UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Adamas Construction and Development Services,	)	
PLLC and Nathan Pierce,	)	Docket No. CWA-07-2019-0262
	)	
Respondents.	)	

ORDER ON COMPLAINANT'S MOTION TO SUPPLEMENT ITS PREHEARING EXCHANGE AND RESPONDENTS' MOTIONS FOR DEFAULT AND ATTORNEYS' FEES

The Director of the Enforcement and Compliance Assurance Division at the United States Environmental Protection Agency ("EPA" or "Agency"), Region 7 ("Complainant"), initiated this proceeding on September 6, 2019, by filing a Complaint and Notice of Opportunity for Hearing ("Complaint" or "Compl.") against Adamas Construction and Development Services, PLLC, and Nathan Pierce ("Respondent Adamas" and "Respondent Pierce," respectively, or "Respondents," collectively), pursuant to Section 309(g) of the Federal Water Pollution Control Act, commonly referred to as the Clean Water Act ("Act" or "CWA"), 33 U.S.C. § 1319(g). Complainant alleged in the Complaint that 1) Respondents failed to develop and maintain records required by 40 C.F.R. § 503.17, in violation of Section 405 of the CWA, 33 U.S.C. § 1345, and the implementing regulations at 40 C.F.R. part 503, and 2) Respondents did not provide complete and timely responses to information requests sent by EPA on September 25, 2018, and June 11, 2019, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318, in violation of that provision. On October 16, 2019, Respondents filed an Answer and Request for Hearing ("Answer") denying the charged violations and requesting a hearing on the matter.[1] Answer at 1.

Pursuant to the Prehearing Order issued on October 18, 2019, and subsequent orders related to filing deadlines, the parties engaged in a prehearing exchange of information process. Specifically, Complainant filed its Initial Prehearing Exchange ("Complainant's Initial PHE") on November 26, 2019; Respondent Pierce filed an Initial Prehearing Exchange ("Respondent's

[1] The body of the Answer is unclear as to whether it was filed on behalf of both Respondents. For example, it begins as follows: "Comes now the Respondent Adamas Construction & Development Services, PLLC, ('Adamas'), by and through their attorney, Chris J Gallus, for its answer to the Complaint against the Respondent, by the United States Environmental Protection Agency Region 7 . . . ." Answer at 1. The Answer was signed by both "Respondent Nathan Pierce for Adamas" and Chris J. Gallus, who identified himself in the signature block as "Attorneys for the Plaintiff." *Id.* at 9. In an email to a staff member for this Tribunal, Mr. Gallus affirmed his representation of both Respondents. Respondent Pierce later identified the Answer as having been jointly filed by both Respondents. *See* Respondent's Initial Prehearing Exchange (Jan. 27, 2020), at 4, 8, 9.

PHE") on January 24, 2020[2]; and Complainant filed its Rebuttal Prehearing Exchange ("Complainant's Rebuttal PHE") on April 3, 2020.[3]

While the prehearing exchange process was underway, Complainant was also granted leave to amend the Complaint. Order on Complainant's Motion for Leave to Amend the Complaint and on the Parties' Motions for Extensions of Time for Prehearing Exchanges (Jan. 2, 2020), at 3. Deemed to have been filed on January 2, 2020, the Amended Complaint and Notice of Opportunity for Hearing ("Amended Complaint" or "Amended Compl.") contains several new legal and factual allegations but leaves the charged violations unchanged. Respondents did not file an answer to the Amended Complaint.

On May 1, 2020, Complainant filed a Motion for Accelerated Decision as to Liability ("AD Motion"), accompanied by a Memorandum and Points of Authority in Support of Complainant's Motion for Accelerated Decision as to Liability. Therein, Complainant seeks entry of an accelerated decision as to Respondents' liability for the alleged violations. Respondents subsequently filed a Response to Complainant's Motion for Accelerated Decision on Liability and Memorandum of Law ("AD Response"), in which Respondents not only oppose Complainant's AD Motion but also appear to request dismissal and additional discovery. Complainant filed its Reply to Response to Motion for Accelerated Decision as to Liability on June 8, 2020.

