UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

84 SEP 13 A9:28

In the Matter of	)	
	)	
Robert Ross & Sons, Inc.,	)	Application for Attorneys'
Docket No. TSCA-V-C-008	)	Fees and Expenses Under the
	)	Equal Access to Justice Act

Recommended Decision

This proceeding arises from an application by Robert Ross & Sons, Inc.1/ for attorneys' fees and expenses under the Equal Access to Justice Act (5 U.S.C. § 504). The application results from a complaint, issued by the Director of the Enforcement Division, U.S. Environmental Protection Agency, Region V on March 31, 1980, charging Robert Ross & Sons, Inc., hereinafter Ross or applicant, with violations of the Toxic Substances Control Act (15 U.S.C. § 2601 et seq.). Following a hearing in Chicago, Illinois during the period September 22 - 24, 1981, the ALJ issued an initial decision on February 1, 1982, dismissing the complaint for the reason that Complainant had not shown that Ross had improperly disposed of PCBs as charged. Complainant appealed the dismissal in part and in a final decision, dated April 4, 1984 (TSCA Appeal No. 82-4), the Judicial Officer affirmed the dismissal. Ross filed an application for

1/ The application reflects that effective December 1, 1981, Robert Ross & Sons, Inc. was reorganized into four separate corporations.

attorneys' fees and expenses on March 2, 1982, and an amended application on May 2, 1984, EPA having in the meantime promulgated regulations (40 CFR Part 17) implementing the Act. The application was referred to the ALJ for preparation of a recommended decision by an order from the Judicial Officer, dated July 19, 1984.

Although the applicant originally requested a hearing on the application, that request was withdrawn by a letter to the ALJ, dated August 16, 1984. Based on the record as presently constituted, I find that the following facts are established:2/

Findings of Fact

1. The complaint, issued on March 31, 1980, charged Ross with improper disposal (incineration) of PCBs of greater than 500 ppm, to-wit 4400 ppm and 760 ppm, in violation of § 6 of TSCA and 40 CFR 761.10 (1979). Ross was also charged with improper disposal of PCB laden waste oils in concentrations of 67.3 ppm in violation of § 6 of the Act and 40 CFR 761.10.

2. Samples upon which the first charge of improper disposal was based were drawn from an 80,000-gallon tank (S01) and from a 17,000-gallon tank (S03) at the time of an inspection of the Ross facility conducted by representatives of EPA on July 10, 1979. The sample (S28) upon which the second charge of improper disposal was based was drawn from an excavated area at the facility referred to as the "mixing pit" at the time of an inspection on November 5, 1979.

2/ Findings are based on the initial decision unless otherwise indicated.

3. EPA's Central Regional Laboratory (CRL) analyzed the samples utilizing gas chromatography with electron capture detection (GCEC) and reported PCB concentrations of 4400 ppm in sample S01, 760 ppm in sample S03 and 67.3 ppm in sample S28. CRL reported a PCB concentration of 95 ppm on a second sample (S08) drawn from the 80,000-gallon tank during the inspection on July 10, 1979. This sample was not used as a basis for a charge against Ross.

4. The contents of the 80,000-gallon tank were incinerated sometime during the period July 10 to October 2, 1979. Complainant did not present any evidence at the hearing that the contents of the 17,000-gallon tank were disposed of in a similar fashion. Likewise, Complainant did not present any evidence at the hearing as to the disposition of the material found in the mixing pit on November 5, 1979.

5. Analysis of a sample drawn from the 17,000-gallon tank by representatives of the Ohio EPA on October 2, 1979, revealed a PCB concentration of 11.89 ppm. Analyses by Environmental Research Group, Inc., a testing and consulting firm employed by Ross, of what purported to be duplicates of sample S28 drawn from the mixing pit on November 5, 1979, revealed PCB concentrations of 10 and 15 ppm.

