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 EPA's MOTION FOR RECONSIDERATION AND EPA's MOTION TO FORWARD ORDER FOR INTERLOCUTORY REVIEW

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). The Motion was denied in the Court's May 20th Order. Thereafter, on May 24, 2002**,** EPA filed a Motion for Reconsideration of that Order, along with a Motion to forward the May 20th Denial Order to the Environmental Appeals Board for Interlocutory Review, in the event of denial of the Reconsideration Motion. Counsel for Respondent filed a Response in Resistance to the EPA Motions. For the reasons which follow EPA's Motions are DENIED.

A fuller understanding of the reasons for the Court's May 20th Denial of EPA's Motion to Compel Production of Documents must begin with EPA's original complaint, which was filed *nearly a year ago*, on June 29, 2001. In its original form the Complaint only alleged, in a single count, a Clean Water Act violation, for which it sought a civil penalty of $100,000.00. That Complaint solemnly announced that, in arriving at the proposed penalty, EPA had arrived at the penalty figure "based upon the facts stated in the Complaint, and the following factors listed in Section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3): the nature, circumstance, extent and gravity of the violations, and with to Respondent, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings resulting from the violations, and such other matters as justice may require, in accordance with the CWA." June 29, 2001 Complaint at 7. When EPA amended the Complaint for the first time, on September 26, 2001, it added a CERCLA and an EPCRA Count, but the Clean Water Act **(**CWA**)** Count remained unchanged in terms of the penalty sought and in its declaration that it had duly considered each of the criteria in arriving at the same $100,000 penalty it originally sought. September 26th Amended Complaint at 7, 9.[1]

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[1] This First Amended Complaint was filed and served on October 25, 2001. The CERCLA Count and the EPCRA Count increased the proposed penalty by $41, 250**,** with $20,625 allocated to each of the new Counts. As with the CWA Count, EPA recited that the proposed penalties for Counts II and III were derived upon consideration of the statutory criteria

In September of last year (i.e. 2001) the Court issued its Prehearing Order, which required the parties' initial exchange by November 2, 2001. This exchange date was then extended, upon EPA's Motion, to December 17, 2001. In March of this year, (i.e. 2002) EPA filed another motion to amend the Complaint, solely to add additional days of alleged violations to Count I, the CWA Count. These added days of alleged violations prompted EPA to seek another $20,000 for that Count. In doing this, EPA referenced the basis for its amended calculation, referring to its Prehearing Exchange at page 24. Motion for Leave to Amend the Complaint at 2, footnote 1. In none of these versions of the Complaint has EPA claimed an inability to derive an appropriate penalty. In fact, each time the Agency has consistently asserted that an appropriate penalty, considering each of the factors, has been calculated.

The Notice of Hearing,[2] issued January 23, 2002, informed the parties that no motions could be filed after March 18, 2002. On the last day for the filing of Motions, EPA filed its Motion to Compel Production of Documents. In the motion it sought Respondent's Federal Tax Returns for 2000 and 2001 and net income (profit/loss) statements for the five calendar quarters from April 2000 through June 2001. EPA related that it sought this information in order for it to "[E]stimate the extent to which Respondent received 'wrongful profits' as a result of operating its facility at processing levels above those which would have kept the facility in compliance with the Clean Water Act." EPA Motion to Compel at 3.[3]

Given that EPA had repeatedly declared it had already considered each of the penalty factors, and the absence of any declaration that, as things stood, its previous evaluation was now wanting, the Court considered then, and now, that there was no demonstrated merit for the discovery EPA sought. In its Motion for Reconsideration, EPA asserts that the Court mistakenly cited *United States v. Municipal Auth. of Union Township*, 150 F.3d 259 (3rd Cir. 1998). EPA maintains that the Court erred in describing the approach as one where a comparison of profits or revenues during periods of compliance is made with those profits derived during the alleged violation, and that such a

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and applicable penalty policies for EPCRA and CERCLA. First Amended Complaint at 9.

[2] Ultimately, the Hearing, originally set to begin on June 18th, was rescheduled and is now set to commence on July 23, 2002.

