

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket Nos.: CWA-07-2001-0052
Iowa Turkey Growers Cooperative d/b/a/)	CERCLA-07-2002-0009
West Liberty Foods,)	EPCRA-07-2002-0009
)	
RESPONDENT)	

**ORDER DENYING COMPLAINANT'S
MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

On March 18, 2002, Complainant United States Environmental Protection Agency (EPA) filed its Motion to Compel Production of Documents against Iowa Turkey Growers Cooperative (Respondent). EPA filed this motion seeking discovery of financial documents pursuant to Rule 22.19(e) of the Consolidated Rules of Practice. 40 C.F.R. § 22.19(e) (2001).

Although Respondent filed its Opposition to EPA's motion one day late, the Court has an obligation to evaluate all motions on their merits. The Rules of Practice provide regulations governing an Administrative Law Judge's (ALJ) issuance of an Order on a motion for discovery. In particular, Rule 22.19(e) provides that an ALJ:

- [M]ay order such . . . discovery *only if* it:
- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
 - (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; *and*
 - (iii) *Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.*

40 C.F.R. § 22.19(e)(1) (emphasis supplied).

Complainant seeks to compel production of the following documents: (1) federal tax returns for tax years 2000 and 2001 and (2) net income statements covering, at a minimum, the five calendar quarters from April 2000 through June 2001. Complainant seeks these documents in order to show that Respondent gained so-called "wrongful profits" from its alleged violations of Clean Water Act (CWA) requirements and regulations. In Count I of the Amended Complaint filed October 25, 2001, EPA alleges that Respondent violated Sections 301 and 307 of the CWA, 33 U.S.C. §§ 1311, 1317 and its implementing regulations. EPA's Amended Complaint alleges that Respondent violated its

permit requirements of pre-treatment prior to discharging into a publicly-owned treatment works (POTW). It further alleges that those permit violations resulted in the “pass through” or unauthorized discharge of pollutants and the “interference” or disruption of the POTW’s treatment processes or operations.

The crucial issue at stake in this motion is whether the financial documents sought by Complainant have “significant probative value” on a disputed issue of material fact relevant to liability or the relief sought.¹ Complainant argues that “wrongful profits” is relevant to the “economic benefit” penalty factor in Section 309(g)(3) of the CWA. Traditionally, economic benefits are determined by the “cost-avoided” method, which measures capital expenditures an owner or operator avoids by failure to comply with the CWA. *United States v. Municipal Auth. of Union Township*, 150 F.3d 259, 266 (3rd Cir. 1998) (comparing the cost-avoided method to the “wrongful profits” method). The “cost-avoided” method takes into account actual, well-defined expenses avoided, such as the expense of installing pollution control equipment.

In contrast, the “wrongful profits” method is a relatively new method some courts have used in determining economic benefit. *Union Township*, 150 F.3d at 265-66. Under the “wrongful profits” analysis, a judge compares profits or revenues a violator gained during years in compliance with the law against the time period in violation of the law. *Id.* at 266. Under the “wrongful profits” method, a judge might make the assumption that the excess profits or revenue was solely the result of not complying with the law, instead of any of a multitude of factors, such as an increase in demand for the violator’s product, for instance. Even those courts that have upheld the use of the “wrongful profits” method admit that the method is prone to speculative calculations of the amount of economic benefit. *E.g. Union Township*, 929 F. Supp. 800, 806 (M.D. Pa. 1996), *aff’d*, 150 F.3d 259 (3rd Cir. 1998). In contrast, the cost-avoided method allows for a much more reliable method of determining a violator’s economic benefit, if any. For example, if a violator refuses to expend a set amount of funds to purchase a particular piece of pollution control equipment, that provides the court with a reliable and probative form of evidence in evaluating economic benefit.

