

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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PROTECTION AGENCY

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
(Washington Courthouse Facility)

**ANSWER TO AMENDED COMPLAINT
AND COMPLIANCE ORDER**

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

NOW COMES Respondents, by and through their attorneys, Mika Meyers Beckett & Jones PLC, and for their answer to EPA's Complaint and Compliance Order, states and alleges as follows:

Preliminary Statement

1. This is a civil administrative action brought by the United States Environmental Protection Agency Administrator under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. §6928(a), and pursuant to Sections 22.01(a)(4), 22.13 and 22.37 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance or Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (the Administrator's Rules"), 64 Fed. Reg. 40137 (July 23, 1999), codified at 40 C.F.R. Part 22 (July 1, 2000).

ANSWER: The allegations contained in paragraph 1 constitute legal conclusions for which no response is required.

2. By lawful delegation, Complainant, the Director, Land and Chemicals Division, Region 5, U.S. EPA, is authorized to issue this Complaint.

ANSWER: Without admitting or denying any substantive allegations in the complaint, Respondent admits that the Director of Land and Chemicals Division, Region 5, is authorized to issue complaints of this type.

3. Pursuant to Sections 3001 - 3005 of RCRA, 42 U.S.C. §6921-6925, the Administrator has promulgated regulations governing generators and transporters of hazardous waste, and governing facilities that treat, store and dispose of hazardous waste. At all times relevant to this Complaint, those regulations were codified at 40 C.F.R. Parts 260 through 279.

ANSWER: Admitted.

4. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. §6926(b), the Administrator granted the State of Ohio final authorization to administer a state hazardous waste program in lieu of the federal government's RCRA program effective, June 30, 1989. 54 Fed. Reg. 27170 (June 28, 1989). The U.S. EPA granted Ohio final authorization to administer certain Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements, effective June 7, 1991, 56 Fed. Reg. 14203 (April 8, 1991) (corrected effective August 19, 1991, 56 Fed. Reg. 28088 (June 19, 1991); September 25, 1995, 60 Fed. Reg. 38502 (July 27, 1995); and December 23, 1996, 61 Fed. Reg. 54950 (October 23, 1996). The U.S. EPA authorized Ohio regulations are codified at Ohio Administrative Code (OAC) Chapters 3745-49 through 69. See also 40 C.F.R. §272.1800 *et seq.*

ANSWER: The allegations contained in paragraph 4 constitute legal conclusions for which no answer is required. To the extent an answer is deemed required, the allegations in paragraph 4 are neither admitted nor denied for lack of information sufficient to form a belief as to the truth thereof. By way of further response, the section of the Ohio Administrative Code cited in paragraph 4 relating to drip pads did not become effective until September 2, 1997, after Respondent's facility in Perrysburg, Ohio ceased operations.

5. At all times relevant to this Complaint, Section 3006(d) of RCRA, 42 U.S.C. §6926(d), provided that any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under Subchapter III of RCRA, 42 U.S.C. §§6921-6939(e).

ANSWER: The allegations contained in paragraph 5 constitute legal conclusions for which no answer is required.

6. Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), the Administrator may assess a civil penalty of up to \$25,000 per day of noncompliance for each violation of a requirement of Subchapter III of RCRA (Sections 3001-3023, 42 U.S.C. §§6921-6939(e)).

ANSWER: The allegations contained in paragraph 6 constitute legal conclusions for which no answer is required. By way of further answer, Respondent denies that EPA has blanket authority to assess civil penalties up to \$25,000 per day, regardless of the nature of the alleged noncompliance and alleges that penalties, if any, must be determined on a case-by-case basis.

7. U.S. EPA has provided notice of commencement of this action to the State of Ohio, as required by Section 3008(a)(2) of RCRA, 42 U.S.C. §6928(a)(2).

ANSWER: The allegations in paragraph 7 are neither admitted nor denied for lack of information sufficient to form a belief as to the truth thereof.

