UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
	)	**Docket No. CWA-10-2000-0188**
DONALD CUTLER,	**)**	
	)	
Respondent	**)**	

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

After issuance of an Initial Decision in this proceeding, and again after the Final Decision and Order were issued, Donald Cutler ("Mr. Cutler" or "Petitioner") submitted a petition for an award of attorney fees and other expenses pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 40 C.F.R. Part 17. Although he was found liable for the violation alleged in the complaint and assessed a penalty, Petitioner contends that he is entitled to reimbursement of his attorney fees and expenses for defending the case because he is a "prevailing party" within the meaning of 5 U.S.C. § 504(a)(1) and (b)(1)(B) in that the penalty assessed by the ALJ was 95% less than that proposed in the complaint, while the penalty assessed by the EAB was 78% less than the penalty proposed. The Complainant in this proceeding, namely, the Director, Office of Ecosystems and Communities, U.S. EPA, Region 10, Seattle, Washington ("EPA" or "Complainant") opposes the Petition.

It is concluded that, while Petitioner is the "prevailing party" as to the issue of ability to pay the proposed penalty, Complainant was "substantially justified" within the meaning of Section 504(a)(1) of the EAJA in claiming at least until the close of the hearing that he had the ability to pay the proposed penalty. No award of attorney's fees and expenses incurred during the appeal phase of the proceeding is made, however, because the EAB's finding that Petitioner was "culpable" in placing fill into wetlands on his property without a permit from the COE is a "special circumstance making an award unjust" within the meaning of EAJA § 504(a)(1). Considering Petitioner's claim under EAJA § 504(a)(4), it is concluded that the proposed penalty may be regarded as both "substantially in excess of the decision of the adjudicative officer" (EAB) and "unreasonable when compared with such decision, under the facts and circumstances of the case." A finding to that effect, however, would not result in an award because of Petitioner's culpability, which, as noted previously, is a special circumstance making an award unjust. Accordingly, it is recommended that his EAJA application be denied.

I. BACKGROUND

The complaint in this proceeding, issued by EPA on August 24, 2000, under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g), charged Donald Cutler with the unlawful discharge of dredged and/or fill material into waters of the United States without a permit from the U.S. Army Corps of Engineers ("COE" or "Corps") in violation of Section 301(a) of the CWA. Specifically, the complaint alleged that Cutler was the owner of property located in Custer County, near Stanley, Idaho, and that from at least 1995 to the present, Cutler and/or persons acting on his behalf discharged dredged and/or fill materials into wetlands near his house without a permit from the COE, covering approximately 0.1 acres. For this alleged violation, Complainant proposed to assess Cutler a penalty of $25,000.

Cutler through counsel answered under date of September 7, 2000, admitting that there were wetlands on portions of his property, but denying that he had discharged dredged and/or fill materials into any of the same, denying that certain areas were properly characterized as wetlands and asserting that, as to other alleged wetland areas, any fill placed was authorized by COE permits. Cutler denied that any penalty was appropriate or authorized, denied receiving any economic benefit from the alleged violation, denied the ability to pay a penalty of $25,000, and requested a hearing.

Hearings in this matter were held on March 20 and 21, 2001, in Boise, Idaho and on October 11, 2001, in Stanley, Idaho, addressing issues of both liability and penalty. In an Initial Decision , issued on December 31, 2002, the ALJ found that Cutler violated the Act by placing fill into wetlands on his property without a permit from the Corps of Engineers pursuant to CWA § 404, and that he was liable for a penalty for the violation. The $25,000 penalty proposed by Complainant was, however, rejected as excessive on the basis that Complainant's assessment of the extent and gravity of the violation was exaggerated, that Cutler had removed unauthorized fill and restored one area in accordance with Complainant's directions, and that the upland/wetland demarcation in a another area of alleged unauthorized fill was uncertain. Moreover, the ALJ found that Cutler produced specific facts demonstrating that he did not have the ability to pay the penalty sought by Complainant. The penalty assessed in the Initial Decision was 5% of the amount claimed or $1,250.

Under date of January 17, 2003, Cutler submitted a "Verified Petition for Attorney Fees and Other Expenses" pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 40 C.F.R. Part 17. Although he was found liable for the alleged violation and assessed a penalty, Cutler claims that he is the "prevailing party" within the meaning of 5 U.S.C. § 504(a)(1) and (4) and (b)(1)(B). Cutler alleges that from the inception of this proceeding, Complainant demanded a $25,000 penalty and was unwilling to accept anything less. He asserts that Complainant's demand was and is unreasonable and has been determined to be so. On the premise that the case would have been settled had the penalty proposed by Complainant been reasonable, Cutler maintains that all work expended by his counsel on this matter was necessitated by Complainant's excessive demand. Cutler contends that Complainant was not "substantially justified" [in insisting on a $25,000 penalty].

Complainant appealed the scope of liability and the penalty assessed by the ALJ to the Environmental Appeals Board ("EAB"). More specifically, Complainant appealed the finding that Cutler did not have the ability to pay the penalty of $25,000 proposed by Complainant, that the upland/wetland demarcation in one area where Cutler placed fill material was uncertain, and the admission in evidence of testimony of Respondent's expert related thereto. Complainant sought an increase in the penalty assessed by the ALJ, on the basis of Cutler's history of violations more than five years prior to the activities alleged in the complaint, his culpability, his ability to pay and the environmental harm resulting from the violation. On Complainant's motion, the ALJ by an Order, dated March 6, 2003, stayed Cutler's EAJA claim pending disposition of the appeal.

In a Final Decision and Order, issued on September 2, 2004, the EAB held that: (1) Cutler lacked the ability to pay the proposed penalty; (2) wetlands violations that occurred more than five years prior to those alleged in the complaint should not have been excluded from consideration; (3) the gravity of the violation is significant because the wetlands are highly sensitive as critical habitat for Chinook salmon, which are federally protected as a threatened species; and (4) Cutler's culpability was significant in that based on numerous prior contacts with regulatory authorities, he knew or should have known that there were federally protected wetlands on his property. The EAB recalculated the penalty based on EPA penalty policies under other statutes, specifically the Toxic Substances Control Act and the Federal Insecticide, Fungicide and Rodenticide Act, which assume that a violator can pay a penalty of four percent of the violator's annual gross receipts averaged over four years. The EAB assessed a penalty of $5,548. *Donald Cutler*, 2004 EPA App. LEXIS 29, CWA Appeal No. 02-01 (EAB, Sept. 2, 2004).

On September 9, 2004, Cutler submitted an "Amended Verified Petition for Attorney's Fees and Other Expenses" ("Petition") which was essentially identical to the original petition, except that Cutler claimed attorney fees and expenses incurred in the appeal stage of the proceeding. Cutler asserts that the total attorney fees for both stages of the proceeding were $25,987.50 at his attorney's hourly rate of $165 per hour, but that the total attorney fees would be $19,687.50 under the statutory rate of $125 an hour set forth in 5 U.S.C. § 504(b)(1)(A). Cutler also claims other expenses in defending against the complaint totaling $1,846.41, which are comprised of expenses for an expert witness, mileage of Cutler's counsel for the trip to the reopened hearing in Stanley, Idaho, expenses for copying, the cost of the transcript, and the cost of video-conferencing his counsel at oral argument before the EAB.

By Order, dated September 9, 2004, the stay of Cutler's EAJA claim was lifted and a due date, of October 12, 2004, was set for Complainant's answer. In its "Answer to Petition for Attorney Fees" ("Answer"), dated October 12, 2004, Complainant contends that it was the "prevailing party" and "substantially justified" in pursuing this case, within the meaning of those terms in the EAJA. EPA argues that the proposed penalty was reasonable under the facts and circumstances of the case and that [in any event] Petitioner willfully violated the CWA, thus precluding an award of attorney fees (Answer at 1).

II. FINDINGS OF FACT

1. At all times relevant to the Complaint, Petitioner, Donald Cutler, and his wife, Sharon Cutler, owned approximately 2.554 acres of property located in Custer County, near Stanley, Idaho (Initial Decision, Finding of Fact 1; Joint Prehearing Stipulations) .