6. The Ross incinerator did not comply with Annex I, 40 CFR 761.40 (1979).

7. The instrument utilized by CRL to test for the presence of PCBs (GCEC) produces a strip-chart recording referred to as a chromatogram. Identification of PCBs is made by comparing the chromatogram of the sample with chromatograms of PCB standards. PCB concentration is determined by use of a formula involving the concentration of the

standard times the area of the sample divided by the area of the standard times the final volume of the diluted sample divided by the weight of the sample. Although these calculations are normally made by a computer, there are instances wherein the calculations are performed manually.

8. In order to conduct the tests, it is necessary to dilute the portion of the sample injected into the chromatograph and this dilution must be recognized in calculating PCB concentrations. Computer printouts of CRL calculations on samples S01 and S03 are in terms of micrograms per liter or parts per billion (ug/l) and it is necessary to divide by 1,000 in order to convert to parts per million. The printout for sample S01 reflects a PCB concentration of 4377.56 ug/l.

9. Ross denied the alleged violations, contending, inter alia, that the samples were not representative and that the tests were improperly conducted.

10. In dismissing the complaint, the ALJ found, inter alia, that sample S01 from the 80,000-gallon tank was only a "grab sample" and not representative of the contents of the tank and that there was no evidence indicating the PCB concentration of any portion of the waste at the time of incineration. Because there was no evidence of the dilution of Ross' waste to reduce PCB concentrations below 50 ppm (40 CFR 761.1(b)) or of the addition thereto of PCBs in concentrations of 500 ppm or greater (40 CFR 761.10(g)(ii)), it was concluded that these provisions of the regulations were not applicable. Although Complainant did not explain how the PCB concentration of 4377.56 ug/l shown on the computer printout for

sample S01 (finding 8) became the reported result of 4400 ppm, Ross' expert was apparently able to duplicate this result from an examination of the CRL file and the ALJ concluded that Ross had not established its contention that the test on this sample was improperly conducted or calculated.

11. The ALJ found that wastes present in the 17,000-gallon tank on July 10, 1979, were the same wastes in the tank on October 2, 1979, and that Complainant had not established its contention that the contents of that tank had been incinerated or otherwise improperly disposed of during that period as charged. Regarding sample S28 collected from the mixing pit on November 5, 1979, the ALJ found that Complainant had not established by a preponderance of the evidence that this sample contained PCBs in excess of 50 ppm as charged. Moreover, he found that there was no evidence as to the disposition of the waste present in the mixing pit on November 5, 1979.

12. Complainant appealed the ALJ's decision only as to the sample referred to as S01. Respondent, although agreeing that the dismissal was proper, filed a protective appeal as to that part of the decision holding test results had not been shown to have been improperly conducted or calculated. The Judicial Officer held that even though the sample was not representative, it, nevertheless, had probative value, but sustained the dismissal for the reason that Complainant has failed to prove that the sample in question contained PCBs in excess of 50 ppm (Final Decision, TSCA Appeal No. 82-4, April 4, 1984). He reached this conclusion, because the computer printout showing PCB concentrations in sample S01 (finding 8) reported

results in terms of micrograms per liter or parts per billion and dividing the reported figure (4377.56) by 1,000 would result in a PCB concentration of only 4.4 ppm. It was concluded that Complainant had not sustained its burden of proving the violation charged.

13. Ross filed an initial application for attorneys' fees and expenses under the Equal Access to Justice Act (EAJA or Act) (5 U.S.C. 504) on March 2, 1982, within 30 days of the receipt of the ALJ's decision. At the time, EPA had not promulgated regulations implementing the Act. The application requested a total of $69,672.35, consisting of $43,181.25 in attorneys' fees (575.75 hours at the rate of $75.00 per hour), $24,237 in fees and expenses for expert witness and the balance of $2,254.10 in miscellaneous fees and expenses.

14. Subsequent to the final decision, Ross submitted an amended application for fees and expenses pursuant to the EAJA (letter to Judicial Officer, dated May 2, 1984). The amended application reflected an additional 119.5 hours at $75 an hour expended in perfecting and supporting Ross' appeal and opposing Complainant's appeal, making a revised total of $52,143.75 claimed for attorneys' fees. Amounts claimed for expert witnesses and miscellaneous fees and expenses remained the same.