Thereafter, on October 26, 2020, Complainant filed a Motion for Leave to Supplement Complainant's Prehearing Exchange ("Motion to Supplement"). On November 2, 2020, Respondents filed a document consisting of a response in opposition to Complainant's Motion to Supplement ("Supplement Response"), as well as motions described by Respondents as a "Crossmotion for Default and to Dismiss" ("Motion for Default") and a "Motion for Attorney Fees and Costs" ("Motion for Attorneys' Fees"). Complainant filed a document consisting of a reply related to its Motion to Supplement ("Supplement Reply") and response to Respondents' Motions for Default and for Attorneys' Fees ("Default Response") on November 10, 2020. Respondents then filed their reply related to their Motions for Default and for Attorneys' Fees ("Default Reply") on November 18, 2020.[4]

Of the motions currently pending before the Tribunal in this proceeding, I am first considering Complainant's Motion to Supplement, as Complainant asserts that the proposed exhibit it seeks to add to its prehearing exchange is a document that supports its AD Motion,

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[2] This document is entitled "Respondent's Initial Prehearing Exchange" and begins as follows, "COMES NOW, the ("Respondent") NATHAN PIERCE, by and through his attorney, Chris J. Gallus, . . . submits this Initial Prehearing Exchange." Respondent's PHE at 1. Unlike the Answer, it was signed by Mr. Gallus alone. *Id.* at 17.

[3] As part of the prehearing exchange of information process, the parties identified the exhibits they intend to introduce into evidence at a hearing in this matter and provided copies to this Tribunal and each other. The exhibits proposed by Complainant will be cited herein as "CX [proposed exhibit number] at [exhibit page number]." The exhibits proposed by Respondent Pierce will be cited herein as "RX [proposed exhibit number] at [exhibit page number]."

[4] The Default Reply is signed by Respondent Pierce, and in the body of the document, it indicates that he is now appearing pro se, Default Reply at 1, 6, "with limited scope representation from [Respondents'] attorney of record," *id.* at 6.

Motion to Supplement ¶ 5, and Respondents' related Motions for Default and Attorneys' Fees. For the reasons set forth below, Complainant's Motion to Supplement is granted and Respondents' Motions for Default and Attorneys' Fees are denied. An order ruling on Complainant's AD Motion and the motions embedded in the body of Respondents' AD Response is forthcoming.

I. PARTIES' ARGUMENTS

A. Complainant's Motion to Supplement

In its Motion to Supplement, Complainant requests leave to supplement its prehearing exchange with a copy of Tom Robinson's response to an information request sent to him pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318. Motion to Supplement ¶ 3. Complainant identified Mr. Robinson as a potential fact witness in its Initial Prehearing Exchange, Complainant's Initial PHE at 3-4, and as explained in its Motion to Supplement, Motion to Supplement ¶ 3, and shown in its Initial and Rebuttal Prehearing Exchanges, Complainant's Initial PHE at 6; Complainant's Rebuttal PHE at 3, Complainant included a placeholder for Mr. Robinson's response in the list of proposed exhibits contained in its prehearing exchange, identifying any such response as CX 41. Complainant explained further in its Rebuttal Prehearing Exchange, "To date, Complainant has not received a response from Mr. Robinson but continues to pursue a response. If such a response is received, Complainant reserves its right to file another Supplemental Prehearing Exchange in accordance with the Court's October 18, 2019, Order and 40 C.F.R. § 22.19." Complainant's Rebuttal PHE at 3, n.2.

In its Motion to Supplement, Complainant explains the circumstances of its receipt of Mr. Robinson's response, asserting that "EPA received Mr. Robinson's response in late February 2020 but due to circumstances related to the [COVID-19] pandemic, including the continued closure of Complainant's offices since mid-March 2020, Complainant did not become aware of its receipt of the response until early October 2020." Motion to Supplement ¶ 4. Pointing to 40 C.F.R. § 22.19(f) as the appropriate standard for adjudicating its Motion to Supplement, Complainant urges that it has met the conditions of that rule insofar as it timely filed the Motion to Supplement after discovering EPA's receipt of the response. *Id.* ¶¶ 6, 8. Complainant also notes that this Tribunal's Prehearing Order requires parties to seek leave to supplement their prehearing exchanges only when supplementation is sought within 60 days of a scheduled hearing and that a hearing date has not yet been set. *Id.* ¶ 9. Given that a hearing has not yet been scheduled, Complainant contends, the supplementation of its prehearing exchange with Mr. Robinson's response will not unduly burden or prejudice Respondents. *Id.* ¶¶ 4, 12. Finally, Complainant argues that Mr. Robinson's response supports its AD Motion as Mr. Robinson states in the response that Respondent Pierce placed biosolids on his property, thereby demonstrating that "Respondents were persons who 'applied sewages sludge' pursuant to 40 C.F.R. § 503.10(a)," and that Respondents did not provide him with any information about the biosolids, thereby demonstrating that "Respondents failed to keep the records required under 40 C.F.R. § 503.17." *Id.* ¶ 5.

