UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Bricks, Inc.,	)	**Docket No. CWA-05-2000-0012**
	)	
Respondent	)	

ORDER ON RESPONDENT'S
APPLICATION FOR FEES AND EXPENSES

On December 2, 2003, respondent Bricks, Inc. ("Bricks"), filed an Application for Fees and Expenses ("Application") under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and the United States Environmental Protection Agency's ("EPA") implementing regulations at 40 C.F.R. Part 17. Bricks seeks an award in the amount of $166,088.75 from complainant EPA. The agency opposes any award for fees and expenses. For the reasons set forth below, Bricks' EAJA Application is *granted in part* and respondent is awarded fees and expenses totaling $79,174.15. 40 C.F.R. § 17.26.

I. Background

Bricks filed this Application for Fees and Expenses after prevailing in a Clean Water Act enforcement proceeding brought against it by EPA under 33 U.S.C. § 1319(g). Initially, Bricks was found to have violated Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), for discharging a pollutant (*i.e.*, fill material) into "waters of the United States" without having obtained a permit from the United States Army Corps of Engineers, as required by Section 404(a). 33 U.S.C. § 1344(a). Bricks was assessed a civil penalty of $65,000 for this violation. *Bricks, Inc.*, 2002 EPA ALJ LEXIS 67 at *3 (Oct. 9, 2002).

Bricks appealed this adverse decision to the Environmental Appeals Board ("EAB"). 40 C.F.R. § 22.30. On appeal, the EAB reversed the finding that Bricks had violated the Clean Water Act and it vacated the penalty assessment. *Bricks, Inc.*, 11 E.A.D. ___, CWA Appeal No. 02-09 (Oct. 28, 2003). Bricks' EAJA Application followed.

II. The Equal Access to Justice Act

The Equal Access to Justice Act "was enacted to award private litigants their expenses incurred in defending against unreasonable government actions." *Scafar Contracting, Inc., v. Secretary of Labor*, 325 F.3d 422, 425 (3rd Cir. 2003). "The broad purpose of the statute is to ensure that private litigants will not be deterred from challenging questionable government decisions due to the burden and expense of litigating against the government." *L&C Services, Inc.*, 8 E.A.D. 110, 115 (EAB 1999).

Thus, EAJA sets forth those circumstances under which a prevailing party may recover litigation-related fees and expenses from the Federal government. 5 U.S.C. § 504. Specifically, Section 504(a)(1) provides:

> 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.

5 U.S.C. § 504(a)(1).

In addition, the prevailing party seeking an award of fees and expenses must submit an application with the agency "within thirty days of a final disposition in the adversary adjudication." 5 U.S.C. § 504(a)(2). Awards of fees and expenses are available only to a party whose net worth did not exceed $7,000,000 at the time that the adversary adjudication was initiated. 5 U.S.C. § 504(b)(1)(B).[1] Section 504(b)(1)(B) defines "party" as, among other things, a business association with less than 500 employees. That Bricks meets this criterion is not in dispute.

III. Discussion

A. Threshold Eligibility Matters

The first issue to be resolved is whether Bricks meets EAJA's eligibility requirements. Specifically, Bricks must have filed its Application in a timely manner and exhibited that its net worth did not exceed $7,000,000 when EPA brought this enforcement action. EPA challenges Bricks on both grounds.

1. The Timeliness of Bricks' Application

Bricks filed its Application for Fees and Expenses on December 2, 2003, thirty-five days

[1] The agency's procedural regulations implementing the Equal Access to Justice Act provide for a lower net worth limit of $5,000,000. 40 C.F.R. § 17.11. These procedural regulations apparently are out of date and are not reflective of the applicable statutory net worth provisions set forth in EAJA.

after the EAB issued the agency's Final Order in favor of respondent.[2] Because "[a] party seeking an award of fees and other expenses shall, within thirty days of a final disposition, submit to the agency an application," 5 U.S.C. § 504(a)(2), and because more than thirty days elapsed since the EAB's decision in favor of respondent, EPA argues that Bricks' Application was submitted out of time. *See* 40 C.F.R. § 17.14(a).[3]

Accordingly, EPA submits that "the application must be dismissed for lack of subject matter jurisdiction," a recurring theme in this case. Compl. Ans. at 23. As explained below, this argument is rejected.