2. Prior to 1990, Mr. and Mrs. Cutler owned a larger parcel of land situated partly in Custer County and partly in Stanley, Idaho. Mr. Cutler used this property as home base for his excavation business. State Highway 21 is situated to the south of the property. A small perennial stream, Meadow Creek, flows in a northerly direction on the east side of the property, which in turn flows into Goat Creek, to the north of the Cutler property, a larger perennial stream that flows east into Valley Creek. Valley Creek flows into the Salmon River, which flows into the Snake River, which flows into the Columbia River, which in turn flows into the Pacific Ocean, approximately 900 miles away. These water bodies and adjacent wetlands on Cutler's property are "waters of the United States" within the meaning of Section 502 of the Act, 33 U.S.C. § 1362, and 40 C.F.R. § 122.2. (Initial Decision, Finding of Fact 5; Tr. 35).

3. In 1990, the Cutlers sold the southern portion of the property fronting on Highway 21, retaining only the 2.554 acres on the northern side along Goat Creek. They decided to construct a new home on the northeast corner of his property, near the area where Mr. Cutler parked his heavy equipment and stored sand, gravel, and other materials used in his excavation business. Initially, he accessed the property by means of a driveway off Highway 21, as he had done for many years. This ended shortly after his sale of the southern parcel, however, when the new owner denied Mr. Cutler permission to drive vehicles and equipment across his property. This left Cutler with no means of access to his remaining property (Tr. at 94, 462).

4. Mr. Gregory Martinez, office leader for the Boise regulatory office of the COE, in response to a report of un-permitted activity at the Cutler site, visited the Cutler property in December 1991. After obtaining permission from Mrs. Cutler, he walked the property and observed that a "new channel" had been excavated for Meadow Creek and that "fill" material had been placed in the east channel to block its flow.[1] He noticed several other small fills had been placed in other graded lower sections of Meadow Creek and that a large steel culvert had been placed in the new channel with dirt fill placed on the west side and partially on the east side. Mr. Martinez again visited the Cutler site in April of 1992, and observed additional "side cast" material adjacent to the new channel in some areas (Initial Decision, Finding of Fact 4; Tr. 31; C's Exhibit 10).

---

[1] The term *fill material* means any "pollutant" which replaces any portion of the "waters of the United States" with dry land or which changes the bottom elevation of a water body for any purpose (40 C.F.R. § 232.3).

5. Mr. Cutler testified that the culvert was being placed "straight across Meadow Creek"[apparently west of where the present bridge is located] in 1992 and then he got stopped by the Corps (Tr. 377-78). Although a 1984 aerial photo (C's Exhibit 1) does not appear to show a channel off of Meadow Creek north of Highway 21, Mr. Cutler denied excavating a "new channel" [in that area], maintaining that he had merely cleaned out an old channel (Tr. 388-89). Under cross-examination, he acknowledged removing some dirt in addition to rubbish [from the channel] (Tr. 451-52).

6. Mr. Martinez clearly qualified as an expert in wetlands determinations having worked on thousands of permits and having made hundreds of such determinations (Tr. 26). Mr. Martinez delineated the areas of the property that were wetlands (Initial Decision, Finding of Fact 6, 7, 10).

7. A Notice of Violation (NOV) was issued to Mr. Cutler by the District Engineer on May 12, 1992. The Notice referred to the unauthorized placement of a 64-inch diameter by 30-foot long culvert and associated fill into Meadow Creek and adjacent wetlands and other miscellaneous fill placed into wetlands. The notice also referred to an on-site meeting with Mr. Martinez on April 24, 1992. Mr. Cutler was ordered to remove the culvert and associated fill material adjacent to and over the culvert and to remove all dredged material side cast into wetlands adjacent to Meadow Creek and within the cross-channels by May 31, 1992. (Initial Decision, Finding of Fact 9).

8. Mr. Cutler completed the restoration work in August of 1992 (Initial Decision, Findings of Fact 9, 12).

9. With the help of a consultant, Mr. Cutler applied for an after-the-fact permit to construct a bridge crossing driveway over Meadow Creek, to access his property, (Tr. 58-59; C's Exhibit 12).

10. In July of 1993, Mr. Cutler was granted an NPDES Section 404 permit by the District Engineer, authorizing the discharge of fill material and concrete into wetlands adjacent to Meadow Creek to construct an access road and bridge on described property said to be located in Stanley, Custer County, Idaho. The work is described as "Discharge approximately 300 cubic yards of fill material (road fill and riprap) and approximately 16 cubic yards of concrete (bridge abutments and center pier) into wetlands adjacent to Meadow Creek to construct an access road and bridge . . . . The project shall be constructed according to the enclosed plans and drawings." (Initial Decision, Findings of Fact 11, 12).

11. Petitioner had placed hay bales in the channel to control sediment, but had removed the bales after completing the bridge and driveway (Initial Decision, Finding of Fact 21; Tr. 378-380).

12. The permit is ambiguous as to whether the placement of hay bales or silt fencing in the channel contemplated by Paragraph 11 of the permit was to be a temporary measure or permanent and it is not clear that Mr. Cutler violated the permit when he removed the bales (Initial Decision, Finding of Fact 21).

13. On September 29, 1993, the Corps issued a second NOV to Petitioner for violating the condition of the 404 permit requiring installation of sediment control devices, as required by Special Condition No 1 [11] and " as directed by Corps personnel." (emphasis added) (Initial Decision, Finding of Fact 20, 21; C's Exhibit 12). The permit was subsequently modified to permit substitution of filter fabric and rock riprap over the "exposed fill face" where erosion could occur (Initial Decision, Findings of Fact 14, 20; Tr. 95, 96, 101). The Notice of Violation was withdrawn (Initial Decision, Findings of Fact 20, 21; Tr.101, 380; C's Exhibit 12).

14. Mr. Flowers, a regulatory project manager for the Corps employed by the Walla Walla District, who has worked on over a thousand CWA § 404 permits and has made hundreds of wetland determinations and delineations (Initial Decision, Finding of Fact 14; Tr. 97), made a visit to the Cutler property in June 1994 and observed what appeared to be "new fill" in wetlands at the Cutler residence (C's Exhibit 4). His memo of the visit describes the new fill as on the upstream (south) side of the bridge abutment and occupying a triangular area approximately 30' to 40' on the wide end by 60' to 80' long. The memo states that Mr. Cutler was asked why he did not get a permit before filling in the area described as "adjacent to his house and the new bridge", and Mr. Cutler replied that he did not need a permit, since the western stream channel had been blocked and the area was now dry. He referred to the area filled as a "mosquito hole." The memo states that, when asked to remove the fill, Mr. Cutler refused, saying he was going to have a lawn there and nobody was going to make him remove the fill. The reference to a lawn indicates that Mr. Cutler was not referring to the triangular area adjacent to the bridge abutment, which is northeast of his house, but to an area immediately southeast of his residence (Initial Decision, Finding of Fact 15).

15. Mr. Flowers described four violations: the first violation as the driveway fill, excavation and side casting of the new channel adjacent to Meadow Creek; the second as not meeting permit conditions for erosion control on the eastern end and to the south of the bridge; the third as filling the triangular area upstream of the bridge abutment, referred to as a "mosquito pond"; and the fourth as filling an area between the Cutler residence and Meadow Creek upstream of the bridge (Initial Decision, Findings of Fact 15, 16; C's Exhibit 10-Flowers; Tr. 124-125).

16. On June 27, 1994, the Corps issued Mr. Cutler a Cease and Desist Order for filling in wetlands in a triangular area next to the western bridge abutment. The Order required him to cease and desist from work in waters of the United States and to remove, down to the original ground surface elevation, all fill that was discharged into the wetland and to dispose of it in an upland area by July 18, 1994. This order was sent to the Cutlers by

certified mail, return receipt requested, but was returned as unclaimed.(Initial Decision, Finding of Fact 17).

17. Mr. Flowers and Mr. Martinez visited the Cutler residence on July 22, 1994, to determine if the fill had been removed (Initial Decision, Finding of Fact 18; Tr.106; C's Exhibit 6). Prior to leaving the area, Mr. Flowers took photographs showing what appears to be reddish soil and gravel fill immediately to the east and north of the Cutler residence, portions of Meadow Creek, riprap fill and surrounding vegetation. (Initial Decision, Finding of Fact 18).

18. The Corps requested the Custer County Sheriff to the serve the Cease and Desist Order on the Cutlers (Initial Decision, Finding of Fact 19; C's Exhibit 7), and the Order was served by the Sheriff on August 8, 1994 (Initial Decision, Finding of Fact 19; Field Investigation Report). The Order required removal of the unauthorized fill material by August 26, 1994. By a letter from the District Engineer, dated September 16, 1994, the Cutlers were reminded of the Cease and Desist Order and informed that an inspection from the road on September 1, 1994, revealed that the required removal of fill material had not yet been accomplished (Initial Decision, Finding of Fact 19; C's Exhibit 8). The Cutlers were informed that, if the material was not removed as required by the Cease and Desist Order, by October 1, 1994, the matter would be referred for legal action. Mr. Flowers inspected the Cutler site on September 7, 1994, and determined that the restoration requirements had been satisfactorily met (Initial Decision, Finding of Fact 19; Field Investigation Report; C's Exhibit 12). The Cutlers were so informed and that no further action would be taken by the Corps in a letter from the District Engineer, dated October 14, 1994 (Initial Decision, Finding of Fact 19; C's Exhibit 8).