B. Respondents' Supplement Response, Motion for Default, and Motion for Attorneys' Fees

Respondents counter that Complainant acted "in bad faith, as a delay tactic and to unduly prejudice" Respondents, by failing to promptly supplement its prehearing exchange, in contravention of 40 C.F.R. § 22.19(f). Supplement Response at 2. For support, Respondents reference the date stamp of February 25, 2020, applied to CX 41 as indicating that Complainant received the document "more than [three] weeks before their office closed in mid-March" due to the COVID-19 pandemic. Supplement Response at 2. Respondents argue that it is "unfathomable" that EPA lacked the proper protocols to ensure that documents such as Mr. Robinson's response were delivered to Complainant, but even if EPA did lack protocols to facilitate the flow of documents during an emergency, it does not excuse Complainant from complying with the applicable rules for almost eight months. *Id.* at 3. Respondents then opine that Complainant intentionally withheld CX 41 because it in fact works against Complainant's AD Motion. Supplement Response at 5. In particular, Respondents contend that Complainant misrepresents the support that CX 41 lends to its case, inasmuch as Mr. Robinson assented to the question in CX 41 about whether he helped apply the materials at issue and went on to describe his and another entity's role as the persons who applied the materials. *Id.* at 3-5. Citing conflicting evidence in the record, Respondents further contend that CX 41 contains "inaccurate, false, or misleading information that may amount to perjury" by Mr. Robinson, inasmuch as Mr. Robinson denied in CX 41 that he received certain information from Respondents. *Id.* at 5-7.

Respondents proceed to request that this Tribunal issue a default order in Respondents' favor, pursuant to 40 C.F.R. §§ 22.19(g)(3) and 22.17(c), on the basis that Complainant did not comply with the prehearing information exchange requirements of 40 C.F.R. § 22.19(a) and (f) by failing to promptly supplement its prehearing exchange upon receipt of Mr. Robinson's response. Motion for Default at 7. Additionally, Respondents request that this Tribunal award attorneys' fees and costs to Respondents, as provided for in 33 U.S.C. § 1365(d), on the basis that they have incurred significant expenses in defending against this action and consequently can no longer afford to hire their attorney to assist in his full capacity. *See* Motion for Attorneys' Fees at 8.

C. Complainant's Supplement Reply and Default Response

Complainant denies Respondents' claim that it filed its Motion to Supplement in an attempt to mislead or sway this Tribunal as unsubstantiated. Supplement Reply at 2. Noting that I have not yet ruled on its AD Motion, Complainant argues that it filed its Motion to Supplement in advance of that ruling and in accordance with 40 C.F.R. § 22.19(f) and this Tribunal's Prehearing Order "[i]n an attempt to ensure that *all* available evidence is before the Court for full and fair consideration." *Id.* Additionally, Complainant argues, "[t]he effort to supplement the record [with Mr. Robinson's response] should not have come as a surprise" given the placeholder that it included in its prehearing exchange for the document. *Id.*

Complainant then maintains that it moved to add Mr. Robinson's response "as soon as Complainant knew the information was in its possession" and points to a document entitled

"Affidavit of Erin Kleffner" ("Kleffner Affidavit")[5] for support. Default Response at 2-3. Given that a hearing has yet to be scheduled, Complainant urges, Respondents have still been given a full opportunity to review and respond to the document as anticipated by the procedural rules and the Prehearing Order. *Id.* at 2. Complainant also argues that Respondents fail to point to any caselaw that supports their request for a default judgment under the present circumstances. *Id.* at 3. To the contrary, Complainant contends, "default and exclusion are reserved for the most egregious circumstances and are rarely granted." *Id.* (citing multiple cases). Finally, with regard to Respondents' request for attorneys' fees, Complainant argues that the only applicable legal authority for awarding attorneys' fees is the Equal Access to Justice Act, 5 U.S.C. § 504, which does not apply at this point in the proceedings. Default Response at 3 (citing multiple cases).