EPA's position that the EAB's decision in this case became the Final Order of the agency upon filing, and hence triggered at that time the running of the 30-day EAJA filing period, is not an unreasonable one. Indeed, in *McQuiston v. Marsh*, 707 F.2d 1082 (9th Cir. 1983), the Ninth Circuit similarly interpreted the Equal Access to Justice Act provisions of 28 U.S.C. § 2412(d).[4] There, the court held that the 30-day period for seeking fees and expenses begins running upon the district court's entry of a final judgment. The Ninth Circuit rejected the notion that the 30 days begin to run after at the expiration of the time to appeal, "or within 30 days of the terminating action in the court of last resort." 707 F.2d at 1085 (citation omitted).

Notwithstanding the Ninth Circuit's decision in *McQuiston v. Marsh, supra,* the Seventh Circuit reached a contrary conclusion in *McDonald v. Schweiker,* 726 F.2d 311 (7th Cir. 1983). The case of *McDonald v. Schweiker*, *supra,* also involved the EAJA provisions of

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[2] The date of December 2, 2003, is the date appearing on respondent's certificate of service. The Application was received by the Office of Administrative Law Judges on December 4, 2003.

[3] Section 17.14 of the agency's procedural rules in part provides:

> (b) Final disposition means the later of:
>
> (1) The date on which the Agency decision becomes final, either through disposition by the Environmental Appeals Board of a pending appeal or through an initial decision becoming final due to lack of an appeal or
>
> (2) The date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.

40 C.F.R. § 17.14.

[4] The EAJA provisions of 28 U.S.C. § 2412(d) apply to judicial proceedings, while the EAJA provisions of 5 U.S.C. § 504 apply to administrative proceedings.

28 U.S.C. § 2412(d). The issue before the Court was whether "the plaintiff's application for attorney's fees, filed more than 30 days after the district court's judgment in her favor but within 30 days after dismissal of the government's appeal, which made the district court's judgment final in the sense of no longer contestable through the appellate process, was timely, as the district court held." 726 F.2d at 313 (citation omitted).

In *McDonald v. Schweiker, supra,* the Court held that the 30-day filing period for seeking fees and expenses under 28 U.S.C. § 2412(d) commenced upon the expiration of the appeal period running from the court's final judgment, *i.e.,* upon completion of all appellate proceedings. 726 F.2d at 315. In addition, the Seventh Circuit noted that the Equal Access to Justice Act was soon to expire and that Congress could then resolve the conflict between its reading of Section 2412(d) and that of the Ninth Circuit, as it saw fit. *Id.*

Congress subsequently did resolve this conflict between the courts and it did so in favor of the Seventh Circuit's holding. In 1985, Congress amended the EAJA provisions of Section 2412 to define "final judgment" in part as "a judgment that is final and not appealable." Pub. L. No. 9980, § 2, 99 Stat. 185 (Aug. 5, 1985) (codified at 28 U.S.C. § 2412(d)(2)(G)).

The Ninth Circuit's decision in *McQuiston v. Marsh, supra*, the Seventh Circuit's decision in *McDonald v. Schweiker, supra,* and Congress' 1985 amendment of of 28 U.S.C. § 2412(d)(2)(G), provide a helpful background for interpreting the 30-day filing period for seeking fees and expenses under the EAJA provisions of 5 U.S.C. § 504 in administrative proceedings. This matter was squarely addressed by the D.C. Circuit in *Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002).

