UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Robert J. Heser & Andrew Heser	)	**Docket No. CWA-05-2006-0002**
	)	
Respondents	)	

RECOMMENDED DECISION DENYING RESPONDENTS' EQUAL ACCESS TO JUSTICE ACT APPLICATION FOR ATTORNEYS' FEES AND COSTS

I. Introduction

In an administrative enforcement action under Section 309(g), 33 U.S.C. § 1319(g) of the Clean Water Act ("CWA" or "the Act"), the United States Environmental Protection Agency, ("Complainant" or "EPA"), alleged that Respondents, Robert J. Heser and Andrew Heser, unlawfully discharged dredged and/or fill material into navigable waters, in violation of Section 301(a) of the CWA, 33 U.S.C. § 1311(a), without having a permit under Section 404 of that Act.

Respondents contested the charges in the Complaint and a hearing was held on the matter from March 26 through March 30, 2007 and April 30 through May 8, 2007 in Carlyle, Illinois. In their defense, Respondents raised the issue of whether EPA's claim was barred by the statute of limitations. Following the hearing, the Court issued an Order of Dismissal on December 19, 2007, concluding that the action was time barred by the applicable statute of limitations. 28 U.S.C. § 2462.

Thereafter, on January 16, 2008, Respondents submitted an Application for Fees and Expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, for an award of $255,277.53 from Complainant. On January 24, 2008, Complainant requested that the Presiding Officer stay the application pending final disposition of the underlying matter. Complainant did not file an appeal and, on March 6, 2008, the EAB issued a Decision not to Review, which represented the final disposition of the case. On March 7, 2008, Respondents submitted a Supplemental Application for Fees and Expenses, seeking an additional $15, 728.31 in fees and expenses incurred subsequent to those reflected in the initial Application. On April 7, 2008,

Complainant submitted an Answer to Respondents' Application. For the reasons which follow, Respondents' Application is DENIED.

II. Arguments of the Parties

Respondents contend that the eligibility requirements that must be satisfied for an award to be made under the Act have been met because: (1) the Application was timely; (2) Respondents' net worth was less than $2 million at the time that the action was initiated; and (3) Respondents are the prevailing party.[1] Respondents further contend that the Complainant was not substantially justified in bringing suit, nor do special circumstances exist to render an award unjust.

Respondents argue that the Complainant's suit was not substantially justified because the Government failed to meet the statute of limitations ("SOL"). They urge that the December 19, 2007 Order of Dismissal unequivocally established that the action was unjustified as a matter of law due to its untimely filing.[2] Respondents also contend that the Complainant was unjustified on a factual basis as well, because it failed to establish a "significant nexus" between Respondents' activities and the harm caused to downstream waters. Moreover, Respondents aver that no special circumstances exist that should prevent an award of fees, claiming that they acted competently and in good faith throughout the proceeding in protecting their rights.

Complainant, EPA, does not dispute that Respondents' Application and Supplement thereto were timely filed nor that Respondents were the "prevailing party" on the SOL issue in the underlying action brought by the Complainant. However EPA does oppose Respondents' contention that it was not substantially justified in bringing suit. Specifically, EPA argues that it was substantially justified in its position that the claim was not time barred due to the applicability of two exceptions to the statute of limitations, namely the "continuing violation" and "discovery" theories, which operate to toll the running of the statute of limitations. EPA maintains that the touchstone for assessing EAJA claims depends upon whether it can be shown that the "case turn[s] on a factual or legal issue upon which reasonable persons could disagree." *Id.* at 7.

EPA asserts that the prevailing authority in federal courts is that discharge into a wetland water without a Section 404 permit is a continuing violation, tolling the SOL until such fill in a

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[1] *See* 5 U.S.C. 504(a) and (b); 40 C.F.R. 17.11.

[2] Respondents offer no rationale, theory, or case law as to why either of the two exceptions to the SOL was unreasonable as applied by Complainant.

wetland or water is permitted or the condition remedied.[3] It contends that the statutory provisions at CWA § 309(a), 33 U.S.C. § 1319(a) and § 309(g), 33 U.S.C. § 1319(g) providing for "per day" penalties, the existence of other regulatory language in § 404 indicating on-going legal obligations, and the existence of a regulatory after-the-fact permit program support the application of the continuing violation doctrine in such circumstances. While Complainant admits that some case law exists to the contrary, it urges that such diversity among the courts as to whether the violation continues as long as the fill remains, establishes substantial justification for the EPA position.