D. Respondents' Default Reply

Respondents maintain that entry of a default judgment is warranted because Complainant acted in bad faith and failed to promptly supplement its prehearing exchange. Default Reply at 1-2. Specifically, Respondents argue that the eight-month period that elapsed between the time Mr. Robinson's response was date-stamped as received by EPA and the time Complainant disclosed the document in this proceeding cannot be considered prompt and suggests that Complainant was intentionally withholding the document in the hope that a favorable decision on its AD Motion would be issued. *Id.* at 2. With regard to the Kleffner Affidavit, Respondents allege that its contents are misleading in that Ms. Kleffner maintains EPA's lack of awareness of Mr. Robinson's response until October 15, 2020, even though the date-stamp shows that EPA was in physical possession of it as of February 25, 2020. *Id.* at 3 (citing *Kickapoo Tribe of Indians v. Nemaha Brown Watershed Joint Dist. No. 7*, 294 F.R.D. 610, 613 (D. Kan. 2013)). Respondents urge, "Clearly someone at the EPA office was aware of the document was received [sic], by the EPA, to time stamp it into the EPA's custody, possession, and control." *Id.* at 3-4. Respondents further argue that the Kleffner Affidavit does not sufficiently explain why EPA failed to discover the document in the three weeks between when it was misplaced and when the office closed. *Id.* at 3. Respondents contend that Complainant's actions amount to "egregious" behavior, *id.* at 5, and that while there may be an absence of caselaw directly on point, the regulations at 40 C.F.R. § 22.19(g) "clearly allow for default to be granted under these circumstances," *id.* at 4. Respondents further argue that although a hearing has not yet been scheduled, Mr. Robinson's response still could have been useful to Respondents in responding to the AD Motion and avoiding unnecessary litigation fees. *Id.* at 2; *see also id.* at 5. Respondents explain that they are "not asking for [the document] to be excluded"; rather, they argue, "the only viable option would be for the court to issue a default order dismissing the case under § 22.17(c), pursuant to [40] C.F.R. § 22.19(g)(3)." *Id.* at 4. Respondents then urge that if this Tribunal issues a default order, it will also have authority to grant their request for attorneys' fees under the Equal Access to Justice Act, 5 U.S.C. §§ 504 *et seq.*, and 28 U.S.C. § 2412(b). *Id.* at 5-6.

[5] Although this document is identified as an "affidavit," I note that it was not notarized. The term "affidavit" is defined as "[a] voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths," *Affidavit*, BLACK'S LAW DICTIONARY (11th ed. 2019), while a "declaration" is defined as "[a] formal statement, proclamation, or announcement, esp. one embodied in an instrument," *Declaration*, BLACK'S LAW DICTIONARY (11th ed. 2019).

II. APPLICABLE LAW

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice" or "Rules"), set forth at 40 C.F.R. Part 22. The Rules of Practice require each party to engage in a prehearing exchange of information pursuant to an order issued by the Presiding Officer, with the Rules describing certain pieces of information to include. 40 C.F.R. § 22.19(a). The Rules of Practice also provide for the supplementation of a prior exchange as follows:

> A party who has made an information exchange under paragraph (a) of this section . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

40 C.F.R. § 22.19(f).

The Rules of Practice go on to identify the potential consequences for a party who fails to comply with the prehearing exchange requirements. Specifically, the Rules state that where a party fails to provide information within its control as required, the Presiding Officer may (1) infer that the information not provided would be adverse to the party failing to provide it; (2) exclude the information from evidence; or (3) issue a default order pursuant to 40 C.F.R. § 22.17(c). 40 C.F.R. § 22.19(g). In turn, Section 22.17 authorizes a Presiding Officer to find a party to be in default "upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer." 40 C.F.R. § 22.17(a). Section 22.17 explains that "[d]efault by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice." *Id.* It then states that upon finding that default has occurred, the Presiding Officer "shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17(c).