As to the probative value factor in the case at bar, Respondent’s Amended Complaint, at 5-7, alleges CWA violations occurring for a period from March 2000 to March 2001. Complainant’s motion requests: (1) federal tax returns for tax years 2000 and 2001 and (2) net income statements covering, at a minimum, the five calendar quarters from April 2000 through June 2001. The net

¹ The first two factors of Rule 22.19(e)(1) resolve themselves in favor of Complainant. The hearing is currently scheduled for July 23, 2002, so the production of these documents will not unreasonably delay these proceedings. Complainant has also shown that it cannot reasonably obtain the information from Respondent, as (1) Respondent is not a publicly traded corporation and does not appear to publicly file its financial information and (2) Respondent has refused to voluntarily release the documents to the Complainant. Nevertheless, the Rules of Practice require that all three factors, including “probative value” be established before an ALJ may grant a motion to compel such discovery. 40 C.F.R. § 22.19(e)(1); *In re Advanced Electronics, Inc.*, CWA Appeal No. 00-5, 2002 WL 393655, slip op. at 18 (E.P.A., Mar. 11, 2002), 10 E.A.D. ____.

income information Complainant requests focuses almost exclusively on the time period in which the alleged violations occurred, and requests a very limited period of non-compliance for a comparison of wrongful versus non-wrongful profits. The request for the net income statements lacks probative value because it would not give the Court a sufficient comparison to compare profits during the time of alleged violation against profits gained during compliance. Complainant does not assert that it has any other financial information in its possession which would allow for a reliable comparison of the period of alleged non-compliance against the period of compliance. Similarly, Complainant's request for tax returns for tax years 2001 and 2000 would provide for only a very limited comparison of the period of compliance against the period of alleged non-compliance.

Furthermore, an ALJ is not compelled to admit or consider "wrongful profits." Complainant submits that the Environmental Appeals Board (EAB) has "recognized" wrongful profits. Although the EAB has *discussed* the issue of wrongful profits, it has by no means required that an ALJ engage in a wrongful profits analysis. In the case *In re B.J. Carney Industries, Inc.*, the EAB stated that profits, delayed costs, and avoided costs are "potential" matters that may be considered and that one is "not obligated" to use any particular method in determining economic benefit. 7 E.A.D. 171, 233 n.84 (E.P.A. 1997).²

Furthermore, it is well-established that an ALJ has broad discretionary matters as to the evaluation of the probative value of evidence. Those cases that have allowed the use of "wrongful profits" analysis rely at least in part on the trial court judge's discretion to decide matters of evidence. *See e.g. Union Township*, 150 F.3d at 264 (Third Circuit confers "wide discretion" on the district court's CWA penalty determination). Furthermore, the EAB vests broad discretion in an ALJ in evaluating the admissibility of documents sought to be compelled through discovery. *In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, 2000 EPA App. LEXIS 15, at *39 (E.P.A., May 15, 2000), 9 E.A.D. ____ (upholding an ALJ's denial of motion to compel discovery of financial documents).

Although some ALJs may, in their discretion, have determined that an evaluation of "wrongful profits" was appropriate for the unique circumstances of their cases, that it no way compels the same result under the case at bar. Also distinguishable from the case at bar is an EPA Chief Judicial Officer's (CJO) decision to take into account wrongful profits in the case *In re The Hoffman Group*, 3 E.A.D. 408, 437 (E.P.A. 1990), *vacated on other grounds sub nom Hoffman Homes, Inc. v. U.S. EPA*, 999 F.2d 256 (7th Cir. 1993). In *Hoffman Group*, the violator filled wetlands in violation of the CWA in order to build houses on that property. On de novo review, the CJO held that an ALJ had incorrectly concluded that a particular tract of wetland was not within the jurisdiction of the CWA. On so concluding the CJO proceeded to calculate the penalty for that

² In another case, EAB discussed "wrongful profits" in the evaluation of an ALJ's decision but never construed the CWA to require the consideration of such profits. *In re Britton Constr. Co.*, 8 E.A.D. 261, 288-90 (E.P.A. 1999). In that case, EAB ultimately held that profits cannot be considered "wrongful" where the government authorizes the conduct that is the source of the violation. *Id.* at 290.

CWA violation, taking into account, among other factors, the profits made on the development of the property. Nevertheless, the CJO did not hold that wrongful profits must be considered. The CJO merely exercised his discretion on novo review to take such profits into account. As previously discussed, the EAB has clearly explained that an ALJ is not required to use the wrongful profits method of determining economic benefit. *In re B.J. Carney*, 7 E.A.D. at 233 n.84. For the reasons previously mentioned, the documents Complainant seeks lack probative value.

Complainant's Motion to Compel Production of Documents is hereby DENIED.

William B. Moran
United States Administrative Law Judge

Dated: May 20, 2002
Washington, DC