19. On April 13, 1995, the District Engineer granted Mr. Cutler's request to modify the CWA Section 404 permit, by the discharge of fill material into approximately 0.009 acres of wetland immediately adjacent to the south side of the west abutment of their driveway bridge (Initial Decision, Finding of Fact 22; Mr. Cutler's Exhibit E). The area authorized to be filled was described by Mr. Flowers as a wetland adjacent to [Mr. Cutler's] home consisting of a low area which had become a pond and held water most of the year (C's Exhibit 12). The modification also authorized the discharge of fill material into 156 linear feet of open trench in wetlands on the west side of Meadow Creek, which is less than half of the size of the area Mr. Cutler had filled and then been ordered to remove. The "new fill" authorized by the permit modification is immediately adjacent to the south side of the west bridge abutment and is a triangular area measuring 19' by 39' (Finding of Fact 22; Tr. 142-143, 146; Mr. Cutler's Exhibits A, E).

20. On November 30, 1999, an employee of the National Oceanic and Atmospheric Administration, National Marine Fisheries Service (NMFS), witnessed the placement of fill material from a nearby stockpile into wetlands adjacent to the existing parking lot on Mr. Cutler's property by use of a dump truck and backhoe. The NMFS employee took photographs of the filling activities (Finding of Fact 23; C's Exhibit 11; Tr. 67-70, 116-

117).

21. On January 7, 2000, Mr. Flowers, accompanied by Ms. Carla Fromm, an EPA environmental scientist, met with the Cutlers at their property in Stanley (Initial Decision, Finding of Fact 25; Tr. 117-18, 176-77; C's Exhibit 12,13). After obtaining Mr. Cutler's permission, they examined the area between the Cutler residence and the west channel, sometimes referred to as the abandoned channel, of Meadow Creek. The area was covered with 30" to 36" of snow and, after removing some snow, they dug through what Mr. Flowers referred to as fresh fill and found wetlands vegetation (Tr. 118). He described the vegetation as "undecomposed" which indicated new fill rather than old fill (see, C's Exhibit 10). Further describing the area, he testified that there was an obvious break in elevation from the flat wetland stream channel area, a step-up and then [another] fairly obvious change in elevation to the level of the Cutler residence (Tr. 118-19). He stated that we went to the edge of that change, starting at the bridge and moving upstream toward the highway, making periodic investigations of the fill, finding different colors of fill [soils] some red, some brownish, some darker, some cobble and some gravel. He testified that the soils indicated hydric, that is, wetland conditions, and that in all cases where he was able to dig through the fill, he found wetland vegetation, essentially sedges, underneath (Initial Decision, Finding of Fact 25).

22. A Conversation Record, dated January 7, 2000, indicates that only one hole was dug through the fill, that Mr. Cutler stated that he intended to have a lawn adjacent to his house and that he had placed fill over an old sewer line, but that he denied placing fill in wetlands. (Initial Decision, Finding of Fact 26; C's Exhibit 13).

23. On February 1, 2000, the Corps issued an NOV, Cease and Desist Order and Request for Information, identifying the alleged violation as discharge of dirt and rock fill material in wetlands adjacent to Meadow Creek, and ordering Mr. Cutler to stop filling wetlands around his residence without a permit (Initial Decision; Finding of Fact 28; C's Exhibit 14).

24. Mr. Cutler did not respond to the NOV, Cease and Desist Order, or Request for Information. (Initial Decision, Finding of Fact 28; Tr. 123-124).

25. A memorandum, dated July 26, 2000, summarizes a visit made to the Cutler site on July 7, 2000, by Ms. Carla Fromm and Greg Martinez (Initial Decision, Finding of Fact 29; C's Exhibit.15). The purpose of the visit was to ascertain the extent of fill placed in the wetlands by Mr. Cutler. After obtaining permission from Mr. Cutler, they took soil samples and measurements of the fill (*Id.*). They discussed their findings with the Cutlers and in doing so discovered what appeared to be "new fill" to the north and east of the Cutler residence, otherwise described as a driveway constructed on fill in wetlands up to the fence on the north property line. Mr. Martinez took two photos during this visit (Initial Decision, Finding of Fact 31; Tr. 181; C's Exhibit 15).

26. EPA issued a Compliance Order to Mr. Cutler under date of August 15, 2000 (Initial Decision, Finding of Fact 32; R's Exhibit E). Among other things, the Compliance Order directed the removal of unauthorized fill from approximately 0.1 acres in accordance with an attached Restoration Plan and the completion of activities in the Restoration Plan in accordance with a schedule in the Compliance Order, requiring the removal of all unauthorized fill in the wetland up to the Cutler residence and along the ridge to the south of the residence. (*Id.*)

27. Pursuant to Section 301(a) of the CWA, any discharge of a pollutant to waters of the United States, except in accordance with the terms of a permit, is unlawful.

28. On August 24, 2000, Complainant issued the complaint which is the genesis of this proceeding, seeking a penalty of $25,000. The complaint alleged that Petitioner unlawfully discharged dredged or fill material into approximately 0.1 acre of federally protected waters of the United States from at least 1995 to the date of the Complaint, without a permit under Section 404 of the CWA (Complaint ¶¶ 6, 15).

29. Petitioner answered the complaint, admitting the presence of wetlands on his property but denying that he had discharged dredged or fill material into wetlands, denying that areas shown on EPA's diagram attached to the Compliance Order were wetlands, and asserting that as to other alleged wetland areas, any fill placed was authorized by permits issued by the Corps. Petitioner denied any penalty was appropriate and denied ability to pay the proposed penalty. He asserted that he was answering the Compliance Order in the same manner as he was answering the complaint, and requested a hearing.

30. Ms. Fromm returned to the Cutler site on October 31, 2000, for the purpose of checking on Mr. Cutler's compliance with the Compliance Order (Initial Decision, Finding of Fact 40; Tr. 191). She took four pages of photos to demonstrate Mr. Cutler's progress in removing fill, annotating the photos in her handwriting (Initial Decision, Finding of Fact 40; Exhibit 16).

31. Mr. Cutler retained the services of American Water Resources Company to perform remedial [restoration] work on the property (Initial Decision, Finding of Fact 43; Joint Prehearing Stipulations). Mr. Bruce Lium of American Water Resources Company, referring to a meeting with the Cutlers at the site on November 7, 2000, prepared notes which he described as a Restoration Plan he prepared for Mr. Cutler on November 7, 2000 (R's Exhibit C). His testimony and the notes recite the removal of fill from the wetlands as discussed with Carla Fromm and Robert Flowers during the last on-site meeting on October 31, 2000, at which time Ms. Fromm took the photos in Exhibit 16 (Initial Decision, Finding of Fact 43). The testimony and evidence presented at the hearing did not clearly indicate the demarcation between uplands and wetlands on the north side of the property. (Initial Decision, Findings of Fact 44-66).

32. An oral evidentiary hearing was held in Boise, Idaho on March 20 and 21, 2001.

33. At the hearing, EPA was granted leave to amend the Complaint to conform to the evidence presented at the hearing as to the area unlawfully filled by Petitioner being 0.3 to 0.5 acre of federally protected wetlands which are adjacent to Meadow and Goat Creeks (Tr. 221-223).

34. Complainant's motion to reopen the hearing, supported by Petitioner, was granted and on October 11, 2001, a reopened hearing, which included a site visit, was held in Stanley, Idaho. Testimony and evidence were presented as to the alleged failure of Petitioner to complete wetland restoration work required by the August 15, 2000 Compliance Order. Additionally, Cutler's consultant, Mr. Bruce Lium of American Water Resources Company, who did not appear at the initial hearing, testified, inter alia, to his understanding that, at a meeting at the site with Carla Fromm (EPA), Robert Flowers (COE), Mr. Cutler and himself on October 31,2000, it was agreed that fill along the Cutler's north property line would be pulled back four-to-six feet from the fence (Initial Decision, note 19 and accompanying text). Mr. Lium was of the belief that Mr. Cutler had removed the fill in that area (Finding of Fact 65). Mr. Lium's notes, which are basically a Restoration Plan prepared for Mr. Cutler, and a copy of the drawing attached to the Compliance Order annotated by Mr. Lium were admitted into evidence.

