UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
LAFAYETTE DIVISION

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| HOOSIER ENVIRONMENTAL COUNCIL, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | CAUSE NO. 4:19-CV-00071 |
| NATURAL PRAIRIE INDIANA FARMLAND HOLDINGS, LLC, et al., | ) | |
| Defendants. | ) | |

**PLAINTIFFS' APPLICATION FOR ATTORNEY FEES AND COSTS UNDER THE EQUAL ACCESS TO JUSTICE ACT**

Pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), the Plaintiffs, Hoosier Environmental Council ("HEC"), Indiana Audubon Society ("IAS"), Thomas Cutts, Debra Cutts, Alyssa Nyberg, Gustaf Nyberg, and Steven Cowley (the "individual Plaintiffs"), hereby respectfully petition the Court for an award of attorney fees and litigation expenses incurred to successfully litigate Plaintiffs' claim under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706, against the United States Army Corps of Engineers ("Army Corps"). As detailed below, Plaintiffs meet the EAJA's requirements for an award of reasonable attorney fees in the amount of $809,225 and costs of litigation in the amount of $16,315.

**Background:**

Plaintiffs filed this lawsuit on, July 29, 2019, raising claims against the Defendants, Natural Prairie Indiana Farmland Holdings, LLC ("Natural Prairie") and the U.S. Army Corps of Engineers ("Army Corps"). [ECF 1] In particular,

Plaintiffs brought a citizen suit under the Clean Water Act ("CWA") alleging that Natural Prairie violated CWA Section 404 by filling ditches and draining its land, which Plaintiffs contend was mostly wetland, to build a large dairy operation there, without obtaining a 404 permit from Army Corps ("CWA claim"). [ECF 1 at 35-36]

In turn, Plaintiffs sought judicial review under the APA ("APA claim"), alleging the Army Corps abused its discretion in issuing an after-the-fact approved jurisdictional determination ("AJD") concluding, contrary to agency regulation and guidance, that Natural Prairie's land was not wetland and that most of the ditches Natural Prairie filled were not jurisdictional waters of the U.S. subject to regulation under the CWA. [ECF 1 at 36-37] To remedy this, Plaintiffs asked the Court to set aside the Army Corps' AJD as arbitrary and capricious, which the Court did on September 29, 2021 [ECF 80].

Specifically, the Court granted summary judgment for Plaintiffs on the merits of the APA claim, set aside the Army Corps' AJD as arbitrary and capricious, and remanded the matter back to the agency, directing Army Corps to reconsider its jurisdiction over Natural Prairie's land consistent with the Court's ruling. [ECF 80 at 37] The Court's decision came on the heels of extensive briefing by the Parties over the course of two years on various procedural and substantive matters related to the APA claim, as well as the Parties' cross-motions for summary judgment on that claim. [see ECFs 22 – 80]

On March 17, 2023, the Army Corps issued its revised AJD [ECF 128], which ultimately led Plaintiffs and Natural Prairie to settle the CWA claim. [ECF 154]

Thereafter, on March 4, 2024, the Court granted Plaintiffs and Natural Prairie's joint motion to dismiss and entered final judgment retaining the Court's jurisdiction to enforce the settlement agreement between Plaintiffs and Natural Prairie, and triggering the 30-day period under the EAJA for Plaintiffs to seek fees and costs as prevailing parties against the Army Corps. [ECF 154] Further details relevant to this fee petition, including specific findings of the Court in granting summary judgment for Plaintiffs on the APA claim, are discussed as appropriate below.

## I. Standard For Fee Recovery Under the EAJA

Congress enacted the EAJA "to ensure that persons not be 'deterred from seeking review of, or defending against, unreasonable government action because of the expense involved in securing the vindication of their rights.'" *Sprinkle v. Colvin*, 777 F.3d 421, 427 (7th Cir. 2015) (quoting *Sullivan v. Hudson,* 490 U.S. 877, 883 (1989)). To that end, the EAJA mandates that in "any civil action brought by or against the United States . . . including proceedings for judicial review of agency action," the court "*shall award* to a prevailing party other than the United States," the party's fees and other expenses "unless the court finds the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

A party seeking fees under the EAJA must submit an application to the court "within thirty days of the final judgment in the action" that: (1) demonstrates the party is a "prevailing party" and "eligible to receive an award" of fees and costs; (2) provides an "itemized statement from any attorney or expert witness" representing the party "stating the actual time expended and the rate at which fees and other

expenses were computed"; and (3) "allege[s] that the position of the United States was not substantially justified." *Id.*

Once the applicant meets these requirements, the burden shifts to the government to demonstrate that its position was substantially justified; that is, the government "ha[d] a reasonable basis in law and fact" to advance its position both before and during the litigation. *Marcus v. Shalala*, 17 F.3D 1033, 1036 (7th Cir. 1994) (citing *Pierce v. Underwood*, 487 U.S. 552, 564–65 (1988)). To that end, the court looks to the agency's record and the court record to determine if the government had reasonable grounds to advance its position throughout the proceeding. *Cummings,* 950 F.2d at 496 (citing 28 U.S.C. § 2412(d)(1)(B)). "Thus, fees may be awarded in cases where the government's prelitigation conduct was not substantially justified even though its litigating position may have been substantially justified and vice versa." *Marcus,* 17 F.3d at 1036.

Finally, when interpreting the EAJA's provisions, courts must be mindful that "[t]he EAJA is meant to open the doors of the courthouse to parties, not to keep parties locked in the courthouse disputing fees well after the resolution of the underlying case." *Sosebee v. Astrue*, 494 F.3d 583, 588-589 (7th Cir. 2007) (citing *Cont'l Web Press, Inc. v. NLRB*, 767 F.2d 321, 323 (7th Cir. 1985)). As such, an EAJA fee request "should not result in a second major litigation" but instead is intended to be a "summary" proceeding where "some informality of proof is appropriate." *Id.* (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 437 (1983)).

