and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

5 U.S.C. § 504(a)(2). While the second sentence of the foregoing provision is simply an allegation or pleading requirement, the first sentence imposes a proof burden on the applicant.[6] *Scarborough v. Principi*, 541 U.S. 401, 414 (2004).

The administrative agency then "bears the burden of proof on the issue of substantial justification." *Hoosier Spline Broach*, 7 E.A.D. at 680. "[T]he fact that the [agency] did not prevail [in the underlying adjudication] does not create a presumption that its position in that adjudication was not substantially justified." *Bricks*, 11 E.A.D. at 804 (citing *Scarborough v. Principi*, 541 U.S. 401, 415 (2004); H.R. Rep. No. 96-1418, at 12 (1980)). Rather, the Supreme Court has held that the term "substantially justified" means that the government's position was "justified to a degree that could satisfy a reasonable person" or, in other words, had "a reasonable basis in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The EAB adheres to this "well-settled" principle. *See Hoosier Spline Broach*, 7 E.A.D. at 681 (citing *Underwood*, 487 U.S. at 568; *U.S. v. Rubin*, 97 F.3d 373, 375 (9th Cir. 1996); *Roanoke River Basin Ass'n v. Hudson*, 991 F.2d 132, 137 n.4 (4th Cir. 1993); and *Kuhns v. Board of Governors of the Fed. Reserve Sys.*, 930 F.2d 39, 43 (D.C. Cir. 1991)). Accordingly, the presiding officer, in determining whether EPA's position was substantially justified, must evaluate both the legal and factual support for that position. *Bricks*, 11 E.A.D. at 804. The purpose of this analysis is not to recount every detail or relitigate the issues of the underlying proceeding but, rather, to consider whether the position advanced by EPA was reasonable. *See Cummings v. Sullivan*, 950 F.2d 492, 499 (7th Cir. 1991) ("It is not our task to determine whether the ruling of the district court was correct; we must decide only whether the Secretary's position before the court was reasonable or justified in substance."). The test, therefore, "is essentially one of reasonableness." *In the Matter of Reabe Spraying Service, Inc.*, 2 E.A.D. 54, 56 (CJO 1985).

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[6] The Supreme Court reached this conclusion when reviewing the dismissal of an application filed under 28 U.S.C. § 2412, not 5 U.S.C. § 504. However, the Environmental Appeals Board ("EAB") has observed that "[t]he provision setting forth the pleading and proof requirements of the EAJA at 5 U.S.C. § 504(a)(2) is virtually identical with the provision of the EAJA at 28 U.S.C. § 2412(d)(1)(B)." *In the Matter of Biddle Sawyer Corp.*, 4 E.A.D. 912, 926 n.41 (EAB 1993). Moreover, the EAB has found that "cases decided under the 28 U.S.C. § 2412 may provide useful guidance for interpreting the analogous provisions in 5 U.S.C. § 504, as these statutes may be deemed *in pari materia*." *In re Donald Cutler*, 13 E.A.D. ___, 2007 EPA App. LEXIS 1, *12 n.9 (EAB 2007) (citing Black's Law Dictionary (8th ed. 2004) ("It is a canon of construction that statutes that are *in pari materia* [statutes that have a common purpose] may be construed together....")).

## III. Discussion

### A. Respondent satisfied the filing and content requirements for an application under the EAJA

Prior to analyzing the reasonableness of EPA's position, the Court must determine whether Respondent met the filing and content requirements imposed by 5 U.S.C. § 504(a)(2). Respondent was required to: 1) file his Application thirty (30) days of the final disposition of the underlying adversary adjudication; 2) show that he is a prevailing party, that he satisfies the net worth and size thresholds of eligibility set forth at 5 U.S.C. § 504(b)(1)(B),[7] and the amount he seeks to recover, together with an itemized statement reporting the actual time expended and the rate at which fees and other expenses were calculated; and 3) allege that the position of EPA was not substantially justified. The Court finds that Respondent satisfied these obligations. As noted above, Respondent filed his Application on August 20, 2009, which met the thirty (30) day filing deadline imposed by the Act. In his Application, Respondent stated that he was the prevailing party in the underlying proceeding and that, "as the owner of an unincorporated business with a net worth of less than $7,000,000 and fewer than 500 employees, [he] is an eligible party for an award of attorney fees under the EAJA."[8] Application at 1-2. Respondent also set forth the amount he seeks to recover and attached to his Application the itemized statement required by 5 U.S.C. § 504(a)(2). Application at 5. Finally, he alleged that EPA's position was not substantially justified. Application at 2.

