

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)

) DOCKET NO. RCRA-05-2008-0007

John A. Biewer Company of Ohio, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)

U.S. EPA ID #: OHD 081 281 412)

Respondent)
_____)

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MOTION TO STRIKE RESPONDENT'S SUR-REPLY

This relates to the Motion to Amend Complaint and Compliance Order (the Motion), filed by Complainant in this matter on September 29, 2008.

On December 8, 2008, the Administrator's Delegated Complainant was served by Respondent with the following document: Respondent's Surreply to Complainant's Reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order (Respondent's Sur-reply). Complainant hereby moves that that document be stricken from the record, for reasons that follow.¹

¹Complainant acknowledges that, in a November 19, 2008, conference call conducted by the Presiding Officer and the parties in this action, the Presiding Officer, *sua sponte*, informed the parties that Respondent would be provided an opportunity to file a sur-reply to Complainant's reply to Respondent's objection to the Motion. At that time, Complainant raised an objection to any such sur-reply as a sur-reply is not provided for in the Administrator's Rules, 40 C.F.R. § 22.16(b), and, as movant, Complainant is entitled to the opportunity to respond to any objection made on the Motion by Respondent. The objection was noted and overruled. As of the filing of the Motion to Strike Respondent's sur-reply, Complainant has received no notice that its objection and the overruling of the objection appear of record in this matter in the file of the Region 5 Hearing Clerk. Complainant's Reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order was filed with the Region 5 Hearing Clerk on November 26, 2008, seven days after the conference call.

Under the Administrator's Rules governing this proceeding, specifically, 40 C.F.R. § 22.16(b), Respondent's sur-reply cannot be warranted as it is not provided for by rule; there is no attempt by Respondent to establish any cause for the filing of a sur-reply; and, a consideration of the sur-reply would deny Complainant an opportunity, which is provided by rule, to respond to certain arguments made by Respondent in its sur-reply.

First, the Administrator's Rules which govern this proceeding provide that, on the filing of a motion, a non-moving party may file a response within 15 days after service of the motion, and that the movant's reply to that response must be filed within 10 days after service of the response, and must be limited to issues raised in the response. 40 C.F. R. § 22.16. No further filings are provided for by rule. This is the rule which governs this proceeding. See 40 C.F.R. § 22.1(a)(4) (the Administrator's Rules, 42 C.F.R Part 22, "govern all administrative adjudicatory proceedings for: . . . (4) . . . "the assessment of any civil penalty under [section 3008 of RCRA]"); and Section 556 (c) of the Administrative Procedure Act, 5.U.S.C. § 556(c) (rulings of officers presiding at an agency hearing are "[s]ubject to the published rules of the agency[.]")

Second, Respondent's fails to identify any reason to justify its filing of a sur-reply, not otherwise permitted by rule, on the Motion. For instance, in its sur-reply, Respondent makes no assertion:

1. That Complainant identified any information, or raised any issues, in his Reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order that had not been raised in the Motion, and accompanying memorandum and attachments;
2. That Respondent has newly discovered information, not earlier available, to put before the Presiding Officer that is material to a determination on the Motion, and that it would be prejudiced if it did not have the opportunity to do so;

3. That Respondent did not have a sufficient opportunity to prepare the response which it did file to the Motion; or
4. That Respondent will otherwise be prejudiced if it does not have an opportunity to file a sur-reply regarding the Motion.

Third, by limiting a movant's reply to "issues raised in the response" of a party opposing the subject motion, the Administrator has made clear that he would provide all parties an opportunity to be heard on any motion being made, but would allow the movant an opportunity to reply to any response to movant's motion, limiting that reply to objections made in response to the motion. A consideration of Respondent's sur-reply is contrary to the intent of the Administrator's Rule that a motion be fully briefed.

In its sur-reply, Respondent raises a new argument, that being that the law "require[s] submission of the proposed amended pleading with the motion to amend." Respondent's Sur-reply, at 2-3. Consequently, a consideration of Respondent's sur-reply prejudices Complainant as he will have no opportunity to respond to a new assertion of law being made by Respondent in objecting to the Motion in its sur-reply. While in its initial reply to the Motion, Respondent argued that the Motion was defective, Memorandum in Opposition to Complainant's Motion to Amend Complaint and Compliance Order, at 6-8, it did not argue that the law requires a motion to amend a complaint to be accompanied by the proposed amended complaint. There is no reason that this argument could not have been made by Respondent in its initial reply to the Motion, which had been on file since September 29, 2008. The Motion at the time of the filing of Respondent's sur-reply was identical to the Motion which was filed in September, and Respondent does not argue, nor does it appear in the text of its sur-reply, that the law cited by Respondent changed between the filing of the Motion and the filing of Respondent's sur-reply.

As there is no assertion by Respondent that Complainant's reply to Respondent's response to the Motion exceeded the limits imposed upon it by the Administrator's rule, nor is there any other cause identified by Respondent that would warrant it being allowed to file a sur-reply, and a consideration of the sur-reply will deprive Complainant of an opportunity to respond to new objections being made by Respondent to the Motion, there can be no cause for a consideration of Respondent's sur-rebuttal. Consequently, that sur-rebuttal should be stricken, and the pleadings on the Motion stand, consistent with the Administrator's rule.

Respectfully submitted,



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

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CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of Complainant's **Motion to Strike Respondent's Sur-Reply** in the office of the Regional Hearing Clerk (E-13J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this **Certificate of Service**.

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

Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Douglas A. Donnell
Mika Meyers Beckett & Jones, PLC
900 Monroe Avenue, NW
Grand Rapids, MI 49503-1423

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812 S. Riverside St.
St. Clair, Michigan 48079
Registered Agent: Richard Biewer

Biewer Lumber LLC
812 S. Riverside St.
St. Clair, Michigan 48079
Registered Agent: Timothy Biewer

December ⁹~~10~~, 2008



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