In *Adams v. SEC, supra,* Adams was the prevailing party in an administrative enforcement proceeding brought by the Securities and Exchange Commission ("Commission"). Thereafter, Adams filed an EAJA application with the Commission. The Commission denied the application, ruling that it was untimely because it was not filed within 30 days of the Commission's "final disposition," as required by 5 U.S.C. § 504(a)(2). The Commission held that while its EAJA regulations define "final" to mean "final and unappealable," 17 C.F.R. § 201. 44(b), the order was "unappealable" inasmuch as Adams was not aggrieved by the order of dismissal in his favor. Accordingly, in the Commission's view, there was no basis on which to conclude that the 30-day filing period commenced only after the statutory 60-day period for appeal had expired, rather than immediately upon the issuance of the order of dismissal. *See* 287 F.3d at 184.

EPA's argument in the present case, that Bricks' EAJA Application is untimely, is similar to the reasoning of the Commission in *Adams v. SEC, supra.* In that regard, EPA argues that Bricks' 30-day EAJA filing period under 5 U.S.C. § 504 begins to run from the time that the EAB filed its decision in this matter, thus constituting final agency action, and not upon the

expiration of the 30-day appeal period available to an aggrieved respondent.[5] Like Adams, the prevailing party before the Securities and Exchange Commission, Bricks was the prevailing party before the EAB and, therefore, could not appeal.

The D.C. Circuit's reasoning in *Adams v. SEC, supra,* provides strong support for Bricks' argument that its Application for Fees and Expenses was timely filed. In that regard, in discussing what it identified as an issue of "first impression," the Court in that case held that as a threshold matter, the meaning of "final disposition" in 5 U.S.C. § 504(a)(2) is "ambiguous, but Congress intended it to mean final and not appealable."[6]

In *Adams v. SEC, supra,* the D.C. Circuit traced the decisions of the Ninth Circuit in *McQuiston v. Marsh, supra,* and of the Seventh Circuit in *McDonald v. Schweiker, supra,* as well as Congress' 1985 amendment of the Equal Access to Justice Act, codified at 28 U.S.C. § 2412 (d)(2)(G). The D.C. Circuit then stated:

> Unlike § 2412, however, the EAJA provision on agency proceedings is unhelpful even after Congress's 1985 reenactment of EAJA, with amendments, in answering the question whether the 30-day deadline for filing commences with a final and appealable agency order or not until the appeal time has expired or any appeal is completed.

287 F.3d at 187.[7]

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[5] Pursuant to Section 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8), "[a]ny person against whom a civil penalty is assessed" has 30 days in which to appeal to the Federal courts. An appeal must be filed "within the 30-day period beginning on the date the civil penalty order is issued." *Id.*

[6] The D.C. Circuit also noted that "the statutory language and the legislative history are unhelpful on the precise question, and that EAJA precedent addresses only EAJA applications under § 2412 in connection with judicial proceedings." 278 F.3d at 186. Still, the Court found that the conflict among the circuits concerning the time period for filing an EAJA application, and Congress' subsequent amendment of 42 U.S.C. § 2412, provides relevant guidance in resolving the same filing issue under 5 U.S.C. § 504.

[7] The Court did note one possible relevant amendment to Section 504. The amendment reads as follows:

> When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying

The Court in *Adams v. SEC*, *supra*, proceeded to state, "[i]n light of Congress's adoption of its approach, the Seventh Circuit's analysis of when EAJA's 30-day deadline begins to run is highly relevant to understanding the meaning of 'final disposition' in § 504(a)(2)." 287 F.3d at 188.

In addition, the D.C. Circuit noted that the former Administrative Conference of the United States, "to which Congress gave the task of consulting with each agency to ensure adoption of 'uniform procedures for the submission and consideration of applications for an award of fees,' 5 U.S.C. § 504(c)(1), interpreted 'final disposition' to mean 'final and unappealable.'" 287 F.3d at 189, citing *Model Rules for Implementation of the Equal Access to Justice Act*, 51 Fed. Reg. 16,659, 16,662 (May 6, 1986). The Court further noted that "the Administrative Conference was aware that in most administrative proceedings covered by EAJA the government will be unable to appeal its own decision." *Id.* In fact, that is the case here, as the agency cannot appeal the adverse decision rendered by the Environmental Appeals Board.