EPA does not challenge that Respondent met the filing and content requirements of 5 U.S.C. § 504(a)(2). Answer at 4. Rather, EPA argues for the dismissal of Respondent's Application on the grounds that 1) Respondent failed to satisfy the documentation requirements set forth at 40 C.F.R. Part 17, and, thus, failed to file a "complete" application, by the statutory filing deadline; and 2) Respondent failed to file his Application under the appropriate statutory authority. For the reasons that follow, the Court rejects these arguments and holds that Respondent has satisfied these requirements.

#### 1. "Incomplete" application

As previously noted, EPA submitted a Motion to Dismiss on October 23, 2009, in which EPA asserts that 5 U.S.C. § 504(a)(2) requires an applicant to file a "complete" application within thirty (30) days of the final disposition of the underlying adversary adjudication. EPA essentially contends that, in order to satisfy this obligation, Respondent was required to comply,

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[7] Under 5 U.S.C. § 504(b)(1)(B), a "party" who is an owner of an unincorporated business is eligible to receive an award if, at the time the adversary adjudication was initiated, the net worth of the business did not exceed $7,000,000 and the business did not have more than 500 employees.

[8] The EAB has held that such assertions are sufficient to "show" within the thirty (30) day filing period that an applicant is entitled to an award. *Biddle Sawyer*, 4 E.A.D. at 925.

by the statutory deadline, with the provisions of 40 C.F.R. Part 17 that relate to the documentation an applicant must submit to support its assertions of eligibility and the amount sought.[9] By failing to attach all of this documentation to his Application on August 20, 2009, and failing to attach it again to his First Response of October 20, 2009, Respondent has, according to EPA, failed to file a "complete" application by the statutory filing deadline. EPA further argues that, by allowing Respondent to supplement his Application yet again to satisfy the documentation requirements, the Court would be allowing Respondent to file his Application out of time. Respondent objects in his Second Response of October 27, 2009, citing *Scarborough v. Principi* for the proposition that an applicant is permitted to amend a timely application after the thirty (30) day filing deadline in order to cure a deficiency as long as the amendment does not prejudice the government. Respondent argues that, because EPA is not prejudiced by Respondent supplying the additional information requested by EPA after the statutory filing deadline, Respondent's Application should not be dismissed.

The Court finds that EPA's argument conflicts with applicable case law. First, however, the Court notes that Respondent's reliance on *Scarborough* is misplaced. In that decision, the Supreme Court considered whether an applicant could permissibly amend his application after the statutory filing deadline to cure an initial failure to allege that the government's position in the underlying proceeding was not substantially justified. *Scarborough*, 541 U.S. at 412. As discussed above, an applicant bears the burden of filing an application within thirty (30) days of the final disposition of the underlying adjudication and showing in the application that it is a prevailing party, that it satisfies the net worth and size thresholds of eligibility, and that it has submitted the amount sought. The applicant must also allege that the position of the government was not substantially justified. Finding that the latter requirement imposes no proof burden on the applicant, the Supreme Court applied the relation back doctrine[10] to allow the applicant to amend his application, after the statutory filing deadline had passed, to include the allegation that the position of the government was not substantially justified. 541 U.S. at 418. The Court

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[9] Those provisions provide, in pertinent part, that an applicant "must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated." 40 C.F.R. § 17.12(a). This exhibit must "describe any transfers from, or obligations incurred by, the applicant or any affiliate occurring in the one-year period prior to the date on which the proceeding was initiated that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling." 40 C.F.R. § 17.12(b). If no such transactions occurred during the relevant period, the applicant must so indicate. *Id.* In addition, an applicant must submit with its application full documentation of fees and expenses, including "a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided." 40 C.F.R. § 17.13(c).

[10] Now codified as Rule 15(c) of the Federal Rules of Civil Procedure, the relation back doctrine permits an amendment to a pleading to relate back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Although Rule 15(c) explicitly refers to "pleadings" in federal district courts, the Supreme Court has applied the doctrine in analogous settings. *Scarborough*, 541 U.S. at 417-18.

reasoned that "[t]he amended application 'arose out of the conduct, transaction, or occurrence set forth or attempted to set forth' in the initial application." *Id.* (quoting Fed. R. Civ. P. 15(c)(2) (as amended Dec. 1, 1993)). The Court stated, however, that any showing of prejudice against the government should preclude application of the relation back doctrine. *Id.* at 422.

