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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)
)
LAKE'S FARM SERVICE LLC) Docket No. CAA-05-2010-0058
)
RESPONDENT) Hon. Barbara A. Gunning
)
)
)
)

**COMPLAINANT'S MOTION FOR LEAVE TO AMEND THE COMPLAINT TO
DECREASE PROPOSED PENALTY AND MEMORANDUM IN SUPPORT OF
COMPLAINANT'S MOTION**

Complainant, the Director of the Superfund Division, Region 5, United States Environmental Protection Agency (Complainant), pursuant to 40 C.F.R. §§ 22.14(c) and 22.16(a) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, hereby moves for leave to amend its Complaint to decrease the proposed penalty from \$112,000 to \$76,000. In support of this Motion, Complainant states as follows:

1. This is a civil administrative action brought under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* (the Act). The Complaint in this action alleges that Lake's Farm Service LLC (Lake's Farm or Respondent) violated the Act by failing to comply with certain provisions of U.S. EPA's Risk Management Program regulations, 40 C.F.R. Part 68, promulgated pursuant to Section 112(r) of the Act, 42 U.S.C. § 7412(r).
2. Complainant initiated this action on August 10, 2010, citing ten separate violations of the Act. In Paragraph 57 of the Administrative Complaint, Complainant proposed a penalty of \$112,000 against the Respondent, utilizing the factors contained in Section 113(e) of the Act,

42 U.S.C. § 7413(e), with specific reference to U.S. EPA's August 15, 2001 Combined Enforcement Policy for violations of Section 112(r) of the Clean Air Act.

3. Complainant subsequently provided a copy of its Penalty Calculation Work sheet to Lake's Farm in response to its request. After receipt of Complainant's calculations, Respondent noted that Complainant had made a computational error, and that the sum of the listed penalty components totals \$102,000. Complainant agrees.

4. In addition, Complainant has reviewed its proposed penalty with regard to the federal statute of limitations, 28 U.S.C. § 2462, and determined that the sum associated with the "duration of violation" component should be reduced from \$64,000 to \$38,000.

5. The Consolidated Rules provide that a Complaint may be amended after the Answer has been filed upon motion granted by the Presiding Officer. 40 C.F.R. §22.14(c). "While no standard is provided in the Rules for determining whether to grant an amendment, the general rule is that administrative pleadings are 'liberally construed and easily amended.'" *In re Scranton Prods., Inc., et al.*, Docket No. CAA-03-2008-0004, 2008 EPA ALJ LEXIS 16, at *2 (Chief ALJ, April 3, 2006) (quoting *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992)). Absent a showing that the proposed amendment is brought in bad faith or for dilatory purposes, results in undue delay or prejudice to the opposing party, or would be futile, leave to amend should be granted. *Id.* at *2-3 (citing *Foman v. Davis*, 371 U.S. 178, 181-82 (1962)).

6. Because Complainant seeks to decrease the proposed penalty in this action, there is no prejudice to Respondent. *See id.* at *3. An amended complaint that merely reduces the proposed penalty adds nothing substantively to the pending charges of violation. *See In the matter of Wood Waste of Boston, Inc.*, Docket No. CWA-01-2006-0090, 2007 EPA ALJ

LEXIS 4 (January 12, 2007).

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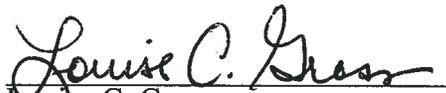
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7. Furthermore, Complainant's request for leave to amend the Complaint to decrease the proposed penalty is not the product of undue delay, bad faith, or dilatory motive. *In re Scranton Prods., supra.*

8. For the foregoing reasons, Complainant respectfully requests that the Presiding Officer grant it leave to amend the Complaint to reduce the proposed penalty to \$76,000. Complainant has attached a signed copy of the proposed Amended Administrative Complaint, in which Paragraph 57 has been revised to reflect the proposed decreased penalty.

Respectfully submitted,

DATED: 5/13/2011



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In the Matter of Lake's Farm Service, LLP

Docket No. CAA-05-2010-0058

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2011, I filed the original and one copy of Complainant's Motion for Leave to Amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion with the Regional Hearing Clerk, U.S. EPA, Region 5, and placed for pickup to be delivered by UPS a copy of Complainant's Motion for Leave to amend Complaint to Reduce Proposed Penalty and Memorandum in Support of Complainant's Motion to:

Honorable Barbara Gunning
Administrative Law Judge
EPA Office of the Administrative Law Judges
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