Furthermore, courts should consider the policy implications of awarding fees under the EAJA; namely, that it "encourages members of the public to assist in the valuable public service of improving the efficiency of government operations" and may motivate "government agencies to investigate, prepare and pursue litigation against private parties in a professional and appropriate manner." *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1080 (7th Cir. 2000).

Applying these principles here, the Court should grant Plaintiffs' fee request. As detailed below, Plaintiffs meet the EAJA's statutory requirements. Plaintiffs are clearly the prevailing parties on their APA claim. They are "eligible" to receive a fee award. And there is no reasonable justification for the Army Corps' position at any stage of the proceeding as confirmed by the Court's summary judgment ruling, which is based on careful analysis of the agency's administrative record and arguments. The Army Corps will not be able to demonstrate otherwise or point to any special circumstances that would make granting a fee award to Plaintiffs unjust.

## II. Plaintiffs are "Prevailing Parties"

The EAJA does not define what it means to be a "prevailing party" other than in the context of eminent domain proceedings. *See* 28 U.S.C. § 2412(d)(2)(H). However, the term is understood to mean a party that "receives at least *some* relief on the merits of his claim." *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep't of Health and Human Servs.*, 532 U.S. 598, 603–604 (2001) (emphasis added); *Jeroski v. Fed. Mine Safety & Health Rev. Comm'n*, 697 F.3d 651, 655 (7th Cir. 2012).

Stated differently, a "prevailing party" is one who "succeed[s] on any significant issue in the litigation which achieves some of the benefit the part[y] sought

in bringing suit." *Austin v. Dep't of Commerce*, 742 F.2d 1417, 1419 (Fed. Cir. 1984) (quoting *Hensley v. Eckerhart*, 461 U.S. 424 (1983)).

Plaintiffs are without question the prevailing parties here. They did more than just obtain *some* of the relief sought on their APA claim, they obtained all of it. The Court granted summary judgment for Plaintiffs on the merits and vacated the Army Corps' AJD as arbitrary and capricious, which is precisely the relief Plaintiffs requested. And that win ultimately led to a favorable settlement of the CWA claim against Natural Prairie. Thus, in every sense of the word, Plaintiffs "prevailed."

## III. Plaintiffs Are "Eligible to Receive an Award" Under the EAJA

Plaintiffs are also "eligible to receive an award" under the EAJA. 28 U.S.C. § 2412(d)(1)(B). To be eligible, a party must be:

> (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed[;] or
> (ii) . . . [an] organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 [1986] (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, . . . may be a party regardless of the net worth of such organization . . .

28 U.S.C.S. § 2412(d)(2)(B); *see also Sosebee,* 494 F.3d at 586-587 (explaining a party is eligible to receive an award if it meets the EAJA definition of "party").

While the fee petitioning party must establish that it meets the EAJA's net worth limitations, courts have not been clear "on what a party needs to do in order to satisfy that obligation." *Sosebee,* 494 F.3d at 587. Instead, "[c]ourts have interpreted the statute to require varying levels of supporting evidence, depending on whether

the applicant is a corporation or individual and whether there is a serious doubt about the applicant's eligibility." *Id.* at 588.

For example, in an EAJA case where "the underlying cause of action began with the assertion that the plaintiff was a prospective buyer of a yacht," the plaintiff's "unsupported statement that he satisfied the EAJA net worth requirement" was insufficient. *Id.* at 588. In contrast, when there is no real question about a party's net worth, courts have held that the party's statement that he meets the net worth requirements is enough. *Id.*

In *Sosebee,* the Seventh Circuit considered this question further and concluded that the EAJA imposes the "normal civil standard of proof" on EAJA applicants, "which is to say by a preponderance of the evidence." *Id.* at 589. As such, the court observed that "an affidavit of net worth would be an efficient way of presenting evidence on the point[;]" but also noted, "there is nothing magical about an affidavit" if there is other competent evidence showing that the fee applicant meets the EAJA's financial eligibility requirements. *Id.* at 588. Moreover, the court confirmed that "Congress did not intend the EAJA application process to be a high stakes gamble," and, thus, "one pleading failure, such as neglecting to assert that one's net worth did not exceed [the statutory limit] at the time suit was filed [does not] completely foreclose[] a litigant's opportunity for EAJA fees." *Id.* at 590. Instead, the party may submit additional evidence of net worth if the question is challenged. *Id.*

Here, the respective net worths of the organizational Plaintiffs, HEC and IAS, were less than the statutory limit of $7 million at the time this case was filed as

confirmed by the organizations' Form 990s filed with the IRS.[1] But even if their net worths exceeded the limit, both HEC and IAS are still eligible, because in 2019 they were (and are) tax exempt, non-profits with far less than 500 employees.[2]

In turn, the individual Plaintiffs have each provided affidavits confirming that their respective net worths did not exceed $2 million in 2019.[3] The fact that Plaintiffs were represented by non-profit counsel provides additional evidence (albeit, circumstantial) that Plaintiffs are not wealthy and, thus, their affidavits should be sufficient to demonstrate financial eligibility for a fee award under the EAJA.

However, if the Court believes Plaintiffs' tax returns or other financial information is necessary on this point, Plaintiffs request that they be allowed to submit such evidence for the Court's in-camera review. As with all tax returns of private citizens, Plaintiffs' tax and financial records contain sensitive information that is generally protected from public disclosure under federal and state law. *See* 26 U.S.C. § 6103; Indiana Code § 6-8.1-7-1.