General Allegations

8. That Respondent John A. Biewer Company of Ohio, Inc., Respondent John A. Biewer Company Inc., and Respondent Biewer Lumber LLC, were each, at all times relevant to this Complaint, corporations incorporated under the laws of Michigan. Respondent John A. Biewer Company, Inc., or Respondent Biewer Lumber LLC, at all times relevant to the violations alleged in this Complaint, was the parent corporation of John A. Biewer Company of Ohio, Inc., and:

ANSWER: Respondent admits only that John A. Biewer Company of Ohio, Inc. is a Michigan corporation that was incorporated on January, 7, 1983, John A. Biewer Company Inc. is a Michigan corporation that was incorporated on December 1, 1980, Biewer Lumber LLC is a Michigan limited liability company that was formed on February 9, 2006, and that at all times relevant to the violations alleged in this Complaint, Respondent John A. Biewer Company, Inc. was the parent corporation of John A. Biewer Company of Ohio, Inc. Respondent denies all other allegations.

(a) Respondent John A. Biewer Company, Inc., and/or Respondent Biewer Lumber LLC, managed or directed activities of Respondent John A. Biewer Company of Ohio, Inc., relevant to the violations alleged in this Complaint, so as to be liable for those violations under *United States v. Bestfoods, et al.*, 524 U.S. 51 (1998);

ANSWER: Denied.

(b) Respondent John A. Biewer Company, Inc. and/or Respondent Biewer Lumber LLC, controlled the activities of Respondent John A. Biewer Company of Ohio, Inc., relevant to the violations alleged in this Complaint, under circumstances warranting a “piercing of the corporate” veil pursuant to the law of the State of Michigan, and a finding, thereunder, that the parent corporation is liable for those violations:

ANSWER: Denied.

(c) On September 29, 2008, Complainant filed a Motion to Amend Complaint and Compliance Order in this matter, seeking to add as respondents John A. Biewer Company Inc., and Biewer Lumber LLC, serving both those parties, as well as John A. Biewer Company of Ohio, Inc., with a copy of the motion and a memorandum in support of that motion; and

ANSWER: Admitted.

(d) On January ___, 2009, the Presiding Officer issued an order granting the motion: (1) finding, without determining any ultimate issue, that Complainant had put forth a sufficient basis to warrant the inclusion of those entities as named respondents for purposes of pleading; (2) directing that Complainant file an amended complaint adding as parties John A. Biewer Company, Inc., and Biewer Lumber LLC; and (3) directing that discovery will commence promptly to determine the relationship and common activities of all three Biewer entities.

ANSWER: Respondents admit that the order allowed Complainant to file an amended complaint. The remaining allegations in subsection d are neither admitted nor denied, as the Presiding Officer’s order is a document that stands for itself.

9. That Respondent, John A. Biewer Company of Ohio, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, are each a “person” as defined by Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and OAC 3745-50-10.

ANSWER: Admitted.

10. That from approximately 1976 to June 2001, the Respondent conducted its business in, and around, buildings located at 649 Landmark Boulevard, Washington Courthouse, Ohio.

ANSWER: Respondent John A. Biewer Company of Ohio admits the allegations in paragraph 10. Neither Respondent John A. Biewer Company, Inc. nor Biewer Lumber, LLC owned, conducted operations, or controlled operations at the Landmark Boulevard location.

11. That the place where the Respondent conducted its business was, and is, a “facility” as defined by OAC 3745-50-10.

ANSWER: Respondent John A. Biewer Company of Ohio neither admits nor denies that the property located on Landmark Boulevard is actually a “facility,” but acknowledges that it has been referred to as such by both the Ohio EPA and the consultants, Mannik & Smith Group. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny the allegations in paragraph 11 as they pertain to their places of business. Neither Respondent John A. Biewer Company, Inc. nor Biewer Lumber, LLC controlled operations at the Eckel Junction Road location.

12. That the Respondent was the “owner” or “operator” of that facility, as defined by OAC 3745-50-10.

ANSWER: Respondent John A. Biewer Company of Ohio admits that it is the “owner” of the property on Landmark Boulevard, admits that it was the “operator” of the property from 1976 until 2001, and neither admits nor denies that the property is a “facility” as stated above. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny that either of them owned, conducted operations, or controlled operations at that location.

13. That in conducting its business, Respondent pressure-treated wood with a chemical solution, that being chromated copper arsenate.

ANSWER: Respondent John A. Biewer Company of Ohio admits the allegations in paragraph 13. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny that either of them owned, conducted operations, or controlled operations at that location.