III. DISCUSSION

At the outset, I note that Respondents have expressly disavowed any request to exclude Mr. Robinson's response from the record.[6] *See* Default Reply at 4 (stating that "the respondent is not asking that [Mr. Robinson's response] be excluded"). Rather, the only relief that Respondents seek under Section 22.19(g) of the Rules is entry of a default judgment against

[6] Among other arguments raised in opposition to the Motion to Supplement, Respondents seem to question the veracity of Mr. Robinson's response. *See* Supplement Response at 5-7. To the extent their argument can be considered to be an evidentiary objection, the Rules of Practice provide that "[t]he Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value . . . ." 40 C.F.R. § 22.22(a)(1). Where a party opposes a motion to supplement the prehearing exchange on the basis that the supplemental information does not satisfy the foregoing standard, such opposition may be considered under the adjudicatory standard for a motion in limine, which is the appropriate vehicle for preventing proposed evidence from being introduced at hearing on that basis. Given their disavowal of any request to exclude Mr. Robinson's response, however, I am not treating Respondents' opposition as such a motion.

Complainant. *See id.* Arguably, that relief is not available to Respondents under the present circumstances, however. As set forth above, Section 22.19(g) authorizes the Presiding Officer to take certain actions, including issuing a default order under Section 22.17(c), "[w]here a party fails to provide information within its control as required pursuant to this section." 40 C.F.R. § 22.19(g). However, Section 22.17(a) provides that a party may be found to be in default in these proceedings only under certain circumstances, which do not include a party's failure to promptly supplement its prehearing exchange pursuant to Section 22.19(f) when it learns that the information therein is incomplete, outdated, or inaccurate. *See* 40 C.F.R. § 22.17(a). Rather, Section 22.17(a) specifically identifies a party's failure to "comply with the information requirements *of § 22.19(a)* [which governs only a party's initial exchange of information] or an order of the Presiding Officer" as grounds for default. *Id.* (emphasis added). Thus, it would seem that when a party fails to supplement its prehearing exchange in accordance with Section 22.19(f), that failure alone is insufficient grounds for a finding of default under the Rules. Under those circumstances, this Tribunal may exercise its discretion to either infer that the information not timely provided would be adverse to the party or exclude the information from evidence, as provided in Section 22.19(g), but not find the party to be in default.

Even if I possess the authority to find a party in default because of a defect in the party's supplementation of its prehearing exchange, I do not consider Complainant to have acted in such a manner with regard to its Motion to Supplement, or Respondents to have been prejudiced by the timing of Complainant's submission of Mr. Robinson's response, such that any of the potential consequences set forth in Section 22.19(g), let alone entry of a default judgement, is warranted. The Environmental Appeals Board has explained that default is generally disfavored and that "doubts are usually resolved in favor of the defaulting party." *Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992). Consistent with this guidance, my esteemed colleague Chief Administrative Law Judge Susan L. Biro has observed that default is typically reserved for "the most egregious behavior," such as "willful violations of court rules, contumacious conduct, or intentional delays." *Hoggan*, 2018 WL 6136858, at *3 (EPA ALJ Nov. 14, 2018) (Order on Complainant's Motion for Default and Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange) (citing *Forsythe v. Hales*, 255 F.3d 487, 490) (8th Cir. 2001). As for the less harsh sanctions identified in Section 22.19(g), I have previously explained that a motion for leave to supplement a party's prehearing exchange may be denied, with the supplemental information thus being excluded, where the motion was not prompt; where the existing prehearing exchange was not incomplete, inaccurate, or outdated; where the record reflects evidence of bad faith or delay tactics on behalf of the filing party; or where the non-filing party would experience undue prejudice if the supplement was accepted. *Aylin, Inc.*, 2016 WL 2759696, at *20 (EPA ALJ Mar. 2, 2016) (Order on the Parties' Motions Relating to Additional Discovery and to Supplement their Prehearing Exchanges) (citing 40 C.F.R. § 22.19(f), (g)).

In the administrative record before me, I do not see circumstances that sufficiently support the imposition of such sanctions. First, in the Prehearing Order, I addressed the issue of supplementation as follows: "Any addition of a proposed witness or exhibit to the prehearing exchange, submitted pursuant to Section 22.19(f) of the Rules of Practice, must be filed with an accompanying *motion to supplement the prehearing exchange* only when supplementation is sought within 60 days of the scheduled hearing." Prehearing Order (Oct. 18, 2019), at 4. Given that a hearing has yet to be scheduled, Complainant was at liberty to supplement its prehearing

exchange with Mr. Robinson's response without even filing a motion requesting leave of this Tribunal. Thus, Complainant can hardly be said to have violated the Prehearing Order.