## IV. The Army Corps' Pre-Litigation and Litigation Positions Were Not Substantially Justified

For purposes of the EAJA "an agency's position is substantially justified if it has a reasonable basis in law and fact." *Phil Smidt & Son, Inc. v. NLRB*, 810 F.2d 638 (7th Cir. 1987). To demonstrate this, the government must make a "strong showing" that its position was grounded in: "(1) a reasonable basis in truth for the

[1] See the IRS Form 990s of HEC and IAS for fiscal years 2018 – 2020, attached hereto as Exhibits A and B.
[2] *Id.*
[3] See Affidavits of Plaintiffs Gus and Alyssa Nyberg, Thomas and Debra Cutts, and Steven Cowley are submitted herewith as Exhibits C-G.

facts alleged; (2) a reasonable basis in law for the theory propounded; and (3) a reasonable connection between the facts alleged and the theory propounded." *Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006); *Golembiewski v. Barnhart*, 382 F.3d 721, 724 (7th Cir. 2004); *Ramos v. Haig*, 716 F.2d 471, 473 (7th Cir 1983).

Although "fees may be awarded if the government's pre-litigation conduct, . . . or its litigation position [were] not substantially justified . . . the district court is to make only one determination for the entire civil action." *Id.* "This global assessment comprehends that the district court will examine not simply whether the government was substantially justified in its position at the beginning or end of the proceedings, but whether the government was substantially justified in continuing to push forward at each stage." *United States v. Hallmark Constr. Co.*, 200 F.3d 1076, 1081 (7th Cir. 2000); *see also Quality C.A.T.V., Inc. v. NLRB*, 969 F.2d 541 (7th Cir. 1992) (concluding that "government was not substantially justified in continuing to pursue what amounted to an unsupportable theory after . . . [a certain] point.")

To illustrate, in *Hallmark,* the defendant construction company sought EAJA fees after defeating an Army Corps' enforcement action alleging the defendant had filled wetlands in violation of the CWA. *Id.* at 1078. While the Army Corps survived summary judgment, the district court ultimately ruled for the defendant at trial, finding the agency's action was "arbitrary and capricious" and that "much of the Corps' evidence rested on speculation and conjecture." *Id.* Even so, the district court denied the defendant's fee request because the agency had survived summary judgment. *Id.* at 1079.

On appeal, the Seventh Circuit found the district court's reasoning "insufficient," "troubling," and not based on "the proper legal standard . . . regarding the justification of the government's position," which is not demonstrated by "the mere fact that the government succeeded in surviving summary judgment." *Id.* at 1079-1080. This is especially so, the Seventh Circuit explained, when there is "strong language against the government's position in an opinion discussing the merits of a key issue, [which] *is evidence* in support of an award of EAJA fees." *Id.* at 1079 (citing *Marcus,* 17 F.3d at 1038 (emphasis added)). As such, the Seventh Circuit questioned how the Army Corps could possibly prove that its position was substantially justified when the district court's "merits opinion so strongly favor[ed] the defendant against the government." *Id.* at 1079.

The Seventh Circuit has since clarified the sort of "strong language" in a merits opinion that will establish a lack of substantial justification for the government's position. Such language includes findings that an agency "violated its own rules and regulations," "failed to apply the [relevant] factors," "ignored significant evidence," or when the opinion does not "adopt or affirm any position taken by the [government]." *Golembiewski*, 382 F.3d at 724-725. That is certainly the situation here.

Indeed, in no uncertain terms, this Court's summary judgment ruling on Plaintiffs' APA claim details the Army Corps' failure to follow its own regulations and guidance and disregard of relevant factors and key evidence in issuing the AJD for Natural Prairie's land. For instance, concluding the agency's AJD finding of no wetlands was arbitrary and capricious, the Court stated in relevant part:

- The parties don't dispute that Natural Prairie made several alterations to the land before contacting the Corps . . . The agency inspector even acknowledged that these activities may have impacted jurisdictional waters. *These alterations should have triggered the Corps' atypical situation review*—at least until the normal circumstances of the property were adequately characterized. Nevertheless, when the Corps made its jurisdictional determination . . . it relied on an assessment of the land by Natural Prairie's environmental consultant finding no wetlands *using the typical situation methodology*. *Despite the presence of hydric soils,* the Corps concluded there was no wetland vegetation or hydrology, so the land was not a wetland. [ECF 80 at 24 (emphasis added, record citations omitted)]

- Despite referencing both [agency guidance] manuals, absent from the inspector's narrative is any description of the prior drainage system . . . Natural Prairie's new drainage system, how these systems were designed to function, and whether they were effective in removing wetland hydrology from the area. Indeed, looking to the narrative alone, *the inspector's conclusion was reached without any consideration of the hydrology of the land before Natural Prairie's alteration.* [ECF 26 (emphasis added, record citations omitted)]

- In recognition of the substantial deference courts give to agencies making technical decisions, the court turns to the reported data sources the agency used to make its jurisdictional determination. *Looking to these sources, but for the aerial photographs there is an absence of the data identified in the Midwest supplement to assess the relevant drainage factors . . . These relevant factors must be considered for agricultural lands . . . The absence of these sources, coupled with an absence of any meaningful discussion of the hydrology of the site before Natural Prairie's alterations, reveal that the Corps didn't follow the procedures outlined in its own guidance when it decided the land was prior converted cropland.* [ECF 80 at 26-27 (emphasis added, record citations omitted)]

