

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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|-----------------------------|---|-------------------------------------|
| In the Matter of |) | |
| |) | |
| John P. Vidiksis and |) | Docket No. TSCA 03-2005-0266 |
| Kathleen E. Vidiksis |) | |
| |) | |
| Respondents |) | |

Order Granting Leave to File an Amended Answer

By motion, dated February 17, 2006, Respondent John Vidiksis, through counsel, filed a motion for leave to file an amended answer and for an extension of time to comply with the Court's Prehearing Order.¹ The Motion relates that Respondent's Counsel was only retained on January 31, 2006 and that, prior to that, Respondent John Vidiksis was acting *pro se*. While the Motion also informed that EPA opposed the request, EPA subsequently filed a Motion to Strike Respondent's Counterclaim from Proposed Amended Answer. The EPA Motion, filed on March 6, 2006, states that it "does not generally object to Respondent's Proposed Amended Answer" but that it does object to the inclusion within that Answer of a counterclaim pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. §2412 ("EAJA"), on the grounds that the Consolidated Rules of Practice, 40 C.F.R. Part 22, do not allow for counterclaims and that such a claim is premature in any event.²

The Proposed Amended Answer does include a counterclaim and demand for judgment against EPA pursuant to the EAJA. Amended Answer of John Vidiksis, at 51. The counterclaim asserts that the penalty demand is "clearly excessive, such that . . . Respondent should be awarded his counsel fees and all other expenses incurred in defending against the Complaint herein." *Id.* at 52. While the Court does not formally strike the EAJA counterclaim, it does rule

¹In a separate Order, issued on March 10, 2006, the Court, after a conference call with counsel for John Vidiksis and EPA counsel, extended the time for compliance with the Prehearing Order to March 17, 2006. Due to an oversight, Respondent Kathleen Vidiksis was not contacted and hence did not participate in the March 9, 2006 conference call. Kathleen Vidiksis has since been contacted by Court staff, sent copies by the Court of all Orders and other documents relating to the litigation and has been notified of a conference call with all parties to be held on March 17, 2006.

²Although the Consolidated Rules allow for 15 days to respond to a motion, there is no need for the Court to wait for that time to elapse, as the matter was raised during the March 9, 2006 conference call, and because the only matter disputed is the EAJA counterclaim. During the conference call, Counsel for Respondent described the EAJA counterclaim as a protective filing and did not dispute that such a claim is premature at this point.

that the Respondent's counterclaim is wholly premature and will not be considered in this litigation. An Equal Access to Justice claim is a separate action and may not be filed until *after* one proceeding under it first prevails in the underlying litigation and it is shown that the agency action was not substantially justified. See: *In re: Bricks, Inc.*, EAJA Appeal No. 04-02, December 21, 2004, 2004 WL 3214472 (E.P.A.), *In re: L & C Services, Inc.*, EAJA Appeal No. 98-1, January 15, 1999, 1999 WL 24397 (E.P.A). Upon consideration, Respondent's Motion to file an Amended Answer is GRANTED. Respondent shall file a copy of the Amended Answer with the Regional Hearing Clerk or, if it was filed with the Motion, send a letter to the Regional Hearing Clerk designating that submission as its official Amended Answer and do so by March 24, 2006.³

So Ordered.

William B. Moran
United States Administrative Law Judge

Dated: March 15, 2006

³The Court reminds counsel for Respondent to familiarize itself with the Consolidated Rules of Practice. Those Rules, which govern this proceeding are found at 40 C.F.R. Part 22. Consistent with those Rules, Respondent Kathleen Vidiksis must be served with any filing.