I turn now to whether Complainant acted in contravention of the requirement set forth in Section 22.19(f) of the Rules to promptly supplement its prehearing exchange when it learned that the information exchanged was incomplete, inaccurate, or outdated. As pointed out by Complainant, it informed Respondents and this Tribunal of the incompleteness of its prehearing exchange from the outset, including a placeholder for Mr. Robinson's response in the list of proposed exhibits contained in its prehearing exchange and explaining in its Rebuttal Prehearing Exchange that it was actively pursuing the response and would provide it as a supplement to the prehearing exchange if received. Complainant's Initial PHE at 6; Complainant's Rebuttal PHE at 3, n.2. The record shows that Mr. Robinson's response was stamped as received by EPA on February 25, 2020, but that Complainant did not seek to supplement its prehearing exchange with the document until eight months later on October 26, 2020. While such a period is not insignificant, I find – contrary to Respondents' suggestion that Complainant possessed Mr. Robinson's response but intentionally did not provide it in a timely manner – that Complainant provided a reasonable explanation, supported by the Kleffner Affidavit, for the timing of its production of the document, thus alleviating concerns that Complainant acted in bad faith or engaged in delay tactics.

Moreover, it does not appear to me that Respondents have been unfairly disadvantaged by the timing of Complainant's Motion to Supplement. While Respondents may have been precluded from addressing Mr. Robinson's response in their AD Response, I have not yet ruled on the AD Motion and the motions incorporated into Respondents' AD Response, so I can still consider the document in rendering those rulings. In the course of responding to Complainant's Motion to Supplement, Respondents also seized the opportunity to raise and expound on the argument, which it presumably would have done in their AD Response had Mr. Robinson's response been available at the time, that Mr. Robinson's response does not, in fact, support Complainant's position on the alleged violations in this proceeding.

For the foregoing reasons, I find that it is appropriate to grant Complainant's Motion to Supplement and deny Respondents' Motion for Default. With regard to Respondents' Motion for Attorneys' Fees, Complainant correctly observes in its Default Response that the only applicable legal authority for awarding attorneys' fees in this proceeding is the Equal Access to Justice Act ("EAJA").[7] The EAJA has been codified under two statutes that govern two distinct types of proceedings: 5 U.S.C. § 504, which applies to adversary administrative adjudications, and 28 U.S.C. § 2412, which applies to civil court actions. In the administrative context, the EAJA provides, in relevant part:

> An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds

[7] While Respondents initially reference 33 U.S.C. § 1365(d) in support of their request for an award of attorneys' fees, *see* Motion for Attorneys' Fees at 8, that statutory provision pertains to citizen suits under the CWA and therefore is inapplicable.

> that the position of the agency was substantially justified or that special circumstances make an award unjust.

5 U.S.C. § 504(a)(1). The EAJA also identifies filing and content requirements that an applicant must satisfy in seeking an award of attorneys' fees:

> A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under [5 U.S.C. § 504(b)(1)(B)], and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing and appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified.

5 U.S.C. § 504(a)(2). Seeing as how I have determined that entry of a default judgment against Complainant is not warranted, there has not yet been a final disposition of this matter, and any application seeking an award under the EAJA would be premature. Accordingly, I find that it is also appropriate to deny Respondents' Motion for Attorneys' Fees.

IV. ORDER

1. Complainant's Motion for Leave to Supplement Complainant's Prehearing Exchange is hereby **GRANTED**.

2. Respondents' Crossmotion for Default and to Dismiss is hereby **DENIED**.

3. Respondents' Motion for Attorney Fees and Costs is hereby **DENIED**.

Christine Donelian Coughlin
Administrative Law Judge

Date: December 14, 2021
Washington, D.C.

In the Matter of *Adamas Construction and Development Services, PLLC, and Nathan Pierce*, Respondents.
Docket No. CWA-07-2019-0262

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Complainant's Motion to Supplement its Prehearing Exchange and Respondents' Motions for Default and Attorneys' Fees**, dated December 14, 2021, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Original by OALJ E-Filing System to:
U.S. Environmental Protection Agency
Office of Administrative Law Judges
https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf

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Dated: December 14, 2021
Washington, D.C.