15. The itemized statement from Ross' expert Henry R. Friedberg & Associates reflects 13.5 hours at $45.00 an hour spent on this matter in 1979, 68 hours at $54.00 an hour in 1980 and 140.5 hours at $54.00 an hour in 1981 for a total of $11,866.50. Mr. Friedberg was one of two expert witnesses for Ross who appeared at the hearing. This statement also reflects a total of $10,225.50 for analyses of samples. The

regulation (40 CFR 17.07(b)(1)) limits the compensation of expert witnesses to $24.09 per hour. Application of this rate to total time expended (222 hours) reduces this aspect of the claim by $6,518.52 to $5,347.98. This sum added to the total for analyses ($10,225.50) equals $15,573.48.

16. The itemized statement of Mr. Paul S. Epstein, Ross' other expert witness at the hearing, reflects a total of 36 hours expended on the Ross matter. This time is billed at the rate of $50.00 an hour, which together with travel and out-of-pocket expenses of $345.00, comprise the total amount claimed of $2,145.00. Application of the maximum hourly rate set by the regulation ($24.09) would reduce the fee claim by $872.76 to $927.24.

17. The application includes a net worth statement reflecting that Ross has total assets of approximately $3.3 million. Included with the application is a statement that there were no transfers from, or obligations incurred by, Ross in the one-year period prior to March 31, 1980, which reduced Ross' net worth below $5,000,000. The application states that at the time the proceeding giving rise to this application was instituted, Ross had 50 employees and that at no time has it had more than 500 employees.

18. Complainant has filed an answer to the application and Ross has filed a reply to the answer.

Conclusions

1. Ross is the prevailing party and a qualified party to receive an award under the EAJA (5 U.S.C. 504).

2. Complainant was not substantially justified in issuing the complaint and pursuing the proceeding charging Ross with violations of the Toxic Substances Control Act and there are no special circumstances making an award to Ross unjust.

3. Ross did not engage in conduct which unduly protracted the proceeding.3/

4. Save for amounts claimed by experts in excess of the maximum hourly rate allowed by 40 CFR 17.07(b)(1), amounts claimed are adequately documented, are considered to be reasonable and should be allowed.

Discussion

The Act, 5 U.S.C. 504, 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."

The Act became effective on October 1, 1981, and applies to any adversary adjudication, as defined in section 504(b)(1)(C) of Title 5, U.S.C., which is pending on, or commenced after, such date. The proceeding giving rise to this application was commenced on March 31, 1980, and was clearly pending on October 1, 1981. Civil penalty proceedings under § 16(a) of the Toxic Substances Control Act (15 U.S.C.

3/ In fact, there is substantial basis for Ross' assertion that Complainant delayed the hearing and ultimate resolution of this matter by failing to promptly respond to legitimate discovery requests.

2615(a)) are adjudications required by statute to be conducted in accordance with 5 U.S.C. 554 and the regulation (40 CFR 17.03(a)(3)) specifically lists such proceedings as within the coverage of the EAJA.

Legislative history of the Act[4/] is to the effect that while no presumption that the agency's position was not substantially justified arises from the mere fact that the agency lost, the test is essentially one of reasonableness and the burden of proof in this respect is on the agency. The rule appears to be that in order to defeat an award to an otherwise eligible party, the government must show that its action had a reasonable basis in law and fact. S & H Riggers and Erectors, Inc. v. OSHA, 672 F.2d 426 (5th Cir. 1982); Enerhaul, Inc. v. NLRB, 710 F.2d 748 (11th Cir. 1983) and Olsen v. Department of Commerce, Census Bureau, 735 F.2d 558 (Fed. Cir. 1984). Some courts, however, while not precisely articulating the scope of the appropriate standard, have indicated that