The Court in *Adams v. SEC*, *supra*, concluded that "§ 504(a)(2) of EAJA is to be interpreted as creating a bright-line rule, discernible by looking at the category of order in question and the applicable law of appealability." 287 F.3d at 183. The Court further concluded, "[w]hen a potential appeal exists under the relevant statute, the time for appeal must lapse, or the appeal be completed, before the 30-day deadline begins to run." *Id.* (citation omitted).

Accordingly, applying the D.C. Circuit's EAJA analysis to this case, Bricks had at the very least until December 8, 2003, in which to file its Application for Fees and Expenses. This is because complainant had 10 days in which to seek the EAB's reconsideration of its final disposition in this matter. 40 C.F.R. § 22.32. In any event, the 30-day appeal period of Section 309(g)(8) of the Clean Water Act, 33 U.S.C. § 1319(g)(8), did not end until November 28, 2003, and thus the EAJA filing period did not begin to run until that time.[8] Either way, Bricks filed its Application on time.

2. Net Worth

The only other disputed threshold matter is the requirement that the EAJA applicant's net worth be less than $7,000,000. 5 U.S.C. § 504(b)(1)(B). To meet the net worth requirement, "[e]ach applicant . . . must submit . . . a detailed exhibit showing its net worth at the time the

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> merits of the case have been finally determined pursuant to the appeal.

5 U.S.C. § 504(a)(2). Because this sentence "lends itself to alternative readings," the Court found it unhelpful. 287 F.3d at 187-188.

[8] The period expired on November 27, 2003, a Federal holiday. 40 C.F.R. § 22.7(a).

proceeding was initiated. . . . The exhibit may be in any form that provides full disclosure of assets and liabilities . . . and is sufficient to determine whether the applicant qualifies" as an EAJA party. 40 C.F.R. § 17.12(a). The applicant bears the burden of proving that it meets this threshold requirement. *Estate of Woll v. United States*, 44 F.3d 464, 470 (7th Cir. 1994).

Bricks has provided sufficient information to show that it meets the net worth requirement. In its Application, Bricks provided its U.S. Income Tax Return for an S Corporation for calendar year 2000. This tax return was verified in an affidavit by Kim Schmitt, the company president. *See* Ex. A. Bricks' tax return reflects a net worth well below the $7,000,000 limit. In addition, in Schedule L, line 6 of respondent's return, concerning "other current assets," there is a reference to Statement 11. Statement 11, also attached to the return, lists, "LAND (SUBDIVISION)," "LAND IMPROVEMENTS (SUBDIVISION)," "LAND - N. AURORA," and "LAND IMPROVEMENTS - AURORA." Thus, contrary to the assertion of EPA (*see* Compl. Ans. at 37-38), respondent has properly listed its real estate assets in showing that it satisfied EAJA's net worth criterion.

B. Whether EPA was "Substantially Justified" in Bringing This Action

To be "substantially justified," the government must have a "reasonable basis both in fact and in law." *Pierce v. Underwood*, 487 U.S. 552, 568 (1988); *see also Frey v. CFTC*, 931 F.2d 1171, 1174 (7th Cir. 1991). The government must be substantially justified during both the underlying administrative action and the litigation itself. *See, e.g., Al-Harbi v. INS*, 284 F.3d 1080, 1084-85 (9th Cir. 2002). The government has the burden of establishing that the facts alleged support the legal theories advanced. *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000). In this matter, complainant was not "substantially justified" in fact. *See L&C Services*, 8 E.A.D. 110, 116 (EAB 1999).