35. According to a letter from the Regional Administrator, National Oceanic and Atmospheric Administration (NMFS), dated December 23, 1999, Valley Creek is designated as critical habitat for Snake River spring/summer Chinook salmon, and proposed critical habitat for Snake River steelhead, both of which species are listed as threatened under the Endangered Species Act. Additionally, the letter recites that Valley Creek provides important spawning and rearing habitat for Snake River steelhead and spring/summer Chinook salmon and that Snake River spring/summer Chinook salmon and steelhead juveniles rear in Valley Creek adjacent to and downstream of the subject action (C's Exhibit 11).

36. Mr. Cutler testified that, although he had lived in that vicinity since 1973, he had never seen a fish in Meadow Creek. While it is not clear whether he had personally seen salmon in Valley Creek or merely been informed of their existence, he acknowledged that salmon appeared in Valley Creek about every year (Tr. 400-01, 458-59).

37. In an Initial Decision in this matter, dated December 31, 2002, the ALJ concluded that Petitioner was liable for discharging dredged or fill material into waters of the United States without a permit under Section 404 of the CWA. Because of general EPA policy precluding the use of violations occurring more than five years prior to the instant violation for penalty enhancement purposes, violations which were discovered and resolved by removal of unauthorized fill more than five years prior to the issuance of the complaint were held not to be for consideration in determining Mr. Cutler's "prior history of violations." Because the demarcation of upland and wetland was uncertain on the north side of the Cutler property (s*ee*, Initial Decision, Findings of Fact 44-66), it was

held that Complainant had failed to prove that all fill placed in that area by Mr. Cutler was in violation of the Act It was also concluded that Complainant exaggerated the gravity and extent of the violation , and that Mr. Cutler had mitigated his culpability and the seriousness of the violation by removal of unauthorized fill and restoration of wetland areas in accordance with EPA's directions. The ALJ found that Petitioner lacked the ability to pay the proposed penalty and assessed Mr. Cutler a penalty of $1,250 or 5% of the amount proposed by Complainant.

38. At the time of the initial hearing in March 2001, Mr. Cutler was 69 years of age, and had been the sole proprietor of an excavation contracting business for over 30 years, using heavy equipment to move sand, gravel, rock and other materials (Final Decision, slip op. at 6, Initial Decision, Finding of Fact 73; Joint Prehearing Stipulations). Because of weather conditions, the construction season is limited to approximately six months of the year in the Stanley, Idaho area. Mr. Cutler normally plows snow with his equipment and maintains or is employed at a snowmobile repair shop in Stanley in the wintertime. This, however, did not happen during the winter 2000-01, because there was no snow to plow or snowmobiles coming through the area ((Final Decision, slip op. at 6;[2] Initial Decision, Finding of Fact 73; Tr. 415, 462-63).

39. EPA supported its contention that Mr. Cutler had the ability to pay the proposed penalty with the following testimony and evidence. Ms. Beatrice Carpenter, a financial analyst for EPA, authored a report, dated March 2, 2001, concerning Mr. Cutler's ability to pay the $25,000 proposed penalty (C's Exhibit 25). She reviewed Mr. Cutler's tax returns, publicly available property records, deeds, court records, and other information supplied by Mr. Cutler. She considered equity in property owned by Mr. Cutler, namely the residence in Stanley and Custer County, worth approximately $150,000, and $50,000 equity in a property valued at approximately $200,000 in Bellevue, Idaho. She also considered cash flows from Mr. Cutler's business, interest income, stock dividend income, and mortgages and loans obtained by Mr. Cutler. She concluded from this analysis that Mr. Cutler would be able to pay the penalty by current business earnings, obtaining a loan, withdrawal of savings, sale of assets, payment of income over a couple of years, or some combination of these sources (Final Decision at 18; Initial Decision, Finding of Fact 79; C's Exhibit 25). Because Mr. Cutler had borrowed over $250,000 in the past year, which, according to Ms. Carpenter, he could not have done without substantial assurance of repayment, she concluded that he could borrow the money to pay the penalty (Final Decision at 18; Initial Decision, Finding of Fact 80).

40. In his testimony at the hearing, Mr. Cutler provided the following information relevant to his ability to pay the proposed penalty. He testified that he had no savings accounts, and no formal retirement plans or accounts other than Social Security, and the possibility of selling his business (Final Decision at 18; Initial Decision, Finding of Fact 76). The

[2] Citations to EAB's Final Decision in this matter hereinafter refer to the slip opinion.

combined balances of his two checking accounts as of the date of the initial hearing was less than $1,000 (Final Decision at 19; Initial Decision, Finding of Fact 76; Tr. 350-51). He testified that in 1999 he took out a loan to purchase a new loader (backhoe), because the old one rolled off a hillside and was totaled, and he could not operate his business without one (Final Decision at 19; Initial Decision, Finding of Fact 76; Tr. 355, 361). Payments on this loan were $1,864 a month and he owed 67 payments for a total of $124,888. He had also purchased another piece of earth moving equipment (Cat "skid-steer") for which the balance due at the time of the hearing was $6,812 and upon which the payments were $524 a month He had an outstanding mortgage of $150,000 on the Belleview, Idaho property for which the payments were $1,411.92 a month.

41. Mr. Cutler had sold two trailers, the proceeds of which were spent over the winter in making payments on the loans (Final Decision at 19; Initial Decision, Finding of Fact 77) Asked whether there was any other equipment he could sell, he replied in the negative except for possibly one truck which he estimated was worth $15,000. He testified he could not afford to license this truck because the State of Idaho had raised the fees so high. (Final Decision at 19-20; Initial Decision, Finding of Fact 77; Tr. 362-64).

42. As to the $5,700 interest and dividends showing on the 2000 tax return, Mr. Cutler testified that his wife received over $27,000 as her share of the estate of her mother, which was put into the business (Final Decision at 20; Initial Decision, Finding of Fact 81; Tr. 368-369).

43. Mr. Cutler testified that he did not have the money to pay the penalty of $25,000 demanded by Complainant and that he could not pay the penalty and continue in business (Initial Decision, Finding of Fact 79; Tr. 374).

44. The testimony and evidence admitted into the record show that Mr. Cutler's income is modest at best (Final Decision at 25-26; Initial Decision, Finding of Fact 79). The tax returns revealed that Mr. Cutler could not make substantial payments on a penalty and have any money left to operate his business or for personal living expenses, including health insurance (Final Decision at 26; Initial Decision, Finding of Fact 79).

45. On February 28, 2003, Complainant filed an appeal of the Initial Decision, contesting both the scope of liability and the amount of the penalty assessed. Complainant appealed the ALJ's decision to allow Mr. Bruce Lium's testimony as to the upland/wetland demarcation along the Cutler's northern property line adjacent to Goat Creek, contending that he was not qualified to render such opinions. As to the penalty, EPA appealed on four separate grounds: that Mr. Cutler has the ability to pay the $ 25,000 proposed penalty,[3] that the penalty should be increased based on evidence of Mr. Cutler's prior

[3] The precise language in the Notice of Appeal on this issue follows: 2. Whether the Presiding Officer erred in holding that Respondent had no ability to pay the proposed penalty where respondent's annual gross income is $140,000 and he owns two homes with a $200,000 equity and a business worth at least $340,000. The Notice of

wetlands violations more than five years prior to the fill activities which are the subject of this case, that Meadow Creek is critical habitat for endangered salmon, and the magnitude of Mr. Cutler's culpability. Petitioner filed a reply to the appeal on March 24, 2003, countering these various arguments. The EAB subsequently heard oral argument in the case on January 22, 2004.