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4/ See House Report No. 96-1418, September 26, 1980, at 10, 11; U.S. Code Congressional and Administrative News (1980) at 4989: "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. In this regard, the strong deterrents to contesting Government action require that the burden of proof rest with the Government. This allocation of the burden, in fact, reflects a general tendency to place the burden of proof on the party who has readier access to and knowledge of the facts in question. The committee believes that it is far easier for the Government, which has control of the evidence to prove the reasonableness of its action than it is for a private party to marshal the facts to prove that the Government was unreasonable ****." "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." Id at 4990.

the showing required of the government [to defeat an award] should be slightly above or more strict than simply reasonableness.5/

Irrespective of the rule to be applied, however, it would seem to be clear that Complainant's action herein did not have a reasonable basis in fact and cannot be regarded as substantially justified. The final decision establishes that Complainant's evidence showed prima facie that sample S01 contained PCBs at a concentration of 4.4 ppm, rather than 4400 ppm as charged, and that Complainant's contention that this gap could be bridged by application of the correct dilution factors to the reported result was based on mere speculation. Inasmuch as Complainant had the burden of establishing the violation charged by a preponderance of the evidence and incineration of PCBs in concentrations below 50 ppm in an unapproved incinerator was not a violation of the Act or regulations, the charge against Ross was dismissed.

Complainant argues that reasonableness in this context means that the agency must be possessed of facts from which it could reasonably believe that the law has been violated and points to the ALJ's finding that Ross had not established its contention that tests on sample S01 had been improperly conducted or calculated (Answer at 11, 18, 19). Complainant says that another way of stating the test is that the agency's position is reasonable if the evidence was sufficient to establish a prima facie case in its favor, unless explained or rebutted.

5/ See Wolverton v. Schweiker, 533 F.Supp. 420 (D.Idaho, 1982); Spencer v. NLRB, 712 F.2d 539 (D.C. Cir. 1983). This is apparently based on the fact that the Senate Judiciary Committee considered and rejected an amendment that would have changed the applicable standard from "substantially justified" to "reasonably justified," the former being regarded as the greater burden.

While Complainant's description of the applicable standard for determining whether its action was substantially justified within the meaning of the EAJA is almost certainly too lenient,6/ no issue need be taken therewith in this instance because it is clear that Complainant has not established a prima facie case of a violation of the PCB rule where its documentary evidence shows a concentration of incinerated PCBs of only 4.4 ppm, far below the legal limit of 50 ppm. It is true that the ALJ, based in part on the fact Ross' expert, from an examination of the CRL file, was apparently able to duplicate reported PCB results as to sample S01, found that Ross had failed to establish its contention that the tests were improperly conducted or calculated. The data upon which the expert's determination was based is not in the record, however, and the final decision holds as a matter of law that failure to document or otherwise support the final reported PCB concentration (Complainant's laboratory director having acknowledged that good laboratory practice required such documentation) under the circumstances present here requires the conclusion that Complainant has not met its burden of proving the violation charged by a preponderance of the evidence.

The result might well be different if Complainant's documentation bridged the gap between the reported result and the figure shown on the computer printout and doubts were cast on the validity of the tests by independent evidence introduced by Ross.7/ In that instance, it would be

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6/ See Sullivan, The Equal Access to Justice Act In the Federal Courts; 84 Colum. L. Rev. 1089, wherein it is argued that the standard should be the existence of a genuine controversy in which the government has some likelihood of prevailing. This would appear to require as a minimum some evaluation of opposing evidence, which is not true as to the mere ability to prove a prima facie case.

7/ This appears to be precisely the case with regard to sample S28 collected from the mixing pit on November 5, 1979.

apparent that Complainant had made out a prima facie case, which is not true as to sample S01 herein. Although the final decision does state (at 19) that the burden of proof therefore shifted back to Complainant to provide evidence of how the so-called dilution factor was used in the laboratory procedures followed by Complainant's analyst, the mentioned discrepancy was highlighted through the cross-examination of Complainant's own witnesses. It is therefore concluded that Complainant failed to make out a prima facie case as to sample S01 and that its action as to that sample was not substantially justified even under its own explication of the applicable standard.8/