Respondent cites this decision as support for his contention that he be allowed to submit the documentation required by 40 C.F.R. Part 17 after the statutory filing deadline. However, the documentation at issue relates to the net worth threshold of eligibility and the amount Respondent seeks to recover, which 5 U.S.C. § 504(a)(2) requires Respondent to "show" in his Application, and the Supreme Court explicitly declined to address "whether a fee application may be amended after the 30-day filing period to cure an initial failure to make the 'show[ings]'" required by the EAJA. *Scarborough*, 541 U.S. at 420 n.7. Thus, this Court concludes that *Scarborough* does not encompass Respondent's argument.

Nevertheless, the Court observes that lower federal courts have held that an applicant may amend a timely application after the statutory filing deadline in order to cure deficiencies related to the "showings" required by the EAJA as long as the government is not prejudiced by the amendment. *Singleton v. Apfel*, 231 F.3d 853, 858 (11th Cir. 2000) (holding that, absent prejudice to the government, timely applications may be supplemented after the statutory filing deadline to establish that an applicant's net worth met the statutory threshold); *Bazalo v. West*, 150 F.3d 1380, 1383-84 (Fed. Cir. 1998) (permitting an applicant to amend his application after the statutory filing deadline to cure his initial failure to establish that his net worth did not exceed the statutory threshold); *Dunn v. U.S.*, 775 F.2d 99, 104 (3d Cir. 1985) (allowing an applicant, who had failed to include in the application a specific amount of fees requested, an itemized statement of the actual time expended, or the rates used to calculate the fees, to submit affidavits supplying the missing information after the statutory filing period). The Court also finds *In the Matter of Biddle Sawyer Corporation*, in which the EAB considered "the nature of the showing of eligibility necessary to perfect a claim under the EAJA," to be instructive. 4 E.A.D. at 922. In that matter, Region 2 of EPA ("Region 2") argued that an application, while timely filed, failed to comply with all of the documentation requirements set forth by the regulations[11] and, therefore, failed to "show" that the applicant was eligible for an award by the statutory filing deadline. 4 E.A.D. at 921. As the statutory filing deadline had passed, Region 2 contended that the applicant should be precluded from curing those deficiencies. *Id.* In response, the applicant argued that, prior to the statutory filing deadline, "allegations or statements alone in an application are sufficient to 'show' eligibility for an EAJA award" and that an applicant may "submit supplemental proof of eligibility after the thirty-day filing period." *Id.* at 924.

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[11] Region 2 asserted that the application was defective because it 1) did not state the exact number of employees and describe the type and purpose of the applicant's business, as required by 40 C.F.R. § 17.11(c); 2) did not include "documentation specifically verifying the applicant's net worth...[at] the time the proceeding was initiated," as required by 40 C.F.R. § 17.12(a); and 3) did not contain the applicant's signature or verification under oath or affirmation as to its eligibility, as required by 40 C.F.R. § 17.11(f). *Biddle Sawyer*, 4 E.A.D. at 918.

On review, the EAB proceeded to reject all of arguments advanced by Region 2. *Biddle Sawyer*, 4 E.A.D. at 924. The EAB first noted that the regulations at 40 C.F.R. Part 17 require an applicant to "'include a *statement* that the applicant's net worth as of the time the proceeding was initiated did not exceed [the statutory amount]'" and "'*state* that the applicant did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees.'" *Id.* at 924 (quoting 40 C.F.R. §§ 17.11(b) and (c)). The EAB then observed that, while each corporate applicant must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated, this exhibit "'may be in any form that provides full disclosure of assets and liabilities of the applicant and is sufficient to determine whether the applicant qualifies under the standards'" of 5 U.S.C. 504(b)(1)(B). *Id.* (quoting 40 C.F.R. § 17.12(a)).

The EAB determined that the applicant fulfilled these obligations, despite failing to comply with all of the documentation requirements of 40 C.F.R. Part 17 prior to the statutory filing deadline. *Biddle Sawyer*, 4 E.A.D. at 924. Noting that 30 C.F.R. § 17.12(a) authorizes the presiding officer to "require an applicant to file additional information to determine the applicant's eligibility for an award," the EAB reasoned that, "contrary to [Region 2's] contentions, the Agency's regulations do not require that an applicant fully 'prove' rather than merely assert eligibility within the thirty-day filing deadline....[I]f the EAJA required an applicant to *prove* eligibility within the thirty-day filing period as a jurisdictional requirement, there would be no need for regulatory provisions allowing the submission of supplemental information since any application that did not prove eligibility within the original thirty-day period would be dismissed...." *Id.* at 925.