46. In a Final Order and Decision, issued September 2, 2004, the EAB affirmed the ALJ's determination that EPA failed to establish by a preponderance of the evidence that Mr. Cutler had the ability to pay the proposed penalty of $ 25,000 (Final Decision at 25). The EAB concluded that Complainant had presented a prima facie case of Mr. Cutler's ability to pay [the proposed penalty] through Ms. Carpenter's analysis and testimony, but that Mr. Cutler successfully rebutted that evidence with his own credible testimony which EPA's cross examination failed to diminish (*id.*). In order to buttress its contention that its position was "substantially justified", Complainant alleges that it dropped the request for a penalty of $25,000 from the inception of the appeal and that it did not request that the penalty be increased to any specific figure (Answer at 11, 15, 16). It is noted, however, that to support this contention, Complainant contents itself with the request in its Appellate Brief that the ".. penalty be increased from the $1,250 assessed" and to counsel's statement before the EAB that the Region would accept a penalty less than that proposed in the complaint (id. at 15). In fact, Complainant's Appellate Brief is replete with arguments that the ALJ abused his discretion and committed an error of law in holding that Respondent lacks the ability to pay the proposed penalty, that Respondent is not penurious and is capable of paying the proposed $25,000 penalty, that it is not reasonable for the ALJ to conclude that Respondent cannot afford to pay $25,000 penalty, and that Respondent did not meet his burden of showing that his income and assets were insufficient to pay the proposed penalty (Complainants Appellate Brief at 2, 23, 25, 26). While the EAB observed in passing that [EPA] seeks an increase in the $1,250 penalty (id. at 12) the EAB essentially treated the appeal on this issue as to whether Petitioner had the ability to pay a $25,000 penalty.

47. To calculate the penalty, the EAB referred to Agency policy from two other statutory contexts, specifically, "Guidelines for the Assessment of Civil Penalties Under the Toxic Substances Control Act", 45 Fed. Reg. 59770, 59775 (September 10, 1980), and "Enforcement Response Policy for the Federal Insecticide and Rodenticide Act" (July 2. 1990), providing that in circumstances in which the extent of a violator's inability to pay is not altogether clear, it is appropriate to assume that an entity can, at a minimum, afford to pay a penalty equivalent to four percent of gross receipts averaged over four years. Omitting gross receipts for 1999, the year of the sale of his business to his children as aberrational, the EAB determined that Petitioner's gross receipts for three years, 1997, 1998, and 2000 averaged $138,701 and that four percent of this figure equaled $5,548, which was the penalty assessed for Cutler's wetlands violations. Because the amount of

---

Appeal also stated: "The Region will request that the Presiding Officer's assessment of a $1,250 penalty be reversed."

the penalty was limited by Mr. Cutler's ability to pay, the EAB declined to address EPA's appeal as to the extent of wetlands filled by Mr. Cutler, as that issue could only operate to increase the amount of the penalty.

48. The EAB held that a preponderance of evidence in the record indicates that Meadow, Goat, and Valley Creeks are critical habitat for Snake River spring/summer Chinook salmon, a threatened species, and concluded that the sensitivity of the environment affected by Mr. Cutler's unlawful fill, and therefore the gravity of the violations, is extremely high (Final Decision at 42-43).

49. By an Amended Verified Petition filed on September 9, 2004, Petitioner applied for reimbursement of fees and costs totaling $27,833.91 under the Equal Access to Justice Act, 5 U.S.C. § 504. The Petition alleged, inter alia, that Mr. Cutler was the prevailing party as evidenced by EPA's demand of a proposed penalty of $25,000 and unwillingness to accept anything less. The Petition further alleged that the position of EPA was not substantially justified, as evidenced by the decision assessing a penalty at 22 percent of what EPA proposed. The Petition (at 2) stated that "All of the controversies placed for decision before the Administrative Law Judge were related to the amount of the penalty and the Respondent's ability to pay" and was the "primary issue on appeal."

50. Explaining sums claimed, the Petition asserted that Petitioner's counsel billed at $ 165 an hour, which is reasonable in the State of Idaho for the nature of the work, and that the total attorney fees charged for the case were $25,987.50. The Petition also stated that attorney fees at the statutory rate in 5 U.S.C. § 504(b)(1) of $125 per hour would total $19,687.

51. In addition to attorney fees, Petitioner applied for reimbursement of costs totaling $1,846.41. These costs are comprised of: $453.30 incurred for Petitioner's expert witness, $91.00 for mileage of Petitioner's counsel to the reopened hearing, $18.30 for copies from EPA, $38.76 for other copying, $8870.30 for the transcript, and $357.75 for videoconferencing Petitioner's counsel at the oral argument before the EAB.

52. Complainant filed an Answer to Petitioner's EAJA Application under date of October 12, 2004, asserting that the Petition should be denied because: 1) Petitioner has failed to show that he is a "prevailing party" within the meaning of the EAJA; 2) Petitioner willfully violated the CWA; 3) the proposed penalty was reasonable under the facts and circumstances of the case; and 4) fees and costs claimed are not allowable.

III. CONCLUSIONS

1. Petitioner was the "prevailing party" within the meaning of the Equal Access to Justice Act (5 U.S.C. § 504(a)(1)) as to the issue of his ability to pay the proposed penalty in this administrative proceeding.

2. Although Complainant's position as to Petitioner's ability to pay the proposed penalty was "substantially justified" within the meaning of the Equal Access to Justice Act (5 U.S.C. § 504(a)(1)) through the close of the hearing, it ceased to be so thereafter, i.e., in the appeal phase of the proceeding.

3. Petitioner, however, is not entitled to an award of attorney's fees and expenses incurred in the appeal phase of the proceeding under § 504(a)(1) because, although the EAB stopped short of finding that Petitioner's violation of the CWA was willful, the EAB determined that because he was aware that there were wetlands on his property, he was culpable in proceeding to place fill on his property without a determination from relevant officials or consultation with an expert as to whether the area filled was wetlands. This is a "special circumstance making an award unjust" within the meaning of EAJA § 504(a)(1).

4. While it appears that the proposed penalty is both substantially in excess of the penalty assessed by the Environmental Appeals Board and unreasonable when compared with such decision under the facts and circumstances of the case, within the meaning of EAJA § 504(a)(4), it is unnecessary to reach that conclusion, because, as previously noted, the EAB's finding that Mr. Cutler was culpable in placing the fill at issue is a special circumstance making an award unjust under § 504(a)(4), no less than under § 501(a)(1).

5. It is recommended that Petitioner's claim under the Equal Access to Justice Act be denied.

IV. DISCUSSION

In his request for attorney fees and other expenses, Petitioner cites Sections 504(a)(1) and (a)(4) of the EAJA, which provide:

(a)(1) An agency that conducts an adversary adjudication shall award, to a *prevailing party* other than the United States, fees and other expenses incurred by that party in connection with that proceeding unless the adjudicative officer of the agency finds that the position of the agency was *substantially justified* or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

* * * *

(a)(4) If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, 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, the adjudicative officer shall award to the party the fees

and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

5 U.S.C. §§ 504(a)(1) and (a)(4)(emphasis added).

Petitioner also cites to Section 504(b)(1)(A) and (B), which define "fees and expenses" and "party" in pertinent part as follows:

(1) For the purposes of this section--
(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $ 125 per hour unless 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.);

(B) "party" means a party, as defined in section 551(3) of this title [5 USCS § 551(3)], who is (i) an individual whose net worth did not exceed $ 2,000,000 at the time the adversary adjudication was initiated . . . .

The EPA promulgated implementing regulations, at 40 C.F.R. part 17 subpart A.[4] Section 17.5(b) of that subpart narrows the scope of the term "party" to an "individual with a net worth of not more than $1 million."

Procedural Defect

In its Answer, Complainant argues that the petition for attorney fees is deficient because

[4] Proceedings for the assessment of Class II administrative penalties under Clean Water Act § 309(g) for violations of the CWA are not included in the list of proceedings covered by the EAJA in 40 C.F.R. § 17.3. However, 40 C.F.R. Section 17.3 provides that the rules apply to "adversary adjudications" which "include" the listed proceedings; the term "include" and the context indicates that list is not exclusive. Class II CWA proceedings are clearly made subject to the Administrative Procedure Act by CWA Section 309(g)(2)(B) and are thus "adversary adjudications" within the meaning of the EAJA. *See*, e.g., *Bricks, Inc.*, EAJA App. No. 04-02, 2004 EPA App. LEXIS 52 (EAB, Dec. 21, 2004, aff'd, No. 05-1125, 2005 U.S. App Lexis 22728 (7th Cir., Oct. 21, 2005); *Agronics, Inc.*, EPA Docket No. CWA-06-99-1631, 2004 EPA ALJ LEXIS 16, n. 18 (ALJ, June 3, 2004).

it fails to include a statement of Petitioner's net worth, as required by 40 C.F.R. § 17.11(b). That provision states in pertinent part, "The application shall include a statement that the applicant's net worth as of the time the proceeding was initiated did not exceed $1 million if the applicant is an individual . . . ." 40 C.F.R. § 17.11(b). The regulations state further, "Each applicant except a qualified tax exempt organization or a qualified cooperative 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.