Split or partial awards under the Act are clearly appropriate and even if its action as to sample S01 is deemed substantially justified, its action as to the other samples cannot be. As Ross points out (Reply to Complainant's Answer at 8), Complainant had no evidence that the contents of the 17,000-gallon tank were incinerated between July 10 and October 2, 1979, as charged in the complaint and no evidence as to the disposition of the wastes present in the mixing pit on November 5, 1979. Complainant

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8/ In Ulrich v. Schweiker, 548 F.Supp. 63 (D.Idaho, 1982) the court reversed the Secretary's decision denying disability benefits under the Social Security Act. Nevertheless, the application for fees under the EAJA was denied, the court holding that there was a genuine dispute as to plaintiff's eligibility, the decision was a "close call" and therefore, the Secretary's decision was substantially justified. Cf. Wolverton v. Schweiker (note 5, supra), where Secretary's decision was not supported by substantial evidence or, according to the court, any evidence, Secretary's decision was not substantially justified and an award under the Act was made. In Cinciarelli v. Reagan, 729 F.2d 80 (D.C. Cir. 1984), the government settled the underlying litigation after the government's position on statutory interpretation was rejected on appeal. In subsequent litigation under the EAJA, the government's position as to interpretation of the statute, although erroneous, was held to be substantially justified. Its position on the facts, however, was held not to be substantially justified, making a partial award appropriate.

did not bother to appeal the ALJ's dismissal of the complaint in these respects. Accordingly, apart from any questions and the validity of the tests,9/ its action as to these wastes cannot be regarded as substantially justified.

Complainant's answer to the application includes references to citizen complaints of odors, haze and respiratory ailments and a copy of a memorandum, dated November 5, 1979, referring, inter alia,10/ to complaints of odors by residents in the area of the Ross facility. Included as Attachment B to the answer is a petition signed by over 100 residents of Eaton Township that proper operational controls be imposed on the facility so that it operated without endangering the petitioners' health. Ross was permitted to reply to the answer and has filed a motion to strike the attachments and references thereto in the answer, asserting that the petition was not in the record of the proceeding and pointing out that Complainant has not moved for further proceedings in accordance with 40 CFR 17.25(b). Ross further points out that in the absence of a motion for further proceedings, any additional facts must be supported by affidavit in accordance with 40 CFR 17.22(c), which has not been done in this instance. Ross alleges that the attachments and references

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9/ Although Complainant is considered to have established a prima facie case that sample S28, collected from the mixing pit on November 5, 1979, contained PCBs at a concentration of 67.3 ppm, the CRL file and computations were reviewed by Ross' expert, Mr. Paul Epstein, and the ALJ held that his uncontradicted testimony cast sufficient doubt as to the validity of the CRL reported result that it could not be held Complainant had established by a preponderance of the evidence the sample contained PCBs equal to or in excess of 50 ppm.

10/ It is of interest that the memorandum refers to the conflicting data bases arising from the large differences between PCB concentrations reported by CRL on samples taken on July 10, 1979, and the Ohio EPA on samples taken on October 2, 1979. The memorandum attributes the differences to analytical error and/or the fact product sampled in July may have been incinerated.

thereto are irrelevant to the issue at hand and highly prejudicial (Reply to Answer at 2). Ross says that it was charged with a violation of an act and regulations addressing the manufacture, use and disposal of PCBs and that this had nothing to do with water contamination, odors, loss of vegetation or medical problems. It asserts that no such complaint has ever been brought against Ross by any state or federal agency.

There being no apparent connection between odors and other complaints from residents of the area concerning operation of the facility and the allegations in the complaint, Ross' motion is prima facie well taken. Although Complainant has not so argued, the only apparent purpose of including the citizen petition as to the operation of the facility is to show that special circumstances make an award to Ross unjust.11/ Because there is no evidence, other than the alleged improper disposition of PCBs, that the Ross facility was operated in violation of any federal, state or local laws or regulations and because any such inquiry would involve extraneous matters clearly beyond the scope of the complaint against Ross, any contention that the citizens' complaints in this instance can be used as a basis for finding an award to Ross unjust is rejected. The motion to strike is granted.12/

Complainant has objected to a number of items in the application for the reason, among others, the charges were incurred prior to the issuance

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11/ Absent such a purpose, the petition hinders rather than helps Complainant's position, because it tends to demonstrate the complaint was issued without adequate investigation in response to public pressure.