Finally, the EAB observed that its conclusions were supported by federal case law, which "[has] consistently held that allegations of eligibility in an EAJA application are sufficient to comply with the application requirements of the EAJA." *Biddle Sawyer*, 4 E.A.D. at 926 (citing *Dunn*, 775 F.2d at 104 ("So long as a fee petition is filed within the 30-day period which puts the court, and eventually the government, on notice that the petitioner seeks fees under the [EAJA], the court may consider the petition and may...permit supplementation.") and *D'Amico v. Industrial Union of Marine and Shipbuilding Workers of America*, 630 F. Supp. 919, 922 (D. Md. 1986) ("[I]t would impose unnecessarily burdensome restrictions on recovery to require an applicant to prove, to the government's satisfaction and in its initial application for fees and costs under the EAJA, that the applicant met all of the eligibility requirements."). The EAB distinguished *United States v. Hopkins Dodge Sales, Inc.*, upon which Region 2 had relied in arguing that the application should be rejected for failure to attach documentation proving the assertions of eligibility in the application. *Id.* at 927. The EAB explained:

> In *Hopkins Dodge*, the petition was held insufficient because there was neither an allegation of eligibility nor factual information that would support a "showing" of eligibility. There is no dispute, however, that there must be some showing of eligibility within the EAJA's 30-day filing period to satisfy the EAJA's jurisdictional prerequisites. We do not, however, read *Hopkins Dodge* as requiring an applicant to "prove," as opposed to "show," its eligibility during that

> period....In contrast to the facts in *Hopkins Dodge*, here it is clear that [the applicant] stated that it met the EAJA eligibility criteria in its Original Application. In particular, [the applicant] stated that it had less than 100 employees and a net worth of less than $7 million. In addition, [the applicant] submitted a net worth exhibit to support its eligibility claim.

*Id.* at 928. The EAB concluded that this information was sufficient to "show" by the statutory filing deadline that the applicant met the eligibility requirements set forth in the EAJA. *Id.* at 924.

Consistent with the foregoing decisions, the Court holds that, contrary to EPA's contentions, an applicant may supplement a timely filed application after the statutory filing period in order to comply with the documentation requirements set forth at 40 C.F.R. Part 17, as long as the applicant asserts his eligibility in the application and provides some information to support those assertions. In other words, an applicant is not required to file a "complete" application, as EPA defines that term, by the statutory filing deadline. Here, the Court finds that Respondent properly asserted his eligibility in his Application and provided sufficient information to show that he satisfied the requirements of 5 U.S.C. § 504(a)(2), such that he may supplement his Application after the statutory filing period in order to comply with the provisions of 40 C.F.R. Part 17 at issue. The Court also notes that Respondent's failure to provide all of the documentation in his Application or in his First Response of October 20, 2009, was not prejudicial, as EPA had been put on notice that Respondent was seeking an award under the EAJA when Respondent timely filed his Application and the Court tolled the deadline for EPA's Answer until Respondent provided the documentation. Accordingly, the Court hereby denies EPA's Motion to Dismiss and holds that Respondent met his burden of showing his eligibility for an award under the EAJA.

**2. Inappropriate statutory authority**

In its Answer, EPA also argues for the dismissal of Respondent's Application on the basis that Respondent filed his Application pursuant to 28 U.S.C. § 2412, which governs civil court actions, rather than 5 U.S.C. § 504, which governs the proceeding at hand. Answer at 3. EPA asserts that, "[h]aving failed to bring this action under the appropriate statutory authority, [Respondent] has failed to provide a timely legal basis upon which reimbursement of fees and expenses may be granted." *Id.* Accordingly, EPA argues, the Court lacks the authority to consider Respondent's Application. *Id.* Respondent objects in his Response, observing that the filing and content requirements and EPA's burden of proof are identical under 28 U.S.C. § 2412 and 5 U.S.C. § 504. Response at 6. Respondent contends, therefore, that he satisfied the applicable requirements under 5 U.S.C. § 504, despite admitting the incorrect citation to 28 U.S.C. § 2412 in his Application. *Id.* Respondent further argues that his "inadvertent error" did not prejudice EPA, as it is required to demonstrate that its position was substantially justified under both statutes. *Id.* at 6-7. Finally, Respondent seeks to amend his Application to reflect the correct statutory provisions, again citing *Scarborough* as support for his argument that a timely

filed application may be amended to cure a deficiency as long as the amendment does not prejudice the government. Response at 7.