In the administrative complaint, EPA alleged that Bricks, "using bulldozers and/or other various earth moving machinery, discharged approximately 8,000 cubic yards of fill into 1.05 acres of the wetlands." CX 26 (Compl. ¶ 13). The complaint alleged further that these wetlands "are adjacent to an unnamed tributary to Blackberry Creek, which is a tributary to the Fox River, which is an interstate water." *Id.* ¶ 14. The complaint went on to state that these wetlands are "waters of the United States," as defined at 40 C.F.R. ¶¶ 230.3(s) and 232.2, and "navigable waters," as defined in Section 502(7) of the Clean Water Act. 33 U.S.C. § 1362(7). The complaint additionally stated that by discharging fill material from the above-referenced machinery, Bricks discharged a "pollutant" from a "point source." Accordingly, because Bricks had not obtained a permit from the Corps of Engineers authorizing this discharge, pursuant to Section 404(a), 33 U.S.C. § 1344(a), the complaint charged respondent with a violation of Section 301(a) of the Clean Water Act. 33 U.S.C. § 1311(a). *Id.* ¶¶ 16-22.

As noted, following a hearing in this matter, a decision was issued in EPA's favor which sustained the charges set forth in the complaint. *Bricks, Inc.*, 2002 EPA ALJ LEXIS 67 (Oct. 9, 2002). Because Bricks prevailed on appeal to the Environmental Appeals Board, it is to the EAB's findings which we will look to determine whether the government was substantially

justified in bringing this action. *Bricks, Inc.*, 11 E.A.D. __, CWA Appeal No. 02-09 (Oct. 28, 2003).[9]

While holding in favor of Bricks, the EAB stated that it was deciding the case "[u]nder these narrow circumstances," and that it did "not rule out the possibility that a hydrological connection exists between the site and Blackberry Creek or a tributary thereof." Slip op. at 22. EPA cites to this language as proof that it was substantially justified in bringing this action. Compl. Ans. at 33. The EAB also commented, however, that EPA's case "suffers from a lack of clarity" and that the testimony cited in the initial decision as supporting the agency is "contradictory and inconclusive at best." Slip op. at 22. Bricks, in turn, cites to this language as support for the proposition that the agency was not substantially justified. Resp. Rep. at 8-9. As explained below, a review of the EAB's analysis of the evidence in this case supports Bricks' position that the government was not substantially justified in bringing this enforcement action.

In that regard, the EAB found that the testimony of Thomas Kehoe, an employee of ENCAP, did not demonstrate that a ditch on the site was hydrologically connected to the Fox River, as EPA maintained. Slip op. at 14-15. Next, the EAB found unpersuasive the testimony of Randolph Briggs, a Resource Conservationist with the Kane/Du Page Soil Conservation District. Briggs asserted that a surface connection exists between the ditch at the site and Blackberry Creek. The EAB concluded that despite complainant's repeated citation to Briggs' testimony, "[w]e are not persuaded that Mr. Briggs' testimony provides the critical missing link in proof." Slip op. at 15.

The EAB also rejected Briggs' testimony, critical to complainant's case, that an "S" shaped channel existed "south of I-88" which provided a hydrological connection to the Blackberry Creek. The EAB commented that it declined to speculate as to the existence of such a channel. Slip op. at 16. Indeed, in the EAB's view, Briggs' "S" shaped channel testimony was "ambiguous" and that this ambiguity was "consequential." Slip op. at 18.[10] Moreover, the EAB discredited Briggs' testimony as to the conditions south of I-88 because the time frame to which Briggs testified "does not coincide with the time during which Briggs inspected the site or in which the violations purportedly occurred." *Id.*

The EAB likewise found the testimony of EPA Inspector Amy Nerbun, that respondent's wetlands were hydrologically connected to a tributary of Blackberry Creek, "via surface water," to be of "limited value." Slip op. at 18. In that regard, the EAB found that "Nerbun's opinion regarding a hydrological connection between the site and Blackberry Creek or a tributary thereof

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[9] There is no doubt that Bricks is the "prevailing party" in this matter. EPA acknowledges this fact, albeit reluctantly.