12/ Before the Judicial Officer, Complainant filed a motion for leave to file a reply to the motion to strike. This motion was denied without prejudice to Complainant's right to renew the motion before the ALJ (letter from Judicial Officer, dated July 19, 1984). Complainant has not renewed the motion.

of the complaint and thus are not properly part of a proceeding under 40 CFR 17.03(a)(3). Ross points out that the applicable statutory language (5 U.S.C. 504(a)(1)) is that the fees and expenses claimed be "incurred in connection with that proceeding," i.e., the proceeding in which the applicant was the prevailing party, and alleges that all the claimed amounts are properly recoverable. Other than the amounts for expert witnesses in excess of the hourly rate allowed by the regulation, which are referred to in the findings and hereinafter, Complainant's objections are considered to be without merit. Specific reasons for overruling the objections follow:

b. Charges (attorneys' fees) for telephone calls, research, review, discussions, etc., on November 5 and 6, 1979, January 3, 15, 16, 17 and 28, February 8 and 26, and March 6 and 16, 1980.

Ross says that these services were performed in anticipation of the proceeding, were therefore in connection with the proceeding and are properly recoverable.

Ross was clearly entitled to legal representation in its efforts to head-off or avoid the filing of a complaint and to be prepared and informed when, and if, a complaint was filed. Ross' contention that these services were in connection with the proceeding and are therefore recoverable is accepted. Questionable, however, is that portion of the hour of services charged on January 3, 1980, which represents a call from Mr. Friedberg concerning a stack test. Prima facie, this concerns the Clean Air Act rather than the TSCA. Conceivably, however, it could relate to tests as to the qualification of

Ross' incinerator to burn PCBs and inasmuch as the charge is not otherwise broken down, the charge is accepted.13/

c. Complainant objects to 15 minutes charged on April 7, 1980, for a call to a Pat O'Connor concerning Federal EPA matters.

Ross explains that Mr. O'Connor was and is Ross' accountant and that it is necessary that he be fully informed as to suits against the firm. This explanation is accepted and the charge is allowed.

d. Complainant also objects to a total of over 5.5 hours charged on June 3 and 5, 1980, concerning television and newspaper coverage of the proceeding against Ross.

Ross explains that there was a barrage of unfavorable publicity concerning the complaint against Ross, that Mr. Ross, President of the applicant at the time, was interviewed by representatives of the news media and that Mr. Ross made the decision to appear on a TV news broadcast in order to explain his company's position to the public. Because adverse publicity could, and allegedly did, have an unfavorable impact on Ross' business,14/ its contention that these services were in connection with the proceeding is accepted. These charges are allowed.

13/ The purpose of the EAJA is to encourage contests of unreasonable or unjustified government actions and this purpose would not be served by a crabbed or narrow interpretation of allowable fees and expenses under the Act.

14/ Although not part of the record, it is of interest that a letter from counsel for Ross to the ALJ, dated October 1, 1980, refers to a press release concerning the case issued by EPA at the time the complaint was issued and to statements made by counsel for Complainant at a meeting of concerned area residents. Complainant, then, appears to have been largely responsible for the publicity concerning the proceeding and its present objection to expenses incurred by Ross in an effort to counter an unfavorable publicity barrage comes with an ill grace.

e,f. Complainant objects to one-half hour charged for a call concerning hazardous waste from EPA on July 16, 1980, and to 15 minutes charged on October 6, 1980, concerning a U.S. EPA Task Force.

Ross points out that it operates a hazardous waste incineration facility and alleges that both calls related to the proceeding against Ross. This explanation is accepted and these charges are allowed.

g. Complainant objects to charges on July 22, October 17, 20 and 28, 1980, concerning Freedom of Information Act requests and an appeal from an apparent denial of such a request. Complainant says that these charges are not properly part of the proceeding and therefore unallowable (Answer at 5).