While this Court finds that *Scarborough* does not support the proposition for which it is cited by Respondent, the Court agrees that Respondent should be allowed to amend his Application to reflect the appropriate statutory authority. First, this Court notes that the Supreme Court explicitly states in *Scarborough* that 28 U.S.C. § 2412(d)(1)(B) relates to "postjudgment proceedings auxiliary to cases already within the court's adjudicatory authority" and concludes, therefore, that "the provision's 30-day deadline for fee applications and its application-content specifications are not properly typed 'jurisdictional.'" 541 U.S. at 414. Accordingly, this Court concludes that it has the authority to consider Respondent's Application in spite of Respondent's error. Moreover, the Court finds that EPA was not prejudiced by the error, as the relevant provisions of the statutes are virtually identical, as noted by Respondent. Therefore, Respondent's Application sufficiently put EPA on notice that Respondent was seeking an award under the EAJA and that EPA bore the burden of demonstrating that its position in the underlying adjudication was substantially justified. As Respondent notes, this is "evidenced by EPA's significant emphasis on justification" in its Answer. For the foregoing reasons, the Court grants Respondent's request to amend his Application and substitute 5 U.S.C. § 504 for 28 U.S.C. § 2412.

### B. EPA was substantially justified in pursuing the underlying enforcement action against Respondent

Having determined that Respondent set forth sufficient information to show his eligibility, pursuant to the requirements of 5 U.S.C. § 504(a)(2), for an award of attorneys' fees and expenses under the EAJA, the Court now turns to the question of whether EPA was substantially justified in bringing the underlying enforcement action. As discussed earlier, EPA must show, in order to demonstrate that its position in the underlying proceeding was substantially justified, that its position had a reasonable basis in law and fact. For the reasons set forth below, the Court holds that EPA has met this burden.[12]

#### 1. Reasonable basis in fact

In order to demonstrate that its position had a reasonable basis in fact, EPA is required "to show that it possessed facts from which it could reasonably believe that the law had been violated." *Reabe Spraying Service*, 2 E.A.D. at 56. In its Answer, EPA identifies both direct and inferential evidence in its possession at various stages of the underlying proceeding that, it contends, led it to form the reasonable belief that Respondent had discharged pollutants from his feedlot into waters of the United States. Answer at 10. EPA further asserts that Respondent mischaracterizes all of the evidence it presented as inferential, Answer at 11, but that, even if EPA had possessed only inferential evidence, it reasonably believed that that evidence would

[12] Because the Court concludes that EPA was substantially justified in pursuing the underlying enforcement action against Respondent, the Court does not reach the parties' arguments relating to special circumstances that make an award unjust nor the amount Respondent seeks to recover.

satisfy the preponderance of the evidence standard, Answer at 17. Finally, EPA argues that "the mere fact that the record contains 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." Answer at 10 (citing *Bricks*, 11 E.A.D. at 805). Thus, EPA argues that it was substantially justified in pursuing the enforcement action against Respondent and that an award is inappropriate. Answer at 23.

Respondent contends in his Application that EPA possessed no direct evidence that a discharge occurred. Application at 2. Respondent later clarifies this position in his Response, acknowledging that EPA presented direct evidence at the hearing, including visual observations and a sample collected with a field test kit by Jeff Prier, an inspector from the Iowa Department of Natural Resources. Response at 3. However, Respondent argues that this evidence "was the equivalent of no evidence," based on the Court's determination that Mr. Prier's testimony and the sample evidence lacked credibility and probative value. *Id.* Respondent contends, moreover, that the inferential evidence presented by EPA was "clearly deficient." Application at 2.

A review of the record supports a finding that EPA possessed a substantial amount of both direct and inferential evidence to support its position that Respondent discharged pollutants from his feedlot into waters of the United States, which EPA presented or attempted to present at the hearing. For example, Mr. Prier testified that he observed a discharge from a corner of Respondent's feedlot that flowed over a terrace, through a cornfield, and into an unnamed tributary. Initial Decision at 7. He testified that the discharge was brown in color and created foam where it entered the tributary. *Id.* In addition to an unaided observation of the alleged discharge, Mr. Prier also photographed the discharge using a camera with a telephoto lens.[13] Initial Decision at 9. Mr. Prier also collected a downstream sample from the unnamed tributary using a field test kit, which revealed ammonia and pH levels that exceeded background levels in the region, a result that Mr. Prier attributed to discharges from Respondent's feedlot. Initial Decision at 8. Other witnesses, EPA inspector Lorenzo Sena and EPA compliance officer Stephen Pollard, testified that they observed and documented distinct flow paths from Respondent's feedlot to the tributary. Initial Decision at 11-14. EPA introduced photographs to support this testimony. Initial Decision at 11. In addition to the foregoing direct evidence, EPA