[10] Specifically, the EAB stated, "[i[n particular, it is unclear from Mr. Briggs' testimony whether his reference to a continuously flowing channel refers to the newly constructed "S" shaped channel south of I-88, the ditch to the north of Bricks' property, or to something else. *Id.*

was not based on her personal knowledge or evaluation of the area to the south of I-88." Slip op. at 19. Moreover, the EAB noted that Nerbun based her testimony on a "Plan" that was admitted into evidence for limited penalty purposes only and that, in any event, the Plan did not even address the surface water conditions in the key area south of I-88. The EAB also rejected EPA's reliance upon the notations on this Plan, noting that EPA failed to address Bricks' assertion that the notations were unreliable. Slip op. at 20.

Finally, the EAB found that EPA's significant reliance upon the testimony of respondent's hydrology expert, Thomas Slowinski, was misplaced. In that regard, it wholly rejected the agency's view that Slowinski's testimony established the existence of a defined channel south of I-88. The EAB concluded that "the waters are far muddier than the Region implies." Slip op. at 20.

In sum, viewing EPA's case through the findings of the EAB, the agency was not substantially justified in bringing this action against Bricks.

C. Qualifying Fees and Expenses

Next, it is necessary to determine the amount of fees and expenses Bricks is entitled to recover. The award that Bricks seeks, $166,088.75, represents the fees and expenses of the law firm of Gardner, Carton and Douglas ("GC&D"), and environmental consultants SDI Consultants ("SDI"), EnCap, and Kenneth Drost, P.C. ("Drost").

Bricks' attorneys, expert witnesses, paralegals, and consultants billed at hourly rates ranging from $70 to $405. Exs. C-G. Bricks' recovery, however, is limited to the rates set forth in the Equal Access to Justice Act. In that regard, Section 504(b)(1)(A) provides that "[a]ttorney or agent fees shall not be awarded expenses in excess of $125 per hour." 5 U.S.C. 504(b)(1)(A).[11]

Further, no "special factor, such as the limited availability of qualified attorneys or agents for the proceedings involved," 5 U.S.C. § 504(b)(1)(B), exists that entitles Bricks to seek fees based on higher rates. To qualify for an exception to the regulatory cap, an applicant's attorneys must have "some distinctive knowledge or specialized skill . . . as opposed to an extraordinary level of general lawyerly knowledge." *Pierce*, 487 U.S. at 572; *see In re Sealed Case*, 254 F.3d

[11] The agency's procedural rules provide for a lesser amount. Under 40 C.F.R. § 17.7(b)(2), "[a]ttorney or agent fees will not be in excess of $75 per hour." Section 17.7(b)(2) appears to be out of date and, as a result, inconsistent with the hourly rate provisions of the Equal Access to Justice Act. In that regard, the complainant does not specifically argue for application of the $75 an hour rate over the $125 an hour rate appearing in EAJA. EPA's only reference to this question involves Bricks' request for higher fees based upon "special circumstances." In that regard, EPA notes that the requested fees are "well in excess of what the Act and the regulations permit." Compl. Ans. at 34.

233, 237 (D.C. Cir. 2001). Bricks has identified no such special factors in this environmental law case warranting attorneys fees at a rate greater than the statutorily prescribed $125 an hour.

Bricks' argument that such special factors exist in this case is unpersuasive. In that regard, Bricks submits that it "would be hard-pressed to retain counsel in the Chicago metropolitan area with the specific wetlands expertise and knowledge of EPA enforcement proceedings required for this matter" for the $125 per hour rate set forth in EAJA. Resp. Rep. at 12. Assuming this assertion to be true, Bricks nonetheless has failed to show that the complexity of this case is such that a higher rate is required under the "special factor" standard.[12]

In addition, Bricks reports fees and expenses dating back to September 3, 1999. Resp. Rep. at 12-13. Bricks' award, however, is limited to fees and expenses incurred after the commencement of the "adversary adjudication," which took place when EPA filed its complaint on July 21, 2000. 5 U.S.C. § 504(a)(1); *see John Boyle & Co., Inc.*, 2 E.A.D. 893, 896-97 (EAB 1989).