Ross asserts that these charges were in connection with the proceeding, because they were necessitated by Complainant's ignoring its attempts to make discovery and thus obtain information essential for its defense. As indicated (note 3, supra), the record supports Ross in this respect and these charges are allowed.

h. Complainant objects to charges shown on November 13, 1980, which include preparation of RCRA plans and two calls to Mrs. Cromling, Executive Vice President of Ross, concerning these plans.

Ross alleges that preparation of the RCRA plans involved an analysis of this proceeding's impact on such plans and that therefore the fees for such time are allowable. Although the matter is not free from doubt, this explanation is accepted.

j,k, l,m & n. Complainant objects to time charged on October 15, 1981, for a call to the ALJ as to whether a transcript of the hearing had been filed,

for a call on January 4, 1982, to the ALJ relative to an extension of time to file a brief, for calls to the Judicial Officer on March 2, 1982, relative to an extension to file an appeal and a brief in support thereof, for a call on April 13, 1982, relative to an extension of time to file pleadings and for charges in the total amount of $148.65 for express mail.

These charges were all incurred in connection with the proceeding, are normal and expected happenings in present day litigation and are clearly allowable.

i. Complainant objects to time (3.5 hours) charged on December 30, 1981, which includes research of the Equal Access to Justice Act upon the ground this time was not properly part of the proceeding.

Ross' answer to this argument is less than satisfactory, merely stating that research regarding the EAJA was included, because the Act was mentioned in its brief. It is concluded, however, that this time is properly chargeable, because it has been held that under the EAJA applicable to judicial proceedings (28 U.S.C. 2412) expenses incurred in bringing a successful EAJA suit are recoverable. Cinciarelli v. Reagan, (note 8, supra). The language allowing recovery of attorney's fees in judicial proceedings tracks that allowing such recovery in administrative proceedings and no reason is apparent why a similar rule should not apply to the latter proceedings.

Regarding its claim for expert witness fees, which as noted previously, were computed at rates in excess of that allowed by the regulation, Ross points out that the Act (§ 504(b)(1)(A)) provides that recoverable "fees and expenses" includes reasonable expenses of expert witnesses and that the amount of fees is to be based upon prevailing market rates for the kind and quality of services furnished. Ross argues that the hourly rate charged by Messrs. Epstein ($50.00) and Friedberg ($54.00) is nearly the same and constitutes strong evidence that the prevailing market rate for such services is approximately $50.00 an hour. Recognizing that the Act further provides that no expert witness may be compensated at a rate in excess of the highest rate paid by the involved agency for expert witnesses, Ross attacks the $24.09 hourly rate set by the regulation as unreasonable and contrary to law. Regardless of the merits of this argument, the ALJ may not ignore or invalidate the regulation and is bound thereby.

Ross' application is otherwise in conformity with the Act and regulation.15/

15/ In a letter to counsel, dated August 2, 1984, the ALJ inquired whether Ross presently desired a hearing and pointed out that the application did not include the statement required by 40 CFR 17.13(b)(1) as to the hourly rate billed and paid by the majority of counsel's clients during the relevant time period. The omitted statement was supplied by a letter from counsel, dated August 14, 1984, wherein it was alleged that the rate of $75.00 per hour specified on page 22 of the amended application and incorporated by reference in its affidavit was considered to comply with the cited requirement.

Conclusion

It is recommended that Ross' application for fees and expenses under the Equal Access to Justice Act (5 U.S.C. 504) be allowed in the amount of $71,243.17.16/

Dated this 13th day of September 1984.

Spencer T. Nissen
Administrative Law Judge

16/ This sum is derived by deducting the amount claimed for expert witness fees above the amount allowed by the regulation ($7,391.28) from the total claim of $78,634.45. If Complainant's position as to the propriety of the sampling and testing of sample S01 be regarded as substantially justified, it is concluded that one-half of the recommended total claim should be allowed.