- *Despite an obligation* to assess the hydrology of the land, *absent from the administrative record is any indication of a meaningful consideration of the nature and characteristics of the hydrology of the land as it existed prior to Natural Prairie's alterations*, how the drainage systems were designed to function, and how effectively and efficiently they could convert land from wetland to upland. There is also no explanation why these steps were skipped. Nevertheless, the Corps concluded the land was drained (in some way) and the drainage systems (at some point) converted it into upland. '*Maybe the assumption was defensible, but the*

*Corps does not provide record support for that assumption.*' [ECF 80 at 27-28 (emphasis added, record citations omitted)]

- [T]he court's review of the administrative record leaves substantial gaps from the data the Corps used to the conclusion the Corps made. *These gaps are so significant that the court is left with the firm conviction that the Corps did not follow its own guidance and procedures* when it concluded that Natural Prairie's land was prior converted cropland before Natural Prairie's alterations. [ECF 80 at 28 (emphasis added, record citations omitted)]

The Court made similar observations about the Army Corps' AJD finding that most of the ditches Natural Prairie filled were not jurisdictional waters of the U.S.:

- The court has already concluded that, based on the entire administrative record, the agency's wetland determination was arbitrary and capricious. Therefore, it cannot subsequently support the agency's irrigation canal finding . . . '*If the Corps bases its conclusions on entirely false premises or information . . . a reviewing court would have difficulty describing its conclusions as reasoned*; it would have to call them arbitrary and capricious.' [ECF 80 at 31-32 (emphasis added, internal citation omitted)]

- Here, there is not only no indication of the procedures (or their adequacy) employed by the inspector to assess the flow characteristics of the filled lateral ditches, but also no explanation that the inspector made a finding about the jurisdiction of any of the lateral ditches independent of its upland irrigation canal finding. [ECF 80 at 34]

- [E]vidence that the Corps considered or conducted any significant nexus evaluation *is absent from the record*, despite the aerial image demonstrating all tributaries were connected to the Bogus Island and Lawler Ditches . . . *The administrative record likewise indicates no such analysis was considered. This unremarked upon omission of an analysis required by both agency guidance and judicial precedence renders the decision arbitrary and capricious.* [ECF 80 at 35 (emphasis added, record citations omitted)]

- 'While we review the Corps' determination narrowly, *no amount of agency deference permits us to let slide critical findings bereft of record support.'* When holes exist in agency reasoning, holes that should be (but aren't) filled by the administrative record, it is not the court's job to fill them. Remand instead is necessary. *Support in the record for a*

*conclusion that the lateral ditches all lacked relatively permanent flow is vague at best. Evidence or an explanation that the lateral ditches were similarly situated is absent. A significant nexus analysis is omitted. These critical findings aren't entitled to deference.* [ECF 80 at 36 (emphasis added, internal citation omitted)]

The Court's summary judgment ruling also confirmed that the Army Corps' position during the litigation lacked merit:

- Nor does the Corps fill these [evidentiary] gaps through its briefing . . . Rhetorically recognizing that an assessment of normal circumstance hydrology is absent from the record, *the Corps attempts to string together evidence that such an assessment is there . . . [But] [t]his evidence does not support the Corps' argument* that the inspector's decision was rationally based on the identified relevant factors, *leaving the Corps with only post hoc justifications that the court cannot accept.* [ECF 80 at 28-29 (emphasis added, record citations omitted)]

- The agency argues that the inspector rationally concluded that the lateral ditches were not jurisdictional tributaries based on the inspector's review of historical aerial photographs of the site, a U.S Geological Survey map, a soil map, and the National Geographic Flood Plan map . . . [*However, the*] *record provides no explanation as to if or how these factors were considered, and indeed no indication of how the conclusions were reconciled from this data. The Corps' post hoc rationalizations in briefing are not afforded deference.* [ECF 80 at 33-34 (emphasis added, record citations omitted)]

In sum, a fair reading of the Court's resolute language in its reasoned opinion on Plaintiffs' APA claim establishes that the Army Corps' pre-litigation and litigation positions were not reasonably grounded in the law or the record evidence and, thus, were not substantially justified.

## V. No Special Circumstances Exist That Make a Fee Award Unjust

Even when the government's position is not substantially justified, a court may still deny fees if the government can show there are "special circumstances that would make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The EAJA does not elaborate on

what constitutes special circumstances. However, the courts have looked to "equitable principles" in resolving the question. *See e.g., Greenhill v. United States*, 96 Fed. Cl. 771, 778 (2011) (confirming that "[c]ourts look to equitable principles such as the doctrine of 'unclean hands' in determining whether there are special circumstances that would make an EAJA award unjust"); *Oguachuba v. INS.*, 706 F.2d 93, 98 (2nd Cir. 1983) (interpreting the EAJA as giving courts discretion to deny awards based on "traditional equitable principles").

For instance, in *Oguachuba,* the Second Circuit held that it would be "plainly inequitable" to award attorney fees to a party who had prevailed in his habeas corpus proceeding due to a technical error when he "would not have been incarcerated in the first place but for his notorious and repeated violations of United States immigration law." 706 F.2d at 99. Similarly, in *United States Dep't of Labor v. Rapid Robert's, Inc.*, the Eighth Circuit concluded that it would be "patently unjust" to award fees to a party who knowingly violated the law but escaped paying fines on procedural grounds. 130 F.3d 345, 349 (8th Cir. 1997).