While Petitioner's request for attorney fees is defective for failing to comply with those requirements, such procedural defect, in the circumstances of this case, is not fatal to its request. The record establishes that Petitioner's net worth does not exceed $1 million, and Complainant does not dispute this fact (Initial Decision, Findings of Fact 74-81; Final Decision at 15-18). Thus there is no dispute that Petitioner is eligible as meeting the definition of "party" in the regulation as well as the statute. See, e.g., *Scarborough v. Principi*, 541 U.S. 801 (2004) (failure of petition for attorney's fees and expenses pursuant to Equal Access to Justice Act, 28 U.S.C. § 2412, to allege that position of United States was not "substantially justified", held not to be jurisdictional and thus, amendment to include the missing allegation subsequent to expiration of statutory filing period was proper).

Whether Petitioner is a "prevailing party"

Turning first to Petitioner's claim under Section 504(a)(1), the initial question is whether Petitioner is a "prevailing party" within the meaning of 5 U.S.C. § 504(a)(1) and the regulation, 40 C.F.R. Part 17. "Prevailing party" is not defined in the EAJA applicable to administrative adjudications, or in the regulations at 40 C.F.R. Part 17.[5]

An excerpt from the legislative history of 28 U.S.C. § 2412(d)(1)(A), the provision of EAJA which applies to Federal judicial proceedings but otherwise is virtually identical to Section 504(a)(1), indicates the purpose of this provision:

> By allowing an award of reasonable fees and expenses against the Government when the action is not substantially justified, [the EAJA] provides individuals an effective legal or administrative remedy where none now exists. By allowing a decision to contest Government action to be based on the merits of the case rather than the cost of litigating, [the EAJA] helps assure that administrative decisions reflect informed deliberation. In so doing, fee-shifting becomes an instrument for curbing excessive regulation and the unreasonable exercise of Government authority.

[5] However, the term is defined in the parallel section of the Equal Access to Justice Act applicable to federal judicial proceedings, at 28 U.S.C. § 2412(d)(2)(H), but only in regard to eminent domain proceedings, and therefore offers no instructive guidance here.

H.R. Rep. No. 96-1418, at 12 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4991 ("1980 House Report"); *see also Comm'r v. Jean*, 496 U.S. 154, 163 (1990) (EAJA eliminates for the average person the financial disincentive to challenge unreasonable governmental actions).

In *Texas Teachers Association v. Garland Independent School District*, 489 U.S. 782 (1989), involving a claim for attorneys' fees under the Civil Rights Act (42 U.S.C. § 1988), the Supreme Court held that "if the plaintiff has succeeded on any significant issue in litigation, which achieved some of the benefit the parties sought in bringing suit, the plaintiff has crossed the threshold for an award of some kind [*i.e.*, is a prevailing party]." The Court quoted from *Hewitt v. Helms*, 482 U.S. 755 (1987) that "respect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail" and went on to hold that, as a minimum, to be considered a prevailing party within the meaning of Section 1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.

The reduction of a penalty to an amount much less than that proposed in the complaint does not alone render the respondent or defendant a "prevailing party" under Section 504(a)(1). In *United States v. Modes*, 1994 Ct Intl Trade LEXIS 54, 18 CIT 153 (Ct. Int'l Trade, March 13, 1994), where the court found the defendant liable for fraudulent invoicing but reduced the proposed penalty from over $3 million to $50,000, the court rejected the defendant's claim under the EAJA that it was a "prevailing party" where it had argued that it was the prevailing party as to 99 percent of the amount at issue. This decision ignores the settled rule that it is unnecessary to be successful on all issues in order to be a prevailing party and is explainable only by the magnitude of the fraud involved.

In a forfeiture action in which the government sought $40,000, the value of the vehicle at issue, and the case settled for $1000 plus investigation costs of $4000, the district court's settlement order was held to be a "'judicially sanctioned change in the legal relationship of the parties'" which was "obviously in the government's favor," so the government, and not the owner of the vehicle, was deemed the "prevailing party" under 28 U.S.C. § 2412(d)(1)(A)). *United States v. One 1997 Toyota Land Cruiser*, Civ. No. 99-55661, 2001 U.S. App. LEXIS 13790 (9th Cir. April 26, 2001)(quoting *Buckhannon Board & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598 (2001)) ("prevailing party" under fee shifting provisions of Fair Housing Amendments Act and Americans With Disabilities Act is one who has been awarded some relief by court).

Where more than one claim or allegation of violation is involved, the question of who is the prevailing party may be complex. *Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 677 n. 30 (EAB 1998), *aff'd, sub nom. Hoosier Spline Broach Corp. v. U.S. EPA*, 112 F. Supp. 2d 763 (S.D. Ind. 1999)(question of whether respondent was a "prevailing party" in context of settlement agreement requiring respondent to pay a penalty of $ 3,000, where EPA originally sought more than $825,000, but where three counts were withdrawn, was a complex one and not

beyond dispute).[6]

Indeed, where a complaint contains more than one claim or allegation of violation, a party may be held to be the "prevailing party" as to some claims and recover attorney fees and expenses only on those claims. Thus, under a theory of apportionment, a party which prevailed on some issues may recover a pro rata portion of the fees and expenses. *Community Heating and Plumbing Co. v. Garrett*, 2 F.3d 1143, 1146 (Fed. Cir. 1993). For example, where a complaint to revoke the respondent's pilot's certificate resulted in a judgment of suspension of his certificate for 180 days, upon his request for attorney fees and expenses, the National Transportation Safety Board determined that he was partially successful in his defense of the multiple charges and granted an award of 15 percent of the fees and expenses. *Allen v. National Transportation Safety Board (NTSB)*, 160 F.3d 431, 432 (8th Cir. 1998), affirming *Allen v. Garvey*, NTSB Order EA-4617, 1998 NTSB LEXIS 13 (NTSB, Jan. 9, 1998). Affirming the Board's judgment, the Eighth Circuit stated that "a party who achieves limited success is entitled to recover a reasonable fee commensurate with the results obtained." *Id.* The District of Columbia Circuit has stated that a court is required "to determine if a partial award [i]s appropriate, with respect to each allegation . . . and in light of the knowledge known by the [government] during the various stages of the proceedings." *Alphin v. NTSB*, 839 F.2d 817, 822 (D.C. Cir. 1988)(citations omitted).

In the context of a settlement, where the respondents admitted liability but the penalty was reduced based on one of several factors for assessing the penalty, the respondents were not deemed "prevailing parties." In *Edward Pivirotto*, 3 E.A.D. 96 (CJO 1990), the complaint proposed a penalty of $16,500, and the respondents admitted the alleged violations of the Toxic Substances Control Act and settled the case, agreeing to a penalty of $2,000 and removal of electrical transformers containing polychlorinated biphenyls (PCBs). The respondents claimed that they prevailed on the issue of their ability to pay the penalty, which is a factor required to be considered in assessing a penalty under Section 16(a)(1)(B) of the Toxic Substances Control Act. The Chief Judicial Officer held that the respondents were not "prevailing parties," for merely persuading the EPA to accept a reduced penalty for admitted violations. 3 E.A.D. at 99-100. Recognizing that "a private litigant may prevail in a settlement even if he does not obtain favorable terms on all issues in the litigation," the Chief Judicial Officer noted that principle is not generally applied to a losing defendant who paid a penalty to the government in settlement of its violations of law. 3 E.A.D. at 100.

On the other hand, where the complaint is withdrawn or dismissed on the basis of the penalty factor of "ability to pay," the respondent may be awarded attorney fees and expenses. In *Agronics, Inc.*, 2004 EPA ALJ LEXIS 16, EPA Docket No. CWA-06-99-1631 (ALJ, June 3, 2004), the complaint proposed a penalty of $137,000, and the complaint was withdrawn upon the complainant's motion where the respondent showed he did not have any ability to pay a penalty

[6] Because EPA had not appealed the ALJ's decision that Hoosier Spline was a prevailing party, and the EAB determined that the Agency's position in the underlying litigation was substantially justified, the EAB found it unnecessary to address the prevailing party question.

beyond a *de minimis* amount. The respondent thus secured resolution of a dispute which changed the legal relationship of the parties, as it was no longer a respondent in an administrative penalty proceeding, and was held to be a "prevailing party" within the meaning of the EAJA, by prevailing on the penalty issue "ability to pay," a factor which CWA § 309(g)(3) specifically requires to be considered in determining a penalty and on which complainant, as the proponent of an order under the Administrative Procedure Act, had the burden of production as well as the burden of persuasion.