Alternatively, if it is found that the continuing violation doctrine does not apply, EPA argues that the discovery rule should apply in this case, and that its application delayed the accrual of the underlying claim until the Corps of Engineers became aware of an actual, as opposed to a suspected, violation during an inspection of the site on February 7, 2000. EPA contends that because the initial citizen's complaint did not document the essential substantive jurisdictional elements of the claim--the existence of a Section 404 regulated wetland and a jurisdictional stream adjacent to the disturbed site– the citizen's complaint could not constitute "discovery" of the violation for discovery rule purposes.

Finally, EPA asserts that if the Court rules against it on the defenses it has raised, the fees and costs claimed by Respondents still are not allowable under the EAJA because: (1) the attorneys fees charged before the initiation of the underlying action are not permittable; (2) the attorneys fees over the statutory cap of $125 are without justification; and (3) Respondents' Application contains fees and costs that are unrelated to the underlying case.

III. Discussion

The applicable provision provides in pertinent part:

> (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 as a party to the proceeding 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 . . . .
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> 5 U.S.C. § 504 (emphasis added).

[3] Additionally, EPA asserts that ongoing row cropping activity as well as the creation of surface drainage ditches on the site in question constituted ongoing and repeated illegal point source discharges. This argument is rejected.

Although Respondents filed two motions for additional discovery prior to the commencement of the hearing, neither involved any statute of limitations issues. One sought information regarding alleged work upstream of the Site while the other sought depositions in order to delve into whether, factually, there was a "significant nexus" between the waters in issue and navigable waters, in light of the Supreme Court's decision in *Rapanos*. Both motions were denied. Order on Respondents' Motion for Additional Discovery, February 23, 2007. On the same date the Court also denied Respondents' Motion to Dismiss for Lack of Jurisdiction based on the *Rapanos* decision. On May 31, 2006, in Respondents' Answer to EPA's initial Administrative Complaint, they raised as an affirmative defense that the action was "untimely and barred by the applicable statute of limitations. Answer at Sec. II., par. 1. All that Respondents had to say about the issue at that time was that they anticipated raising a number of defenses to the Complaint, including the statute of limitations. The entire defense regarding that claim stated only, "According to the allegations of the Administrative Complaint, the conduct at issue occurred in August or September, 1999. Accordingly, this suit brought in May, 2006 is untimely." Answer at 3. At the commencement of the hearing Respondents' counsel mentioned, but without any elaboration, that they had "statute of limitations issues." March 26, 2007 hearing at Tr. 21. However, Respondents did not file any motions or otherwise support that affirmative defense theory until after the hearing. Briefing on the statute of limitations issue did not occur until after the hearing had concluded. Certainly everyone was aware that the statute of limitations was an issue, as the parties executed two tolling agreements regarding that very issue. EPA Exhibit 25, CX 000419-421 and Exhibit 26, CX 000419-421. As noted earlier, EPA does not contest that Respondents are the "prevailing party" within the meaning of the statute. As such, Respondents are entitled to reasonable fees unless EPA can convince the Court that its position in the underlying case was substantially justified. For the purposes of the EAJA, "substantially justified" means "justified in substance or in the main, that is, justified to a degree that could satisfy a reasonable person . . . [this] means, of course, more than merely undeserving of sanctions for frivolousness."[4] The legislative history for the Act[5] indicates that no presumption that the agency's position was not substantially justified arises from the mere fact that the agency lost, and that the test is essentially one of reasonableness and the burden of proof

[4] *Comm'r v. Jean*, 496 U.S. 154, 158, n.6. (1990) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988)).

[5] *See* House Report No. 96-1418, September 26, 1980, at 10-11; U.S. Code Congressional and Administrative News (1980) at 4989-90: "The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact no award will be made.. . .The standard, however, should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing."

in this respect is on the agency.[6] Thus, apart from the outcome at trial, the Court must independently evaluate the government's position to determine whether it was substantially justified.[7] Likewise, "when the EAJA issue turns on a pure question of law—in this case whether the government's interpretation of the statute was substantially justified—the EAJA court should not place too much weight on prior judicial characterizations of the government's position because these characterizations will in all likelihood not have been made with an intent to resolve EAJA questions."[8] Accordingly, the court must make a determination of whether EPA's position on a question of law was substantially justified apart from any earlier determinations in this litigation.

Because the Order of Dismissal in the underlying action was based on the SOL issue, rather than the merits of the case, the position of the government which must be evaluated here is the reasonableness of the claim by EPA that its action was not time barred under 28 U.S.C. §2462. The goal here is not to recount every detail of the underlying proceeding or re-litigate the case, but rather, to consider whether the position taken by EPA was reasonable.[9] As explained *infra*, in assessing EPA's position as to the applicability of the continuing violation doctrine to the SOL, the Court finds that EPA's interpretation was substantially justified.