On the other hand, the Federal Claims Court in *Greenhill,* concluded that the plaintiff's incorrect answer on a DOJ employment questionnaire that led to the litigation and her counsel's conduct, which caused multiple discovery delays, were not the sort of special circumstances that would make a fee award unjust. 96 Fed.Cl. at 778. In reaching that conclusion, the court reasoned "that without evidence of purposeful deceit, plaintiff's error [did] not render an EAJA award unjust." *Id.* In turn, the court noted that the discovery delay caused by plaintiff's counsel "was not

the cause of the litigation" nor did it "so unreasonably and unduly protract[] the litigation" as to warrant denial of fees. *Id.* at 779.

In the instant matter, there is no evidence of any wrongdoing by Plaintiffs or their counsel, much less evidence of the sort of willful, unlawful, dilatory conduct that would make a fee award to Plaintiffs unjust. To the contrary, equitable considerations weigh in Plaintiffs' favor for all the reasons Congress enacted the EAJA in the first place; namely, to "improve citizen access to the courts" and remove the burden of a party having "to choose between acquiescing to an unreasonable Government order or prevailing to his financial detriment." *Oguachuba,* 706 F.2d at 98-99 (quoting H.R. Rep. No. 1418, 96th Cong., 2d Sess. at 12)

## VI. Plaintiffs Seek Reasonable Attorney Fees and Litigation Expenses

A party seeking fees and expenses under the EAJA must provide "an itemized statement from any attorney or expert witness representing or appearing on behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed." 28 U.S.C. § 2412(d)(1)(B). Recoverable "fees and expenses" are defined to include "the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees." 28 U.S.C. § 2412(d)(2)(A). In turn, a reasonable attorney fee under the EAJA is one "based upon prevailing market rates for the kind and quality of the services furnished" not to exceed "$125 per hour unless the court determines that . . . a special

factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C. § 2412(d)(2)(A).

As presented below, Plaintiffs seek an enhanced fee award for their counsels' work on the APA claim, which was complex and required attorneys with specialized knowledge and skill in the practice of environmental law and litigation. Plaintiffs' fee request is based on a conservative "lodestar" amount calculated by multiplying the number of hours that were reasonably necessary for Plaintiffs' counsel to obtain the successful result they achieved by a reasonable hourly rate—i.e., the market rate in 2019 for Indiana environmental attorneys with comparable skills and experience. Plaintiffs also seek attorney fees for their counsel's time to prepare this fee petition as allowed by the EAJA. And finally, Plaintiffs seek their expert witness costs that were reasonably necessary to pursue the APA claim.

A. Plaintiffs Are Entitled to Enhanced Rates

The EAJA directs courts to award "reasonable attorney fees" to prevailing parties at a base rate of $125 per hour or higher if justified by "a special factor" such as "the limited availability of qualified attorneys for the proceedings." *Pierce v. Underwood,* 487 U.S. 552, 572 (1988) (citing 28 U.S.C. § 2412(d)(2)(A)). Such a "special factor" includes the need for attorneys in "an identifiable practice specialty … where such qualifications are necessary and can only be obtained at rates in excess of the [EAJA] cap." *Id.* at 571. The Ninth Circuit recognized "environmental litigation" as one such "identifiable practice specialty." *Love v. Reilly*, 924 F.2d 1492, 1496 (9th Cir. 1991) (citing *Animal Lovers Volunteer Ass'n, Inc. v. Carlucci,* 867 F.2d

1224, 1226 (9th Cir. 1989). And the Seventh Circuit appears to agree with that view. *Raines v. Shalala*, 44 F.3d 1355, 1361, n.9 (7th Cir.1995).

By any measure, Plaintiffs' APA claim was a highly complex environmental proceeding that required representation by attorneys experienced in environmental law and litigation.[4] Indeed, uncovering and recognizing that the Army Corps' AJD was flawed in the first place was due to Plaintiffs' counsel's specialized expertise.[5] Preparing Plaintiffs' Complaint required in-depth understanding of CWA Section 404, relevant federal regulations, and related jurisprudence.[6] Pursuing the APA claim involved navigating the difficult procedural requirements of the APA, proving Plaintiffs' standing to bring the APA claim, understanding wetland science, and applying the Army Corps' complicated technical and regulatory guidance for conducting wetland delineations and CWA jurisdictional determinations to the facts of this case.[7] At every turn, Plaintiffs' counsel were called upon to utilize their specialized skills and distinctive knowledge in environmental law and litigation—especially given that opposing counsel for the federal government and Natural Prairie are themselves seasoned environmental litigators and were formidable adversaries.[8]

But for the fact that Plaintiffs' counsel are non-profit environmental attorneys, Plaintiffs could not have afforded to bring their APA claim. In 2019, market rates for environmental lawyers in Indiana with comparable experience were (and are) far

[4] Exhibit H: CV of Kim E. Ferraro; Exhibit I: CV of Jeffrey B. Hyman.
[5] Exhibit J: Declaration of Kim Ferraro ¶15(c).
[6] Exh. J ¶15(d).
[7] Exh. J ¶15(d).
[8] Exh. J ¶16; Exhibit K: Biographies of Brad Sugarman and Daniel McInerny.

above $125 per hour. Indeed, in a recent opinion by Judge DeGuilio in a CWA enforcement action, this Court approved a fee award based on market rates in 2019 of $538 per hour for an environmental lawyer with 10 years of experience and $637 per hour for an environmental attorney with 20 years of experience. *United States v. United States Steel Corp.*, No. 2:18-CV-127 JD, 2024 U.S. Dist. LEXIS 49170, *31-32 (N.D. Ind. Mar. 19, 2024) (noting the defendant steel company did not object to the proposed hourly rates, which the court "independently [found were] reasonable and reflect[ed] the rates charged by attorneys of similar skill and experience in the relevant community.")[9]

In reaching this conclusion, Judge DeGuilio "concur[red] with the assessment of several experienced litigators and environmental attorneys, proffered in declarations[10] . . . who indicate[d] that the proposed rates [were] reasonable." *Id.* at *32. Judge DeGuilio also found it appropriate to consider prevailing rates in the "Chicago legal market" even though the CWA violations occurred in Portage, Indiana given "the legally complex nature of the proceedings, which required specialized knowledge that was unavailable within the [Northern] District." *Id.* at *2, *32.