While complainant did issue a Compliance Order against Bricks prior to issuing the complaint,[13] such action did not amount to an "adversary adjudication" because it was not "required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a). *See Friends of the Earth v. Reilly*, 966 F.2d 690, 692 (D.C. Cir. 1992) (held that withdrawal proceeding was not "adversary adjudication" within the meaning of the Equal Access to Justice Act).[14]

A review of the Application's supporting documentation follows. On the basis of this documentation, Bricks is entitled to an award of $79,174.15.

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[12] In seeking a higher fee rate, respondent cites to *United States v. Knote*, 879 F. Supp. 89, 90 (E.D. Mo. 1995). That case, however, does not stand for the proposition that specialized skill in regulatory environmental law is enough, standing alone, to allow for a higher fee award. Rather, the court awarded higher fees in *United States v. Knote* because it found "that in the long-run, considerable time and cost were saved by retaining" the particular counsel. *Id.* at 90. The attorneys had billed at an already discounted rate and had an intimate, eight year-long familiarity with the case. *Id.* at 90-91. Bricks has not shown that the circumstances of this case are similar to those of *United States v. Knote.*

[13] The Compliance Order was issued to respondent on November 30, 1999. The order informed Bricks that it was in violation of the Clean Water Act and outlined the corrective actions necessary to come into compliance. *See Bricks, Inc.*, 11 E.A.D. __, CWA Appeal No. 02-09 (Oct. 28, 2003), slip op. at 7-8.

[14] The Court in *Friends of the Earth v. Reilly, supra,* also noted that "EAJA is 'a partial waiver of sovereign immunity' and 'must be strictly construed in favor of the United States.'" *Id.* at 696, citing *Ardestani*, 112 S.Ct. at 520.

1. Fees and Expenses of GC&D

Bricks seeks $148,077.32 in fees and expenses owed to GC&D. Application at ¶ 33. As shown below, however, Bricks may recover $76,869.79 for such services.

The following table provides the number of hours per month that GC&D's attorneys billed. Ex. C. The table applies the $125 per hour rate and does not include fees predating July 21, 2000, the date on which this enforcement action commenced.

Invoice #	**Attorney(s)**	**Hours**	**Fees ($) (Hours X $125)**
3132275	Deely	0.65	81.25
3134923	Deely, Saielli, Harsch	23.55	2,943.75
3136542	Deely, Saielli, Harsch	36.25	4,531.25
3139939	Deely, Saielli, Harsch, Murawski	29.75	3,718.75
3142803	Deely, Latham, Harsch	16.05	2,006.25
3144379	Deely, Latham, Harsch, Murawski	17.8	2,225.00
3147363	Deely, Latham, Harsch, Murawski	176.25	22,031.25
3149990	Deely, Latham, Murawski	1.75	218.75
3151824	Deely, Latham, Harsch	67.65	8,456.25
3154343	Deely, Latham	25.65	3,206.25
3182615	Deely, Latham	8	1000.00
3194476	Deely, Latham	15	1,875.00
3198452	Deely, Latham	26.05	3,256.25
3200113	Deely, Latham, Harsch	49.25	6,156.25
3203756	Deely, Latham	1.55	193.75
3204804	Deely, Latham	17.25	2,156.25
3214547	Deely, Latham, Harsch	21.50	2,687.50
3216759	Deely, Latham	11.50	1,437.50
	TOTAL– GC&D ATTORNEYS	**545.45**	**$68,181.25**

In addition, Bricks' award also includes fees for work performed by GC&D's paralegals. 40 C.F.R. § 17.7. The following table provides the number of hours per month that GC&D's paralegals billed. Ex. C. The table applies a $62.50 per hour rate and does not include work done prior to July 21, 2000.

