

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the matter of)
)
Wood Waste of Boston, Inc.,) **Docket No. CWA-01-2006-0090**
)
Respondent)

**ORDER DENYING RESPONDENT'S MOTION
TO COMPEL ATTENDANCE AND TESTIMONY**

In this case, the U.S. Environmental Protection Agency ("EPA" or "the Agency") charges that Wood Waste of Boston, Inc. ("Wood Waste"), violated the National Pollutant Discharge Elimination System permit program under the Clean Water Act ("the Act"). 33 U.S.C. §§ 1251 *et seq.* Specifically, EPA alleges that from September, 1999, to the date of the complaint's issuance of November 15, 2006, Wood Waste failed to have a permit as required by Section 308 of the Act. 33 U.S.C. § 1318. EPA also alleges that respondent discharged storm water associated with industrial activities in violation of Section 301. 33 U.S.C. 1311. For these violations, the government seeks the maximum civil penalty of \$157,500.

Wood Waste denies these charges and, accordingly, a hearing has been scheduled in this matter to commence on March 13, 2007. Respondent now moves to require the "attendance and testimony" of certain unidentified witnesses at this hearing to determine "the procedure and methodology" by which the Agency calculated the proposed penalty. Mot. at 1. Specifically, Wood Waste "moves that the Presiding Officer require the attendance and testimony of any and all U.S. Environmental Protection Agency ('EPA') staff who participated substantively in EPA's determination that \$157,500.00 is an appropriate penalty for the violations alleged in the Complaint." *Id.* Respondent argues that "[t]he requested testimony is significantly probative as to the appropriateness of the penalty sought by Complainant," and that the testimony is needed "to ascertain whether the proposed penalty is an arbitrary and capricious abuse of discretion." Mot. at 2 & 4. Respondent also argues that the requested testimony is needed "to determine the weight" apparently given by Complainant to each of the Clean Water Act's statutory penalty factors in calculating the proposed penalty.

EPA opposes respondent's motion. In its opposition, EPA represents that the civil penalty that it proposes in this case is the result of the Agency's evaluation of the evidence expected to be introduced at hearing, and not (as is usually the case) the result of an EPA employee performing penalty calculations pursuant to a formula prescribed in an Agency penalty policy. Thus, it is the government's view that Wood Waste's request simply cannot be accommodated.

Under the circumstances of this Clean Water Act case, EPA's position is correct.¹ Here, EPA has pled the statutory maximum penalty and whether such a penalty will be assessed (*i.e.*, assuming that liability has been established) is to be determined through an evaluation of the record evidence alone. See 33 U.S.C. 1319(g)(3). To the extent that Wood Waste argues that such a methodology is "arbitrary and capricious," this argument is rejected. Indeed, respondent's assertion that this tribunal is ill-equipped "for translating fact patterns into penalty figures" is off the mark. Reply at 1. That is precisely the role of this tribunal should the government establish that a violation occurred. So too is respondent's assertion that a denial of its motion would relieve EPA of its burden of proof as to penalty. This assertion has no merit as it is undisputed that the government bears the burden of proof on this issue and further, that any penalty assessment will be based entirely upon the evidentiary case that the government establishes at hearing.

Accordingly, Wood Waste has made no showing that it is entitled to the relief that it requests and, therefore, its motion is *denied*.

Carl C. Charneski
Administrative Law Judge

Issued: January 3, 2007
Washington, D.C.

¹ Were this a case in which EPA actually applied the methodology of a penalty policy to calculate a proposed penalty, then a different result likely would obtain.