[13] The Court ruled against EPA's attempt to supplement its prehearing exchange with these photographs, which EPA presented only ten days before the hearing commenced. Initial Decision at 3 n.4. Accordingly, the Court further ordered Mr. Prier not to testify to his observation of a discharge through the telephoto lens. Answer at 19. EPA now attaches the photographs to its Answer, not "as an attempt to reargue the underlying case," but "to demonstrate the facts...EPA relied upon in its belief that [Respondent] had violated the law." Answer at 12. Respondent counters that EPA's attempt to introduce these photographs violates the Court's previous ruling. The Court disagrees and finds that EPA permissibly identifies the evidence upon which it relied at different stages of the underlying proceeding, including the aforementioned photographs, as EPA offers this evidence only for the limited purpose of demonstrating that it was substantially justified. Moreover, as this Discussion reveals, EPA presented much other evidence at the hearing which establishes "substantial justification" for pursuing this action.

presented inferential evidence of a violation. Initial Decision at 15. In particular, EPA presented computer modeling as evidence that discharges of pollutants from Respondent's feedlot entered the unnamed tributary. Initial Decision at 16.

Although EPA possessed a substantial amount of evidence to support its position, the Court determined that this evidence fell short of satisfying EPA's burden of persuasion for various reasons. First, as noted above, the Court ruled against EPA's attempts to introduce some of the evidence at the hearing. In addition, Respondent identified significant defects in the computer modeling while cross-examining EPA's expert witness Sandra Doty. Then, in consideration of the evidence presented at the hearing, the Court found fault in the testimony or credibility of each of EPA's witnesses. The Court also found that EPA acknowledged the weakness of its evidence relating to its allegation that pollutants from Respondent's feedlot reached the unnamed tributary, leading it first to develop the computer modeling and then to withdraw Count 1 of the originally filed Complaint when deficiencies in the modeling were revealed at the hearing. Although the Court found that EPA presented some evidence from which it could infer that a discharge occurred, the aforementioned deficiencies, coupled with the contradictory evidence presented by Respondent, led the Court to conclude that EPA failed, "both through direct evidence and by inference," to establish that pollutants from Respondent's feedlot reached waters of the United States. Initial Decision at 16. In other words, EPA presented evidence to support its position, but the Court held that this evidence was insufficient to overcome the deficiencies identified and the contradictory evidence presented by Respondent in order to satisfy the preponderance of the evidence standard. However, that failure should not be confused with the distinct concept of whether "substantial justification" existed to file the Complaint and pursue the matter.

Accordingly, the fact that EPA did not prevail in the underlying proceeding does not translate into a showing that EPA was not substantially justified in pursuing the action. To the contrary, the Court finds that, while EPA failed to establish by a preponderance of the evidence that Respondent discharged pollutants from his feedlot into waters of the United States, EPA had substantial justification to believe, in light of the evidence in its possession, that a violation had occurred. Case law supports the Court's conclusion. In *Bricks*, the EAB considered whether Region 5 of EPA ("Region 5") was substantially justified in pursuing an enforcement action against the applicant for discharging pollutants into waters of the United States without first obtaining a permit from the United States Army Corps of Engineers. 11 E.A.D. at 797. The EAB determined in the underlying proceeding that Region 5 failed to establish by a preponderance of the evidence that a hydrological connection existed between the wetlands in question and a navigable water, which was a critical element of Region 5's case. *Id.* at 797-98. Notwithstanding this determination, the EAB concluded that Region 5 was substantially justified in pursuing the underlying action. *Id.* at 804. The EAB reasoned that Region 5 "presented a significant amount of evidence pointing to a possible hydrological connection," including the testimony of several witnesses. *Id.* The EAB noted that its decision turned on its findings and conclusions "relating to the probative value of the witnesses' testimony, including doubts surrounding the depth of the witnesses' knowledge of the relevant circumstances[,] as well as gaps, ambiguities, and contradictions in the testimony of the witnesses when considered in the

aggregate." *Id.* at 805. The EAB observed, however, that it could not expect Region 5 "to have predicted that [it] would necessarily favor the testimony of certain witnesses over others, or discount the relevance of certain evidence." *Id.* The EAB further observed that the underlying proceeding was "not a situation where [Region 5] omitted a crucial element of proof from its case; rather, this [was] a situation where proof was in fact presented, but it fell short, in the [EAB's] view, of meeting [Region 5's] burden of persuasion." *Id.* at 804. Under such circumstances, the EAB concluded that it "would be hard pressed to conclude that [Region 5] lacked a reasonable basis to proceed." *Id.*[14]

The Court finds this matter to be analogous to *Bricks*. In the underlying proceeding, EPA possessed evidence of each element of its case. In fact, EPA presented both direct and inferential evidence of the alleged violation, but the Court simply found that evidence to be insufficient to satisfy the preponderance of the evidence standard. As in *Bricks*, the Court finds here that EPA could not have anticipated that Respondent would identify defects in the computer modeling, as those defects became apparent only on cross examination. The purpose of cross examination is to reveal weaknesses in the opposing party's evidence, but the fact that cross examination was so effective in this matter does not necessarily mean that EPA's position was not reasonably based in fact. Similarly, EPA could not have anticipated that the Court would find that its evidence lacked credibility and probative value. Again, such adverse determinations do not necessarily mean that EPA's position was not reasonably based in fact. Moreover, *Bricks* instructs that evidence found to be lacking in credibility or probative value is *not* the equivalent of no evidence, as Respondent contends. Thus, the Court must consider all of the evidence possessed by EPA, in spite of any ultimate deficiencies with it, when analyzing the factual support for EPA's position.