Invoice #	**Paralegal/Legal Assistant**[15]	**Hours**	**Fees ($) (Hours X $62.50)**
3132275	Jackson	1.2	75.00
3134923	Johns, Jackson, Boyd	5.7	356.25
3136542	Jackson	1.1	68.75
3139939	Boyd	1	62.50
3142803	Krivis, Jackson	2.7	168.75
3144379	Bird	3.35	209.38
3147363	Yesnick, Krivis, Walker, Jackson	15.5	968.75
3149990	Walker	.5	31.25
3151824	Walker	1.5	93.75
3154343	Aguilar, Walker	1.8	112.50
3200113	Griswold	5	312.50
	TOTAL– GC&D PARALEGALS	**39.35**	**$2,459.38**

Bricks' request also includes $8,655.91 in expenses reported by GC&D. Ex. C. Although complainant does not challenge this particular portion of the Application, one error warrants correction. A portion of SDI's bill erroneously appears twice in the Application. First, two payments to SDI, totaling $2,426.75, appear among GC&D's expenses. Ex. C (invoices of Nov. 13. 2000 & Dec. 8, 2000). Bricks also seeks to recover these fees through Mr. Slowinski's affidavit. Ex. D. Accordingly, Bricks' expenses shall be reduced by $2,426.75, to **$6,229.16.**

2. Fees and Expenses of Thomas Kehoe

[15] Bricks does not distinguish GC&D's attorneys from its non-attorneys. Ex. C. Because Bricks has the burden of providing adequate documentation, 40 C.F.R. § 17.13(b), the paralegal rate will be applied to any person listed in Exhibit C who does not appear as an attorney either as an attorney of record in this matter, on GC&D's website, or in the Martindale Hubbell Index.

Bricks also seeks to recover fees incurred as a result of its expert Thomas Kehoe. Application at ¶ 36-37. Kehoe billed respondent $1,062.50 for "Professional Services" and reported expenses of $5.50. Ex. E. The application, however, overstates the amount due to Bricks.

Kehoe's invoice does not comply with the requirements in 40 C.F.R. § 17.13(b) because it does not state "the actual time expended." *Id.*; Ex. E. What is clear is that Kehoe testified on the morning of January 24, 2001 for no more than four hours. Tr. at 373. Therefore, Bricks' award shall include fees covering four hours of Kehoe's expert testimony, or $96.36. 40 C.F.R. §§ 17.7(b)(1) & 17.13(b)(1). Bricks shall also recover Kehoe's expenses ($5.50). Thus, Bricks is due a recovery of **$101.86** for Kehoe's testimony.

3. Fees and Expenses of SDI

Bricks also seeks to recover $4,405.00 in fees and $75.61 in expenses arising from wetlands consultation services provided by SDI during September, 2000, October 2000, and January, 2001. Application at ¶ 34-35; Ex. D. However, SDI's invoices do not list the "specific services" performed and fail to detail what its employees did while billing the hours reported. 40 C.F.R. § 17.13(b)(1). Such "deficiencies" warrant a 50% reduction of Bricks' recovery of SDI's fees. *Am. Wrecking Corp. v. Sec'y of Labor*, 364 F.3d 321 (D.C. Cir. 2004). Further, Bricks' award cannot include SDI's expenses of $75.61, which consist of car mileage, tolls, and parking fees. Ex. D. "Such costs are not reimbursable as expenses under the EAJA." *Am. Wrecking* at *7 (citing *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 974 (D.C. Cir. 2004)). Thus, Bricks' recovery shall include **$2,202.50**, a 50% reduction of fees due to SDI.

4. Fees and Expenses of Drost and EnCap

Finally, Bricks seeks the fees and expenses of Drost and EnCap. Application at ¶ 38-42; Exs. F & G. As stated, however, Bricks' award cannot include fees and expenses generated prior to the commencement of the adversary adjudication.[16]

[16] For the same reason, Bricks will also be unable to recover Manhard's fees and expenses. Application at ¶ 43-44; Ex. H.

IV. Order

Pursuant to 5 U.S.C. § 504 and 40 C.F.R. Part 17, Bricks is awarded fees and expenses totaling $79,174.15.

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Carl C. Charneski
Administrative Law Judge

Issued: July 16, 2004
Washington, D.C.