The question here is whether the reduction of the penalty from $25,000 proposed in the Complaint to $5,548 in a final decision, due to Petitioner having established his inability to pay the proposed penalty, renders Petitioner a "prevailing party" under Section 504(a)(1) of the EAJA. The basis for the CJO's conclusion in *Pivirotto,* that the respondents persuaded the complainant to reduce a penalty in settlement, does not apply here.[7] Petitioner prevailed through litigation on at least one issue, by having successfully rebutted evidence as to his ability to pay the penalty. Therefore, he may be considered a "prevailing party" under Section 504(a)(1) as to that issue. However, Petitioner can only be awarded fees if it is also found that Complainant's position was not "substantially justified."

Whether Complainant's Position was "Substantially Justified"

A prevailing party may be awarded attorney fees and expenses under EAJA unless the federal agency can show that its position was "substantially justified" or that special circumstances make the award unjust. 5 U.S.C. § 504(a)(1). Complainant bears the burden of proof on the issue of substantial justification. *Bricks, Inc.*, EAJA Appeal No. 04-02, 2004 EPA App. LEXIS 52 (EAB, Dec. 21, 2004)(citing 1980 House Report at 11) aff'd, No. 05-1125, 2005 U. S. App Lexis 22728 (7th Cir., Oct. 21, 2005). As stated by the EAB:

> The term "substantial justification" means that the government's position in the adjudication must have a "reasonable basis in both law and fact." *Id.*, citing *Pierce v. Underwood,* 487 U.S. 552, 565 (1988) ("substantial justification" means "justified in substance or in the main," which is no different from having a reasonable basis in law and fact). . . .
>
> Whether an agency's position was substantially justified is "determined on the basis of the administrative record, *as a whole,* which is made in the adversary adjudication for which fees and other expenses are sought." 5 U.S.C. § 504(a)(1)

[7] *Pivirotto* is not applicable for an additional reason, i.e., it is based on the discredited notion as stated in the applicable penalty policy that the respondent has the burden of raising and establishing its inability to pay a proposed penalty. It is now clear that under statutes, such as the CWA, providing that "ability to pay" is one of the factors the Administrator is required to consider in determining a penalty, Complainant , as the proponent of an order under the Administrative Procedure Act, has both the burden of production and the burden of persuasion. See, e.g., *Director, Office of Workers' Compensation Programs, U.S. Department of Labor v. Greenwich Collieries,* 512 U.S. 267 (1994).

> (emphasis added). As the [EAB] has previously stated, it is well-established that this provision requires that the trier of fact to evaluate the government's position *in its entirety*, and may not focus exclusively on the government's position or conduct during discrete stages of the case. . . .
>
> It is possible that in the course of examining the government's position in its entirety, a reviewing body might conclude that an action was initially substantially justified but not thereafter. *See In re Hoosier Spline Broach Corp.*, 7 E.A.D. 665, 686 (EAB 1998). Such a situation may occur, for example, where evidence arises in the course of an evidentiary hearing that virtually eliminates the agency's chief claims. *See, e.g., Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541, 545 (7th Cir. 1992) (substantial justification for bringing worker safety claim lost when NLRB pursued claim after hearing testimony that workers were not contesting unsafe working conditions; EAJA fees awarded from conclusion of hearing onward). . . .
>
> . . . . The substantial justification analysis should contain an evaluation of the factual and legal support for the government's position throughout the entire proceeding. *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004); *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000).

Bricks, Inc., 2004 EPA App. LEXIS 52 * 17-20 and n. 10 (citations omitted).

In the present case, there is no question that Complainant was the prevailing party as to Petitioner's liability, and as to some penalty determination factors. Therefore there is no need to evaluate whether Complainant was substantially justified as to those issues. As to the penalty determination factor of ability to pay, as concluded above, Petitioner was the prevailing party.

As confirmed by the EAB, Complainant had presented a prima facie case of ability to pay the proposed penalty of $25,000 through Ms. Carpenter's analysis and testimony. It was during Respondent's case at the hearing that Mr. Cutler successfully rebutted that evidence with his own credible testimony, which Complainant's cross examination failed to diminish (Findings of Fact 40, 41, 42, 43, 47; Final Decision at 25). Therefore, EPA was substantially justified in pursuing its position on ability to pay the proposed penalty through the end of the hearing.

The question is whether EPA was substantially justified in pursuing that issue after the hearing. If not, then Petitioner may be entitled to an award of attorney fees and expenses incurred in defending that claim commencing from the close of the hearing. *See, Quality C.A.T.V., Inc. v. NLRB, supra*.

According to Complainant, its position as to the penalty during the appeal phase of the proceeding was not to insist on the $25,000 penalty proposed in the Complaint, but merely that the $1,250 penalty assessed by the ALJ should be increased. As noted supra, however, this position is not supported by the Notice of Appeal filed by Complainant, nor by its Appellate

Brief, and the EAB treated the appeal as to 'ability to pay" as turning on Petitioner's ability to pay a $25,000 penalty (Slip Opinion at 14-17). It is concluded that, while Complainant's position that Petitioner had the ability to pay a $25,000 penalty may have been justified at the time the complaint was issued, and at the beginning of the hearing based on the opinions and analysis of its expert, Ms. Beatrice Carpenter, it lost any such substantial justification no later than the conclusion of the hearing because of the testimony of Mr. Cutler, which was not rebutted, and certainly no later than the ALJ's decision. It is clear from the Initial Decision that Complainant was insisting that Mr. Cutler had the ability to pay a $25,000 penalty at that time and, as noted supra, its contention that on appeal, it did not claim a penalty of any specific amount is simply an after- the- fact attempt to bolster the contention that its position was substantially justified throughout the litigation. The citations to its Appellate Brief noted above belie Complainant's contention that it did not on appeal seek a penalty of $25,000 and the EAB treated the appeal as to ability to pay as turning on Petitioner's ability to pay a penalty of $25,000. The EAB, of course, affirmed the ALJ's conclusion that Cutler lacked the ability to pay a $25,000 penalty and in this regard, it is worthy of emphasis that the EAB's assessment of a $5,548 penalty is not based on findings from evidence in the record that Petitioner had the ability to pay that amount, but on an assumption that he had the ability to pay four percent of his gross revenues averaged over four years, which assumption is derived from Agency penalty policies applicable to statutes other than the one under consideration.

From the foregoing, it may well be that Petitioner is entitled to some portion of attorney fees and expenses incurred in the appeal phase of the proceeding. In this regard, it is clear that, contrary to Petitioner's contention, the issues on appeal were not limited to ability to pay and as to these other issues, Petitioner was not the prevailing party. Moreover, on the ability to pay issue on which he did prevail, Petitioner would not be entitled to compensation for all expenses incurred in defending the penalty claim, but only in defending that portion of the penalty sought which was not substantially justified. It is unnecessary to address the question of what portion of attorney's fees and expenses incurred in the appeal phase of the proceeding may be compensable, however, because the record shows that Mr. Cutler, while being well aware that there were wetlands on his property, nevertheless, placed fill thereon without any consultation with COE or EPA personnel or advice from his consultant as to whether the areas filled were wetlands. The EAB, while stopping short of finding that Mr. Cutler's actions in placing the fill were willful, ruled that he was culpable in this activity and it is concluded that this is a special circumstance making an award unjust within the meaning of § 504(a)(1).

Whether Petitioner is entitled to Attorney Fees and Expenses under 504(a)(4)

Assuming *arguendo* that Petitioner is not a prevailing party under Section 504(a)(1), he may be eligible to recover attorney fees and expenses under Section 504(a)(4). The first question to consider under Section 504(a)(4) is whether the "demand by the agency is substantially in excess of the decision of the adjudicative officer." 5 U.S.C. § 504(a)(4). The second question is whether it "is unreasonable when compared with such decision, under the facts and circumstances of the case." *Id.* While the first question may be readily answered in Petitioner's favor, the answer to the second is more problematic.

EPA argues that its written demand was merely that the $1,250 assessed by the ALJ be increased and was thus not substantially in excess of the decision of the adjudicative officer (EAB) thereof or unreasonable .[8] EPA argues further that the penalty proposed in the Complaint was reasonable, as evidenced by the EAB ruling that EPA made a prima facie showing of Mr. Cutler's ability to pay the proposed penalty (Answer at 11; see, Final Decision at 25).

Section 504(a)(4) of EAJA, which pertains to administrative proceedings, is almost identical to 28 U.S.C. § 2412(d)(1)(D), which pertains to federal judicial proceedings.[9] There are very few published court opinions interpreting either provision.

