

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

2007 APR 27 PM 1:05

IN THE MATTER OF:)
) DOCKET NO. RCRA-05-2008-0006
John A. Biewer Company of Toledo, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Washington Courthouse Facility))
)
U.S. EPA ID #: OHD 081 281 412; and)
)
John A. Biewer Company, Inc.)
812 South Riverside Street)
St. Clair, Michigan 48079; and)
)
Biewer Lumber LLC)
812 Riverside Street)
St. Clair, Michigan 48079)
)
Respondents)
_____)

COMPLAINANT'S RESPONSE TO RESPONDENT'S SUR-REPLY BRIEF

The Administrator's Delegated Complainant, by counsel, hereby submits this response to Respondent's Sur-Reply.

PROCEDURAL RESPONSE

Complainant would note that, in proposing amendments to her rules governing her assessment of penalties under the various federal environmental statutes, the Administrator has clearly stated her intention that, under her rule governing motions, 40 C.F.R. § 22.16, briefing on the motion be limited and "a motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer." 63 Fed. Reg. 9464, at 9470. However, the Administrator also provides that "[f]or those instances where this motion-response-reply may not be appropriate, the Presiding Officer may order an alternative approach." Id. Given the modest

sur-reply filed by Respondent, and the circumstances disclosed in Respondent's April 17, 2009, letter to the Presiding Officer, Complainant has no objection to the filing of the Sur-Reply.

SUBSTANTIVE RESPONSE

In its Sur-Reply, Respondents appear to make a general objection to Biewer Lumber LLC being a subject of the proposed discovery order. This is based upon its observation that that company "did not exist prior to February 9, 2006, and thus cannot produce documents relating to Biewer Lumber, LLC pre-dating February 9, 2006." Respondent's Sur-Reply, at 2. Respondent's go on to argue that "the objection by Biewer Lumber, LLC to producing documents predating its creation is not only a legitimate objection, but a practical limitation on the ability of that entity to produce documents which are applicable to that entity." Id.

However, the question is whether a discovery order will issue against all three Respondents. As with any discovery order, should an order be issued on Complainant's Motion for Discovery ("the Motion"), and any specific information sought in the Motion not exist, the party subject to the Motion can simply state that to be fact in its response to the discovery order.

In the present circumstances, it is necessary for a discovery order to include Biewer Lumber LLC as a subject to determine whether "piercing the corporate veil" between Respondent John A. Biewer Company of Toledo, Inc., and John A. Biewer Company, Inc., and Biewer Lumber LLC, is warranted by law. While certain corporate papers might say one thing, the law applicable holds that: "It is not enough to simply have the requisite papers for incorporation drawn up and filed. The entity must then function as a corporation in fact." Complainant's Reply to Respondent's Response to Complainant's Motion for Discovery, at 6. To determine

whether John A. Biewer Company of Toledo, Inc., operated as a “corporation in fact,” and continues to so operate, independent of John A. Biewer Company, Inc., and Biewer Lumber LLC, it is necessary to review relevant corporate and financial information, identified in the Motion, of all three of these companies.

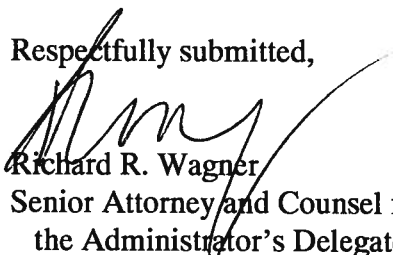
While it is true that the web-site of Biewer Lumber references a “Biewer Lumber™,” to put that reference in context, the Biewer family goes on to state: “Biewer Lumber™ is a third generation, family owned company.” Memorandum in Support of Complainant’s Motion for Discovery, at 4. Whatever legal documents were created in 2006, the Biewer family itself has identified Biewer Lumber™ as a family “company” that has been in operation for three generations.¹ While Respondents in this action have insisted that they are each independent companies and not responsible for actions, or inactions, of each other, the Biewer family makes clear at the Biewer Lumber web-site that all aspects of its vertically integrated wood treatment operations -- from its companies treating the wood through the sale of the treated wood -- have been acting in concert over the past 45 years. *Id.* Moreover, in the Sur-Reply, Respondents acknowledge that the “Biewer Lumber™” has been used “as a trademark name” by and for all Respondents, which itself is evidence that, though they may have been organized on paper as

¹Complainant has noted that “in earlier providing balance sheets and income statements for Respondent John A. Biewer Company of Toledo, Inc., going back to 1997 -- nine years prior to Biewer Lumber’s supposed organization in 2006 -- those statement were provided by the Chief Financial Officer of Biewer Lumber.” Memorandum in Support of Complainant’s Motion for Discovery, at 4. It should be further noted that the cover letter by which that officer submitted the records is on “Biewer Lumber™” letterhead, and dated September 25, 2007, *Id.*, Attachment D, more than one and a half years after the corporate documents were filed establishing Biewer Lumber LLC. This is clear evidence that, notwithstanding what may appear in the corporate papers filed, in actual fact, those responsible for the Biewer family operations acted as if Biewer Lumber™ and Biewer Lumber LLC were one and the same entity.

independent companies, they did not each “function” as an independent corporation “in fact.” The fact that each of these respondent companies is represented by the same counsel is further evidence that each of the Respondents view themselves as having a common interest with the other two.

Under the circumstances, a discovery order, as proposed, is warranted against all three Respondents, including Biewer Lumber LLC. If any specific information ordered produced by Respondents does not exist, Respondents can so state in responding to the order.

Respectfully submitted,


Richard R. Wagner
Senior Attorney and Counsel for
the Administrator’s Delegated Complainant

In Re John A. Biewer Company of Toledo, Inc.
No. RCRA-05-2008-0006

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CERTIFICATE OF SERVICE


I hereby certify that today I filed the original of the **Complainant's Response to Respondent's Sur-Reply Brief** in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

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April 28, 2009



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