EPA contends that, to satisfy the "substantially justified" standard, it must show that bringing the action can be shown as justified to a degree that would satisfy a reasonable person. Thus, it contends that there is a "simple reasonableness" standard and accordingly that its position must have a reasonable basis in law and fact. EPA Br. at 5, citing *Pierce v. Underwood*, 487 U.S. 552, 565-66 (1988) and *Frey v. Commodity Futures Trading Comn'n*, 931 F.2d 1171, 1174 (7th Cir. 1991)("*Frey*"). Importantly, EPA emphasizes that losing on the issue in question, here whether the statute of limitations had run, does not create a presumption that its position lacked substantial justification. It notes that the Seventh Circuit, the applicable Circuit for this case, arising as it did in Illinois, had found that "substantial justification" exists where the legal arguments asserted are plausible. *Id.* at 6, citing *Frey.* Other relevant factors include "the clarity of the governing law," and "the consistency in which the government has asserted its legal position" and whether courts themselves have reached different conclusions on the issue. *Id*. 6-7.

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[6] *In the Matter of Robert Ross & Sons, Inc.*, TSCA-V-C-008, 1984 EPA ALJ LEXIS 11, 12 (Sept. 13, 1984).

[7] *Cinciarelli v. Reagan*, 729 F.2d 801, 806 (1984), holding that although the government's position as to the interpretation of the statute was erroneous, it was substantially justified.

[8] *Id.*

[9] *See Cummings v. Sullivan*, 950 F.2d 492, 499 (7th Cir. 1991) ("It is not our task to determine whether the ruling of the district court was correct; we must decide only whether only the Secretary's position before the court was reasonable or justified in substance.").

EPA points out that the Environmental Appeals Board ("EAB") has spoken to the issue of what constitutes "substantial justification" for EAJA claims. For example, the EAB in *In re Bricks*, 11 E.A.D. 796, 805-06, 2004 WL 3214472 (E.P.A.) made the point that the agency's failure to prevail in its complaint does not determine the outcome in a subsequent EAJA claim. There, while EPA's underlying enforcement action was dismissed, its defense to the EAJA claim was upheld because the Board found EPA's position regarding the claimed facts and law to be substantially justified as the agency could not have been expected to predict the outcome. The Court observes that the same is true in this action, as the case law was not so clear that the Agency could have predicted the outcome of the statute of limitations question.[10]

Inconsistent with the requirements of 40 C.F.R.§ 17.11, the Respondents did not make specific allegations or arguments regarding the alleged unreasonableness or lack of substantial justification for EPA's position regarding the statute of limitations. Instead, the Respondents only looked to the Court's dismissal as the basis for showing a lack of substantial justification. However, as noted, the outcome of a decision does not establish this by itself. In this instance, EPA agrees that the issue is whether the government's position on the running of the statute of limitations was reasonable or substantially justified. Addressing this, EPA states that it has long been their position that the statute of limitations does not begin to run until the offending fill material has been removed.[11] It points out that the Complaint alleges that the violation was continuing, by asserting that the unpermitted fill occurred between August and September 1999 and that the violation was "continuing to the present." Emphasizing this, it observes that the Complaint asserts that each day the unpermitted fill remains in the waters of the United States "constitutes a continuing violation of the [Clean Water] Act and an *additional day of violation* . . . ." EPA Brief in Opposition at 9, citing Complaint at paragraphs 16 and 25. (emphasis added). It notes, and this Court does not disagree, that from a factual standpoint, it showed at the hearing that the fill had never been removed and that no Section 404 permit was ever issued regarding this activity.

The factual predicate being established, the next question is whether EPA's *legal position* that the continued presence of fill in waters of the United States constitutes a continuing violation or, phrased differently, that each day the fill remains constitutes an additional day of violation, was a reasonable or substantially justified position to take. The Court finds without hesitation that EPA's position was reasonable and substantially justified. Putting aside EPA's

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[10]On the other hand, the EAB determined that there was no substantial justification where EPA's case lacked "a shred of evidence establishing the key elements of the offenses." EPA Br. at 7, citing *L & C Services*, 8 E.A.D. 110, 119 (EAB 1999).