The function of Section 2412(d)(1)(D) is "merely to permit non-prevailing parties to recover fees and expenses where the United States obtained a judgment that was substantially and unreasonably-exceeded by its initial demand." It "only permits recovery of the fees and expenses incurred in defending against the *excessive demand,* not in litigating the entire proceeding." *American Wrecking Corp. v. Secretary of Labor*, 364 F.3d 321, 328 (D.C. Cir. April 20, 2004)(per curiam)(emphasis in original). The D.C. Circuit explained that "To hold otherwise would permit prevailing parties to circumvent the 'substantial justification' requirement of Section 2412(d)(1)(A), a result we do not imagine Congress would have intended." *Id.*

Sections 504(a)(4) and 2412(d)(1)(D) were added to the EAJA in 1996 as part of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, § 232(a).

---

[8] Answer at 10. EPA has not shown that the request on appeal to increase the $1,250 penalty assessed constitutes the "demand" as defined by the EAJA. Section 504(b)(1)(F) of EAJA defines "demand" as "the express demand of the agency which led to the adversary adjudication, but does not include a recitation by the agency of the maximum statutory penalty (i) in the administrative complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount." As the Ninth Circuit has stated, "The EAJA defines demand as a static concept and not one that metamorphoses over the course of settlement negotiations." *One 1997 Toyota Land Cruiser* at *12. Even assuming *arguendo* that the "demand" is not such a static concept where an appeal is concerned, Complainant's argument here is of no avail. Assuming Complainant's assertion that it has not adjusted its demand to any specific dollar figure in its appeal brief is accurate, the penalty proposed in the Complaint is the only "demand" relevant to the case for the purposes of § 504(a)(4). Moreover, Complainant's assertion that it dropped the proposal for a $25,000 penalty after the Initial Decision is refuted by its Appellate Brief and by the Final Decision.

[9] 28 U.S.C. § 2412(d)(1)(D) provides as follows:

> If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

The legislative history of those sections explains as follows:

> the test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case so as to be unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.
> The comparison called for in the Act is always between a "demand" by the government for injunctive and monetary relief taken as a whole and the final outcome of the case in terms of injunctive and monetary relief taken as a whole.
> * * * *
> The Committee intends for it to be applied in such a way that it 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.

Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle C, 104th Congress, 2nd Session, 142 Cong Rec S 3242, S3244 (daily ed. March 29, 1996).

In *One 1997 Toyota Land Cruiser*, 2001 U.S. App. LEXIS 13790 (9th Cir. April 26, 2001), the government in its forfeiture complaint demanded the seized vehicle at issue, which it valued at $40,000. The court considered that disparity between the demand and the final settlement of $1,000 (plus $4,000 for the costs of investigation) as "substantial." The court observed that the government's initial demand was reasonably linked to the value of the target of the forfeiture action. The court noted, however, that at the time the action was filed, the government had no statement that the vehicle had been purchased with illegal drug proceeds, and therefore its valuation of the case at $40,000 was, under the facts and circumstances of the case, not reasonable when compared to the settlement amount. 2001 U.S. App. Lexis 13790 * 15.

In *Wolkow Braker Roofing Co.*, OSHRC Docket Nos. 97-1773 & 98-0245, 2000 OSAHRC LEXIS 94 (ALJ, Aug. 11, 2000), where the government proposed a penalty of $61,100 for nine alleged violations of the Occupational Safety and Health Act, and seven counts were dismissed and one was reduced from the level of "willful" to "serious," the Administrative Law Judge held that the demand was unreasonably in excess of the true value of the case, considering the serious weaknesses apparent in the government's case at the hearing, overly zealous enforcement policy, and "obstinate" refusal to engage in meaningful settlement discussions, thus prolonging the litigation.

In those cases, the final penalty was, respectively, only two and a half percent and seven percent of the initial demand. In the present case, the disparity is far less; the final assessed penalty being 22 percent of the penalty initially demanded. While there may be no bright-line rule or numeric standard upon which to evaluate whether the penalty initially demanded is "substantially in excess" of that ultimately awarded, and Congress has indicated (142 Cong.

Rec. at 3244), that the standard "should not be a simple mathematical comparison", the rule of reason indicates that $25,000 is substantially in excess of $5,548.

The next question is whether the demand by the Agency was unreasonable when compared with the Final Decision under the facts and circumstances of the case. Complainant argues that the proposed penalty was reasonable, given the facts and circumstances known to the Region prior to the hearing (Answer at 10). To support this assertion, Complainant relies heavily on the allegation that it made no particular demand on appeal (Answer at 11). As noted above, however, this allegation is contradicted by its Appellate Brief and the EAB's Final Decision and, in any event, the only relevant demand for the purposes of § 504(a)(4) is the $25,000 penalty sought in the complaint (supra note 9). While the relevant demand is that in the complaint, the reasonableness of Complainant's position must be evaluated on the case as a whole. Pertinent here is the fact that the EAB found it necessary to derive the four percent of gross income averaged over four years rule by which it determined Mr. Cutler's ability to pay from penalty policies applicable to the Toxic Substances Control Act and FIFRA rather than the CWA. The penalty demanded is substantially in excess of the penalty awarded and it may be concluded further that the demand is not a reasonable evaluation of the case compared with the Final Decision.

It is, of course, true that several factors, considered by the ALJ in mitigation of the proposed penalty, were determined not to warrant mitigation of the penalty by the EAB. Specifically, the EAB held that the Petitioner's prior history of violations "reflects a pattern of disregard for the regulatory requirements in this case" (Final Decision at 36). The EAB also held that the wetlands at issue were federally designated critical habitat for Snake River spring/summer Chinook salmon which are listed as threatened or endangered under the Endangered Species Act, and therefore that the sensitivity of the environment at the location of the violation is extremely high (*Id.* at 43). Moreover, the EAB held that Petitioner was culpable in violating the CWA. (*Id*. at 44). However, no specific reductions were made from the proposed penalty (or from the statutory maximum penalty), nor were any dollar values assigned, to account for each of the various penalty factors by either the Administrative Law Judge or the EAB. The EAB determined a penalty based entirely on Petitioner's ability to pay, calculating four percent of Mr. Cutler's gross receipts averaged over four years (*Id.* at 45). As indicated previously, the four- percent rule was derived from penalty policies applicable to statutes other than the CWA. The EAB did not express any opinion as to whether the $25,000 proposed penalty was an appropriate assessment aside from the ability to pay issue.

Assuming, however, that the proposed penalty were unreasonable, the next question is whether "the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust." These exceptions are described in the legislative history of Sections 504(a)(4) and 2412(d)(1)(D) as follows:

> In addition, the bill excludes attorney's fee awards in connection with willful violations, bad faith actions and in special circumstances that would make such an award unjust. These additional factors are intended to provide a "safety valve" to

> ensure that the government is not unduly deterred from advancing its case in good faith. Special circumstances are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees, even in situations where the ultimate award is significantly less than the amount demanded. Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of the fees unjust. The actions covered by "bad faith" include the conduct of the party seeking fees both at the time of the underlying violation, and during the enforcement action. For example, if the party seeking fees attempted to elude government officials, cover up its conduct, or otherwise impede the Government's law enforcement activities, then attorney's fees should not be awarded.

142 Cong. Rec. at S 3244.

There is no indication in the record that Mr. Cutler tried to elude government officials or otherwise impede enforcement activities. In fact, the record is to the contrary as he readily permitted EPA and COE representatives to inspect his property when asked. While there is testimony that he never responded to a Request for Information from EPA (Initial Decision, Finding of Fact 28) and testimony that he did not fully and immediately comply with orders to remove fill and restore wetlands, restoration work in Area 2 [south and east of Cutler residence] was not in issue[10] and, of course, fill to be removed in Area 1, along the north property line was disputed.

While stopping short of finding that Mr. Cutler's violations of the CWA were willful, the EAB found him culpable for placing fill on his property in areas which he knew or should have known might affect wetlands without consultation with the COE or his own consultant. It is concluded that this determination is a special circumstance making an award unjust within the meaning of § 504(a)(1), no less than under § 501(a)(1).

It will be recommended that Donald Cutler's petition for attorney fees and expenses under the EAJA be denied.

[10] At the reopened hearing counsel for Complainant represented that Mr. Cutler's compliance with the Administrative Order in Area 2 was not in issue (Initial Decision at 29, note 26).

V. ORDER

It is recommended that the EAJA application filed by Donald Cutler be denied.[11]

Dated this _____ day of October 2005.

_____

Spencer T. Nissen
Administrative Law Judge

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