Notably, Judge DeGuilio also approved the party's "use of the 'Fitzpatrick Matrix' to ground their hourly rate calculation" explaining:

> The Fitzpatrick Matrix is a chart prepared by the United States Attorney for the District of Columbia to guide what can be considered reasonable legal fees in complex matters. While the Matrix is not

[9] The hourly rates approved by Judge DeGuilio in *U.S. Steel* were submitted as an exhibit, which Plaintiffs provide for this Court's reference as Exhibit L.

[10] The declarations of attorneys David Dabertin and Robert Graham relied on by Judge DeGuilio in *U.S. Steel* are provided here as Exhibits M and N, respectively.

> adopted for use by the Department of Justice outside the District of Columbia, other judges within this district have held it is a useful resource for determining whether fees are reasonable, particularly in '*similarly situated metropolitan areas, such as the Chicago metropolitan area where this Court is located*.'

*Id.* at *32, n.10 (quoting *Mitchell by Mitchell v. LVNV Funding, LLC*, No. 2:12-CV-523, 2020 U.S. Dist. LEXIS 64591, 2020 WL 1862192, *3 n.1 (N.D. Ind. Apr. 13, 2020) (emphasis in original)).[11] According to the Fitzpatrick Matrix, hourly rates in 2019 for attorneys with 12 and 15 years of experience in complex federal litigation—as did Plaintiffs' counsel at the time—were $562 and $593, respectively.[12]

These Chicago-area billing rates are somewhat higher but comparable to those in the Indianapolis market. As found by the Indiana Court of Appeals, reasonable rates in 2018 for experienced Indianapolis-based environmental attorneys were $450 (partner) and $410 (associate) per hour. *Himsel v. Ind. Pork Producers Ass'n,* 95 N.E.3d 101, 113 (Ind. Ct. App. 2018). Similarly, the District Court for the Southern District of Indiana found the billing rate of $436.50 per hour in 2019 to be reasonable for an Indianapolis-based attorney with 14 years of experience in commercial litigation. *Finishmaster, Inc. v. Gmp Cars Collision Fairfield,* 2020 U.S. Dist. LEXIS 138072, *5 (S.D. Ind. 2020). In other words, the billing rates in 2019 of experienced environmental lawyers in Indiana—whether they practiced in the Northern or Southern Districts—were far above $125 per hour.

[11] See *The Fitzpatrick Matrix* attached hereto as Exhibit O at 1.
[12] Exh. O at 1.

As detailed in the Declaration of Plaintiffs' counsel, Kim Ferraro, both she and co-counsel, Jeffrey Hyman, have dedicated their legal careers to the practice of public interest environmental law and are highly skilled in that area.[13] Attorneys with their specialized skills were required for the APA claim, but not available in 2019 or since then for $125 per hour. And the fact that they represented Plaintiffs *pro bono* does not preclude a fee award at market rates. *Atl. States Legal Found., Inc. v. Universal Tool & Stamping Co.,* 798 F. Supp. 522, 526 (N.D. Ind. 1992) (confirming that when attorneys represent clients *pro bono,* courts "must look to the rate charged by attorneys of similar skill and experience in the relevant community."); *see also Howard v. Heckler*, 581 F. Supp. 1231 (S.D. Ohio 1984) (citing the legislative history of the EAJA to conclude that a party's "failure to assume the financial burden of representation is not a bar to the recovery of fees," which "should be based on prevailing market rates without reference to the fee arrangements between the attorney and client.") There is no reason for a different outcome here.

B. Plaintiffs' Fee Request is Based on the Lodestar Amount and is Reasonable

The starting point for determining a reasonable attorney fee is by calculating the "lodestar" amount; that is, multiplying "the number of hours reasonably expended on the litigation by a reasonable hourly rate." *Gisbrecht v. Barnhart,* 535 U.S. 789, 793 (2002) (citing *Hensley,* 461 U.S. at 426); *Pennsylvania v. Del. Valley Citizens' Council for Clean Air,* 478 U.S. 546, 565 (1986) (directing courts to view the lodestar with "a strong presumption" that it "represents a reasonable fee"); *Houston v. C.G.*

[13] Exh. J ¶¶ 15(a),(b).

*Sec. Servs., Inc.,* 820 F.3d 855, 859 (7th Cir. 2016) (explaining that a court "will apply the loadstar analysis to determine the appropriateness of the requested award by conducting a computation of the reasonable hours expended multiplied by a reasonable hourly rate.")

The party seeking a fee award has the burden of demonstrating the lodestar amount; that is, proving hours worked and the proposed rates are reasonable. *Spegon v. Catholic Bishop,* 175 F.3d 544, 550 (7th Cir. 1999). In so doing, the party's counsel should use her "billing judgment" to ensure the fee request excludes hours that "were not reasonably expended on the litigation" or that are "excessive, redundant, or otherwise unnecessary." *Id.* (citing *Hensley*, 461 U.S. at 433). The district court may then "increase or reduce . . . the lodestar amount by considering a variety of factors," the most critical of which "is the degree of success obtained." *Id.* (cites omitted).