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[14] *Compare In re L&C Services, Inc.*, in which the EAB considered whether Region 7 of EPA ("Region 7") was substantially justified in pursuing an enforcement action against the applicant for alleged violations of asbestos NESHAP regulations. 8 E.A.D. 110, 111 (EAB 1999). The EAB determined that Region 7's position that the observed materials contained asbestos was not reasonably based in fact, as Region 7 had conceded that sampling was the only method of confirming the presence of asbestos, but with respect to four of the counts against the applicant, Region 7 failed to collect any samples. *Id.* at 118. With respect to the remaining counts, Region 7 had taken samples of the observed materials and conducted laboratory analyses confirming the presence of asbestos, but Region 7 failed to provide any probative evidence that the sampled material was friable. *Id.* The EAB indicated that the matter was not one where the record contained contradictory evidence. *Id.* Rather, it was one where Region 7 failed to present "a shred of direct evidence establishing key elements of the offenses with which it charged [the applicant.] Moreover, [Region 7] lacked any compelling circumstantial evidence to fill the gap left by the complete absence of direct evidence." *Id.* at 119. Because the record "was so lacking of evidence that the specific materials observed by the inspector were either asbestos or friable," the EAB held that Region 7's position was not reasonably based in fact. *Id.* at 120. The shortcomings identified in *L&C Services* were not present in the Lowell Vos matter.

The Court notes that Respondent attempts to analogize the underlying proceeding to *L&C Services* and distinguish it from *Bricks*, but the Court finds Respondent's arguments unpersuasive. With respect to *L&C Services*, Respondent argues that, like Region 7 in that matter, EPA in this proceeding "produced no evidence via samples that any runoff containing pollutants from [Respondent's] feedlot had reached a water of the United States." Response at 2. Respondent asserts, moreover, that his expert witness testified "that sampling was the only reliable way to establish whether a discharge of pollutants actually occurred." *Id.* Accordingly, Respondent claims that "EPA did not have any evidence to establish a basic element of its case – that being a discharge of pollutants to a water of the United States." *Id.* Finally, Respondent claims that, while "EPA believes it did present evidence,...that evidence was found to be irrelevant, unreliable, or otherwise without probative value. Such evidence is equivalent to no evidence." *Id.*

As noted, the Court finds that *L&C Services* is distinguishable from the present matter because, while Region 7 conceded in *L&C Services* that sampling was necessary to confirm the presence of asbestos, EPA made no such concessions here. To the contrary, EPA has maintained that sampling evidence is *not* the exclusive means of proving a discharge. Initial Decision at 16. Moreover, at no point during the underlying proceeding did the Court conclude that EPA's lack of sampling data necessarily meant that it lacked any evidence of a discharge. As discussed above, the Court rejects Respondent's contention that unreliable or unpersuasive evidence is the equivalent to no evidence. The EAB held in *Bricks* that the evidence presented by Region 5 was unpersuasive, yet the EAB still concluded that Region 5 possessed a significant amount of evidence that provided a reasonable basis for Region 5's position in that matter. Similarly, although the Court ultimately found that the evidence EPA presented at the hearing was not persuasive, the Court cannot conclude that EPA failed to possess any evidence at all of a discharge.

With respect to *Bricks*, Respondent asserts that EPA relies on that decision to support the proposition "that its inability to prove one element necessary for a finding of a violation does not mean that it was not substantially justified in bringing the action." Response at 2. Respondent argues, however, that EPA ignores that the element it was unable to prove is identical to Count 1, which EPA voluntarily withdrew. *Id.* As already discussed, although the Court believed that EPA withdrew Count 1 due to a perceived weakness in its evidence, this weakness was not revealed until EPA presented the evidence at the hearing. Moreover, Respondent's argument fails to recognize the Court's holding that "EPA's decision to drop Count 1 does not deprive the Agency of the opportunity to establish the violation of Count 2." Initial Decision at 24. Although the Court questioned the reasoning behind EPA's decision to withdraw Count 1, the Court explicitly rejected Respondent's argument that it necessarily prevented EPA from establishing Count 2.[15]

[15] Respondent also contends that "[p]roving a hydrological connection is much different that [sic] proving a discharge of pollutants to a water of the United States...." Response at 3. Respondent fails to explain the basis for this contention or how it creates a different standard in this matter. In both *Bricks* and the underlying proceeding here, EPA failed to satisfy its burden of establishing an element of its case by a preponderance of the evidence, not because it lacked any

In accordance with the foregoing discussion, the Court concludes that EPA's position was reasonably based in fact.