[3] EPA, in its most recent motions now attempts to re-frame its initial request, which was for documents that would show "wrongful profits." Now EPA appears to characterize its request for the financial documents as necessary to further its attempts to show *any* economic gain garnered during the period of alleged violation, not just "wrongful" gain attributable to the violation. This suggests that Respondents should be assessed a penalty for *any* profits and/or earnings gained while Respondents were in violation of the law, regardless of whether such profits and/or earnings are attributable to the violation. If the Court were to assess a penalty for *any* earnings and/or profits a violator accrues while it is in violation of the law, regardless of whether such funds would have accrued in absence of a violation, that would result in inappropriate, excessive and unduly harsh penalties.

comparison would only be pertinent where one was selling a product below market price. The Court believes that, in fact, the federal district court did have a basis for comparison. As the Third Circuit noted: "[t]he district court commented . . . 'Production volume . . . was higher in each year from 1989 to 1993 *than it was in 1994*, and, therefore, it is reasonable to believe that Fairmont ***gained*** at least $417,000 in earnings annually during the period of its violations." 150 F.3d 259, 263 (emphasis supplied). Thus, the district court was able to discern how the respondent profited during its period of violation. In contrast, EPA's last-day motion makes no such declaration how the financial information it seeks will enable it to make such a deduction. Nor does its Motion for Reconsideration explain the value of receiving this information. Thus, while EPA wants to "explore" whether the Respondent "received an economic gain from *additional* sales generated as a direct result of its excessive discharges," it has presented nothing to show how the requested information may lead it to determining the amount of *additional* sales.[4] Instead, EPA seems to be suggesting that *any* profits Respondent derived during the alleged violations would be "wrongful."[5] A motion for discovery must persuade a court of the value of, or need for, the information sought. Having failed to demonstrate the need or use for the discovery as well as the inadequacy of its previous evaluations of the penalty criteria, EPA's Motion for Reconsideration must be DENIED.

The discussion above necessarily bears on EPA's alternative motion to forward its May 20th Order Denying Complainant's Motion to Compel Production of Documents. In addition, the Court has determined that, in association with the points in the foregoing discussion, an important question of law or policy concerning which there is substantial grounds for difference of opinion has not been demonstrated in this instance, under the particular facts presented, and also that an immediate appeal from the Order would not materially advance the ultimate termination of the proceeding. It is the general policy of the EAB to defer to an ALJ's discretion in making evidentiary determinations as

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[4] The Court also rejects EPA's fallback position in its Motion for Reconsideration, in which it suggests that *the Court* should have expanded its discovery request if it believed EPA's request was too narrow. It is not the Court's role to supervise EPA's discovery requests by curing perceived inadequacies. The Court also observes that, in addition to failing to establish the useful basis for the discovery information, even in its Motion for Reconsideration, EPA relies upon its Penalty Policies, as authority for seeking information on "wrongful profits." However, in a Clean Water Act case these policies only apply for settlement purposes and there is no Clean Water Act policy for the Court to examine and consider, should liability be established.

[5] While a court may look to "wrongful profits," in most cases a cost-avoided method is applied. *See e.g., United States v. Smithfield Foods, Inc.*, 191 F.3d 516, 528 nn.7 & 10 (4th Cir. 1999), *cert. denied*, 531 U.S. 813 (2000) . Underlying the various approaches to calculating an appropriate penalty, whether the "top-down," the "bottom-up" or some other method is used, is the requirement to fairly evaluate each of the penalty criteria. If liability is established, the Court will proceed to do such an evaluation in light of the particular facts. The end result of this analysis may produce a penalty that is the same as that which has been proposed by EPA or it may result in a lesser or greater amount being imposed.

to the discovery of documents. *See e.g. In re Chempace Corp.*, FIFRA Appeal Nos. 99-2 & 99-3, 2000 EPA App. LEXIS 15, at *39 (E.P.A., May 18, 2000), 9 E.A.D. ___.

Accordingly, Complainant EPA's Motion for Reconsideration and its Motion to Forward the May 20th Order are DENIED.

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William B. Moran
United States Administrative Law Judge

Dated: June 5, 2002
Washington, D.C.

In the Matter of Iowa Turkey Growers Cooperative
d/b/a West Liberty Foods, Respondent
Docket No. CWA-07-2001-0052

CERTIFICATE OF SERVICE

I certify that a true copy of **Order Denying EPA's Motion for Reconsideration and EPA's Motion to Forward Order for Interlocutory Review,** dated June 5, 2002 was sent this day in the following manner to the addressees listed below.

_____
Nelida Torres
Legal Staff Assistant

Dated: June 5, 2002

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