To that end, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley,* 461 U.S. at 435. That includes fees for work that was external to, but in service of, the central litigation. *Pennsylvania v. Del Valley Citizens' Council for Clean Air,* 478 U.S. 546, 560-561 (1986) (upholding an award of fees for counsel's work in parallel administrative proceedings that were deemed "necessary to the attainment of adequate relief for their client."); *Chrapliwy v. Uniroyal, Inc.,* 670 F.2d 760, 763 (7th Cir. 1982) (approving a fee award for legal services rendered in "several [separate] court and administrative proceedings" that had "contributed to the ultimate termination of the [federal court case].")

As for determining a reasonable rate for the lodestar calculation, the strongest indicator is the market rate in the community. *Jeffboat, LLC v. Dir., OWCP*, 553 F.3d 487, 491 (7th Cir. 2009) (confirming that "a reasonable hourly rate is the rate that lawyers of similar ability and experience in the community charge their paying clients for the type of work in question.") However, the "community" is not necessarily confined to the "local market" especially when "the subject matter of the litigation is one where the attorneys practicing it are highly specialized and the market for legal services in that [practice] area is a national market." *Id.*

Applying these principles here, Plaintiffs' counsel calculated a conservative but fair lodestar amount. The amount requested is based on substantially fewer hours than were actually spent on the APA claim, multiplied by the low-end of the market rate in 2019 for experienced, Indiana-based environmental attorneys.

*1. The number of hours expended on the APA claim is reasonable.*

As detailed in the Declaration of Plaintiffs' counsel, Kim Ferraro, she exercised careful billing judgment in reconstructing the number of hours she and her co-counsel, Jeffrey Hyman, expended on the APA claim. At the time the APA claim was pending, Ms. Ferraro worked for HEC and Mr. Hyman worked for the Conservation Law Center ("CLC").[14] Both organizations are non-profits that provide *pro bono* representation to clients in environmental matters. As such, their standard operating procedures did not involve client billing or the creation of contemporaneous records.[15]

[14] Exh. J ¶¶ 5(a),(b).
[15] Exh. J ¶ 14.

While Plaintiffs' counsel acknowledge that contemporaneous records are preferred, "it is not categorically forbidden to use reconstructed records" in support of a fee request. *United States v. United States Steel Corp.,* 2024 U.S. Dist. LEXIS 49170, *35-36 (N.D. Ind. Mar. 19, 2024) (confirming "there is no *per se* rule requiring the submission of contemporaneous time records in support of a request for attorney's fees") (citing *Harper v. City of Chicago*, 223 F.3d 593, 605 (7th Cir. 2000)); *Bell v. Powell*, 2019 WL 3945511, at *4 (S.D. Ind. Aug. 21, 2019) (noting the Supreme Court allows estimates of an attorney's time) (citing *Fox v. Vice*, 563 U.S. 826, 838 (2011)).

That said, the court may consider whether use of reconstructed records warrants a discretionary reduction in fees. *U.S. Steel,* 2024 U.S. Dist. LEXIS 49170 at *36 (citing *Harper*, 223 F.3d at 605). However, given the careful methodology and diligence Plaintiffs' counsel used in a "good faith effort to exclude . . . hours that are excessive, redundant, or otherwise unnecessary," *Hensley,* 461 U.S. at 434, and her selection of a lower billing rate than was customary in 2019 for experienced environmental attorneys, such a discretionary fee reduction is not called for here.

Specifically, in estimating hours, Ms. Ferraro did not include any time spent by law students and associate attorneys on the APA claim.[16] Ms. Ferraro did not include the many hours she spent pursuing a state administrative permit appeal involving Natural Prairie's operation, which uncovered the Army Corps' flawed AJD.[17] Nor did Ms. Ferraro include the time she spent obtaining Army Corps' records

[16] Exh. J ¶ 28.
[17] Exh. J ¶ 25.

through a FOIA request.[18] In total, Ms. Ferraro excluded an estimated 600 hours that would otherwise be recoverable under the EAJA.

Ms. Ferraro also exercised considerable restraint and billing judgment in reviewing all court filings in the APA claim and other electronic records to estimate the number of hours she and Mr. Hyman spent preparing or responding to each court filing and the time spent on each related meeting, task, or communication.[19] These estimates are documented in a detailed spreadsheet and reflect meticulous efforts to avoid duplication or any over-estimates of time.[20] For example, where both Ms. Ferraro and Mr. Hyman were involved in a meeting, call or email exchange, the time of only one attorney is included in the calculation.[21] In all, Ms. Ferraro conservatively estimates that she dedicated at least 1482 hours to prosecuting the APA claim and that Mr. Hyman spent at least 278 hours, for a total of 1760 hours.[22]

*2. The proposed hourly rates are on the low-end of prevailing market rates for experienced environmental attorneys in Indiana.*

Plaintiffs propose an hourly rate of $434 for their lead attorney, Kim Ferraro, and $464 per hour for Plaintiffs' co-counsel, Jeffrey Hyman. These rates represent the low-end of prevailing market rates charged by Indiana environmental attorneys in 2019 and are thus reasonable.