[11]EPA takes pains to note that its arguments regarding "substantial justification" or reasonableness are not a back door attempt to relitigate the dismissal outcome. Rather, it explicitly advises that its arguments are directed only to show there was a substantial justification in support of its position regarding the running of the statute of limitations in this Clean Water Act matter.

arguments concerning the EAB's views about continuing violations under other environmental statutes, the Court does take notice that a number of federal courts have applied the continuing violation doctrine to Clean Water Act cases.[12] EPA Br. at 11, citing *United States v. Cumberland Farms of Conn., Inc*.,[13] 647 F. Supp. 1166 (D.Mass. 1986), aff'd 826 F. 2d 1151 (1st Cir. 1987), cert denied, 484 U.S. 1061 (1988), *Sasser v. Administrator*,[14] 990 F.2d 127, 129 (4th Cir. 1990), *Informed Citizens United, Inc. v. USX Corp.*, 36 F.Supp. 2d375, 377-78 (S.D. Tex. 1999). So too, EPA notes that the majority of federal courts that have addressed the continuing violation issue, in instances where there has been an unpermitted discharge of fill into wetlands, have held that the violation continues until the fill is removed. Consequently those courts taking that view have held that the five-year statute of limitations is tolled and does not begin to run until the illegal fill has been removed. EPA Br. at 12, citing *United States v. Reaves*,[15] 923 F.Supp. 1530, 1533-34 (M.D. Fla. 1996), and *United States v. Fisher Sand & Gravel*, 1999 U.S. Dist. LEXIS 8443 (D.Wyo. May 20, 1999).[16]

Given these cases, EPA argues that its position regarding the statute of limitations left a decisional field in which it can fairly be described as remaining uncertain.[17] EPA contends that

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[12]EPA also correctly observes that the EAB has found continuing violations in analogous situations involving other environmental statutes. EPA Br. at 10, citing *In re Harmon Electronics, Inc.*, 7 E.A.D. 1, 28 (EAB 1997), *rev'd on other grounds*, 19 F. Supp.2d 988 (W.D. Mo. 1988), and *In re Lazarus*, 7 E.A.D. 318, 368 (EAB 1997).

[13]In *Cumberland Farms* the court held that "a day of violation constitutes not only a day in which Cumberland was actually using a bulldozer or backhoe in the wetland area, but also every day Cumberland allowed illegal fill material to remain there."

[14]*Sasser* held that "each day that the pollutants remain in the wetlands without a permit constitutes an additional day of violation."

[15]*Reaves* held that the § 404 enforcement action was not barred by any SOL where "[d]efendant's unpermitted discharge of dredged or fill materials into wetlands on the site is a continuing violation for as long as the fill remains."

[16]EPA acknowledges that the view of the federal courts is not uniformly in support of its position. In this regard it notes that this Court's Initial Decision cited *3M v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994) and *United States v. Telluride*, 884 F. Supp. 404 (D. Colo. 1995). However, it argues, reasonably, that neither of these cases operate to preclude its ability to argue that the continuing violation theory is viable in the context of application of the statute of limitations.

[17]Having found that there was substantial justification for EPA's position regarding the statute of limitations, the Court does not address whether the fees and costs themselves, as claimed by the Respondents, are inconsistent with the EAJA. EPA also correctly notes that the only issue subject to potential EAJA recompense is the statute of limitations defense. Thus, Respondents' contentions regarding Clean Water Act jurisdiction in light of the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006), was neither fully litigated nor a basis for the Court's decision in this matter. Accordingly, it cannot be said that the Respondents "prevailed"

the Court's acceptance of the reasoning applied in *Telluride* 884 F.Supp. 404 (D.Colo.1995) and its reading of the decision in *3M v. Browner*, 305 U.S. App. D.C., 17 F. 3d 1453, 1462 (D.C. Cir. 1994) was "not necessarily foreseeable and does not signify that EPA's legal argument in opposition was not substantially justified." The Court agrees with EPA's position in this regard.[18] Accordingly, on the basis of the foregoing reasons, it is recommended that the EAJA application filed by Respondents be denied.[19]

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William B. Moran
United States Administrative Law Judge

Dated: October 8, 2008
Washington, D.C.

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on that jurisdictional issue.

[18] While the Court finds that EPA's position was substantially justified on the basis of a divergence of opinion among the federal courts on the continuing violation argument and the related question of the running of the statute of limitations, it rejects EPA's other arguments that the violation was continuing based on the Respondents' ongoing farming operations and its contention that the discovery rule doesn't occur when the agency *discovers* the offending condition, but rather only when the agency *concludes* that its discovery is a violation, regardless of whether an inordinate amount of time elapses between the discovery and the agency's conclusion. Although not the only basis for rejecting EPA's theory that the Respondents' farming at the Site "caused ongoing and repeated illegal point source discharges," at the most primary level, the evidence of record does not support such a finding of fact.

[19] Although, in accordance with 40 C.F.R. § 17.26, this is a recommendation 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 therein provided.

In the Matter of Robert J. Heser, Heser Farms and Andrew Heser, Respondents
Docket No. CWA-05-2006-0002

I hereby certify that the following, Recommended Decision Denying Respondents' Equal Access to Justice Act Application for Attorneys' Fees and Costs, dated, October 8, 2008 was sent in the following manner to the addressees listed below.

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Knolyn R. Jones
Legal Staff Assistant

Dated: October 8, 2008

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