**2. Reasonable basis in law**

The Court now considers whether EPA's position was reasonably based in law. EPA argues that its position was reasonably based in law as "[t]he CWA, its implementing regulations, applicable precedent, and the Presiding Officer's decision in the underlying matter are in agreement that a point source that discharges to a water of the U.S. must apply for an NPDES permit." Answer at 5. EPA points out that Respondent did not dispute in his Application that "EPA lacked statutory support and would thus be unjustified in seeking penalties" if EPA had established by a preponderance of the evidence that an actual discharge had occurred. *Id.*

In point of fact, Respondent does not dispute in his Application that he would have been required to apply for an NPDES permit if an actual discharge had occurred. Instead, Respondent spends considerable time arguing that EPA was not substantially justified because it relied solely on circumstantial evidence, namely computer modeling, to support its claim that Respondent discharged pollutants from his feedlot into waters of the United States. According to Respondent, EPA was required to collect samples or other direct evidence of a discharge in order to be substantially justified in pursuing an action against Respondent. In response, EPA takes note that Respondent failed to cite any case law to support this argument that circumstantial evidence such as modeling is legally insufficient to demonstrate that a discharge of pollutants occurred. Answer at 11. To the contrary, EPA cites *In the Matter of Service Oil, Inc.*, EPA Docket No. CWA-08-2005-0010, 2007 EPA ALJ LEXIS 21 (ALJ, Aug. 3, 2007), as support for its position that circumstantial evidence is an appropriate method of establishing that a discharge has occurred. Answer at 14, 17.

In accordance with its earlier discussion, the Court holds that the parties' arguments with respect to the propriety of relying solely on circumstantial evidence are moot as the Court finds that EPA presented direct evidence (as well as circumstantial evidence) that Respondent discharged pollutants from his feedlot into waters of the United States. As no dispute exists concerning Respondent's duty to apply for a NPDES permit had a discharge occurred, the Court finds that EPA had a reasonable basis in law for pursuing its claims against Respondent.

## IV. Conclusion

Pursuant to the foregoing discussion, the Court holds that, while Respondent met the filing and content requirements of 5 U.S.C. § 504(a)(2), EPA was substantially justified in pursuing the underlying enforcement action. EPA possessed a significant amount of direct and inferential evidence from which it could reasonably believe that Respondent discharged

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evidence, but because the evidence it possessed was deemed unpersuasive. Nevertheless, the fact that EPA did not prevail does not create a presumption that EPA's case lacked a reasonable basis in fact.

pollutants from his feedlot into waters of the United States. The deficiencies in the evidence and the contradictory evidence presented by Respondent led the Court to find only that, for purposes of satisfying the preponderance of the evidence standard, the evidence fell short. However, the preponderance of the evidence standard is distinct from the reasonableness standard at issue here, and the Court finds that the evidence satisfies this latter standard. Thus, the Court concludes that EPA's position in the underlying proceeding was reasonably based in fact. In addition, the Court finds that EPA's position was reasonably based in law, as Respondent does not dispute this issue. For the foregoing reasons, the Court recommends that Respondent's Application be denied.[16]

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: April 2, 2010
Washington, D.C.

[16] In accordance with 40 C.F.R. § 17.26, the Court is issuing a recommended decision on Respondent's Application, rather than an initial decision. However, 40 C.F.R. § 17.27 provides that any review of this decision will be performed in accordance with the procedures for the type of substantive proceeding involved. Therefore, this decision will become a final decision pursuant to 40 C.F.R. § 22.27(c), unless the parties appeal it to the EAB or the EAB elects *sua sponte* to review it in accordance with 40 C.F.R. § 22.30.

In the Matter of Lowell Vos d/b/a Lowell Vos Feedlot
Docket No. CWA-07-2007-0078

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Recommended Decision Denying Application for Attorneys' Fees and Costs Under the Equal Access to Justice Act**, dated April 2, 2010 was sent in the following manner to the addressees listed below.

Knolyn R. Jones
Legal Staff Assistant

Dated: April 2, 2010

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