As discussed above, Judge DeGuilio recently approved the use of the Fitzpatrick Matrix for determining market rates for environmental attorneys in a

[18] Exh. J ¶ 25.
[19] Exh. J ¶¶ 24-28.
[20] Exhibit Q: Plaintiffs' Timekeeping Records.
[21] Exh. J ¶ 27.
[22] Exh. J ¶ 10; Exh. Q at pages 13-15.

similarly complex environmental proceeding in the Northern District of Indiana. *Supra* at 19-20. According to the Fitzpatrick Matrix, market rates in 2019 for attorneys with the same number of years of experience as Plaintiffs' counsel at the time (12 and 15 years), were $562 and $593 per hour.[23]

Nevertheless, Plaintiffs propose using lower billing rates of $434 and $464 per hour for attorneys with their levels of experience practicing in the "Midwest Middle Market" in 2019.[24] Specifically, in *Finishmaster,* the Southern District Court of Indiana relied on a 2019 report submitted by the plaintiffs' attorneys that "analyz[ed] average market firm rates by year and level in the local community," to conclude that the hourly rate of $436.50 for a "partner attorney at [an Indianapolis law firm] . . . with fourteen years of [litigation] experience" was reasonable. 2020 U.S. Dist. LEXIS 138072 at *5-7. The 2019 report relied on by the Southern District Court provides the average billing rates of more than 400 attorneys of varying levels of experience who practice in the Midwest's "Middle Market," which includes Indianapolis.[25]

Plaintiffs propose that the Indianapolis market is the appropriate market here for two reasons. First, unlike the Chicago-based environmental attorneys who were held to have reasonably relied on the Fitzpatrick Matrix in *U.S. Steel,* the offices of Plaintiffs' counsel in 2019 were in Indianapolis and Bloomington. Second, using the lower market rates in Indianapolis reflects billing judgment to account for the fact

[23] Exh. O at 1.
[24] Exh. H ¶ 19.
[25] The 2019 Thomson-Reuters' "Peer Monitor" report for the Middle Midwest Market is attached hereto as Exhibit P.

that Plaintiffs' counsel lack contemporaneous records of their time. Based on the Midwest Middle Market report, the average billing rates in 2019 for attorneys with Ms. Ferraro's and Mr. Hyman's years of experience were $434 and $464 per hour, respectively.[26] Multiplying these rates by the number of hours each attorney reasonably spent on the APA claim yields a conservative lodestar amount of $772,505.

C. Plaintiffs Request Reasonable Fees for Their Counsel's Time Preparing This Fee Petition

A fee award under the EAJA should "cover the cost of all phases of successful civil litigation" including the costs to recover reasonable fees against the government. *Comm'r v. Jean*, 496 U.S. 154, 162-164 (1990). On that front, Plaintiffs' counsel spent at least 80 hours preparing this fee petition.[27] Given its complexity and the fact that the estimated hours do not include the time spent by associate attorneys and law students who assisted with the fee petition, the number of hours is reasonable.[28]

Plaintiffs propose an hourly rate of $459 for Ms. Ferraro's time on the fee petition based on the Middle Midwest Market rate in 2019 for an attorney who has been practicing, as she has now, for the last 17 years.[29] Plaintiffs believe this is a conservative but fair billing rate given that it is based on customary rates from five years ago while accounting for Ms. Ferraro's additional experience. Accordingly,

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[26] Exh. M at 1 (indicating the average rate in 2019 for a partner attorney with 11-13 years of experience was $434 per hour, and the average hourly rate for a partner with 14-16 years of experience was $464).
[27] Exh. J ¶¶ 11-13; Ex . Q at p. 16.
[28] Exh. J ¶ 12.
[29] Exh. M at 1 (stating the average rate in 2019 for an attorney with 17-19 years of experience was $459 per hour).

Plaintiffs request a reasonable attorney fee of $36,720 for their counsel's time to prepare this petition.

D. Plaintiffs Are Entitled to Recover Reasonable Litigation Expenses

Plaintiffs are entitled to recover "the reasonable expenses of expert witnesses" including "the reasonable cost of any . . . [expert] analysis . . . which is found by the court to be necessary for the preparation of the party's case." 28 U.S.C. § 2412(d)(2)(A).

Here, Plaintiffs hired Rachele Baker, a wetland scientist and drainage expert with extensive experience in Section 404 regulation, wetland delineations, and CWA jurisdictional determinations to provide assistance on the APA claim in two respects: (1) to help analyze technical and scientific aspects of Army Corps' AJD; and (2) to assess the likely consequence of the Army Corps' AJD and Natural Prairie's actions on the nature and wildlife areas at the adjacent Kankakee Sands.[30] Plaintiffs provided Ms. Baker's analysis to the Court in briefing the APA claim. [ECF 66-1 (Affidavit of Rachele Baker] And the Court relied on her report in concluding that Plaintiffs had standing to proceed. [ECF 80 at 6-8]

Accordingly, Plaintiffs are entitled to recover the costs of their expert in the amount of $16,315.00. As Ms. Baker's invoices reflect, she spent 125.5 hours at a rate of $130 per hour for her consulting services on the APA claim.[31] Her time was reasonable given the volume of records she reviewed, the complexity of issues

[30] Exh. J ¶ 32; Exhibit R: Rachel Baker's CV.
[31] Ms. Baker's invoices for her consulting services on the APA claim rendered from October 28, 2019 through September 30, 2020 are submitted as Exhibit S.

involved, and the quality of her analysis and report, which was instrumental in Plaintiffs' success. The hourly rate she charged was likewise reasonable and, in fact, reflected her agreement with Plaintiffs' counsel to provide her consulting services at a discounted, non-profit rate.[32]

**Conclusion:**

For the all the foregoing reasons, Plaintiffs respectfully request an award of attorney fees and litigation expenses under the EAJA in the amount of $825,540. This amount includes $680,233 for 1482 hours of Ms. Ferraro's time on the APA claim and 80 hours of her time on this fee petition. It also includes $128,992 for 278 hours of Mr. Hyman's time on the APA claim, and $16,315 in expert witness costs.

Respectfully submitted,

*/s/ Kim E. Ferraro*

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 3, 2024, a copy of the foregoing document was filed with the Court electronically. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

*/s/ Kim E. Ferraro*

[32] Exh. J ¶ 33.