14. That in its production process, after Respondent pressure-treated wood with a chromated copper arsenate, it transported the treated wood by rail to a drip pad in a building on its facility grounds, where the wood underwent a preservative reaction.

ANSWER: Respondent John A. Biewer Company of Ohio denies allegations contained in paragraph 14 because they are not true. The drip pad at the Landmark Boulevard location in Washington Courthouse, Ohio, was an outside drip pad. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny that either of them owned, conducted operations, or controlled operations at that location.

15. That, as the wood underwent a preservative reaction on the drip pad, excess chemical solution on the wood either evaporated or fell off of the wood onto the drip pad as waste.

ANSWER: The allegations contained in paragraph 15 are denied because they are not true. The excess chemical solution that fell off of wood onto the drip pad was captured and reused. By way of further answer, John A. Biewer Company, Inc. and Biewer Lumber, LLC deny that either of them owned, conducted operations, or controlled operations at that location.

16. That in June 2001 Respondent ceased its operation as described in Paragraphs 13 through 15.

ANSWER: Respondent John A. Biewer Company of Ohio admits the allegations in paragraph 16. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny that either of them owned, conducted operations, or controlled operations at that location.

17. That constituents of chromated copper arsenate include greater than 5% chromic acid (CAS #7738-94-5); arsenic acid (CAS #7778-39-4); and copper oxide (CAS #1317-38-0).

ANSWER: Admitted.

18. That waste material generated by the Company, identified in Paragraph 15, was a “solid waste,” as defined by Section 1004(27) of RCRA, and by OAC 3745-51-02.

ANSWER: The allegation contained in paragraph 18 is vague and ambiguous with regard to the word “Company” and the phrase “waste material generated.” Respondent John A. Biewer of

Ohio admits that the chromated copper arsenate that was cleaned off the drip pad and shipped to a waste facility was “solid waste.” Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny the allegations in paragraph 18 to the extent that either entity is the “Company” referred to in paragraph 18.

19. That waste material generated by the Company, identified in Paragraph 15, was waste listed as “hazardous,” OAC 3745-51-31, and identified by U.S. EPA as hazardous waste No. F035. See 46 Fed. Reg. 4617 (January 16, 1981).

ANSWER: The allegation contained in paragraph 19 is vague and ambiguous with regard to the word “Company” and phrase “waste material generated” and, thus, the allegation is neither admitted nor denied. Respondent John A. Biewer of Ohio admits that chromated copper arsenate, if disposed of as a waste, may be a hazardous waste, depending on concentration. Respondent John A. Biewer of Ohio neither admits nor denies the accumulation of such waste at the property. By way of further response, Respondent John A. Biewer of Ohio admits that its material was listed as F035 by 46 Fed. Reg. 4617 (January 16, 1981). Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny the allegations in paragraph 19 to the extent that either entity is the “Company” referred to in paragraph 19.

20. That waste material generated by the Company, identified in Paragraph 15, was a “hazardous waste,” as defined by Section 1004(5) of RCRA, and by OAC 3745-51-03.

ANSWER: The allegation contained in paragraph 20 is vague and ambiguous with regard to the word “Company” and the phrase “waste material generated”, and thus the allegation is neither admitted nor denied. Respondent John A. Biewer of Toledo admits that chromated copper arsenate, if disposed of as a waste may, depending on concentration, be a hazardous waste, but neither admits nor denies the accumulation of such waste at the property. Respondent John A. Biewer Company, Inc. and Respondent Biewer Lumber LLC deny the allegations in paragraph 20 to the extent that either entity is the “Company” referred to in paragraph 20.

Alleged Violation: Failure to Meet Closure Requirements

21. Complainant incorporates Paragraphs 1 through 20 of this Complaint as though set forth in this paragraph.

ANSWER: Respondent John A. Biewer of Ohio, Respondent John A. Biewer Company, Inc., and Biewer Lumber LLC repeat, as if fully set forth herein, their responses to paragraphs 1 through 20 above.

22. That Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 C.F.R. Part 265, Subpart W. See Paragraph 4.

ANSWER: The allegations in paragraph 22 constitute legal conclusions for which no answer is required.

23. That OAC 3745-69-45 provides that: “At closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste.”

ANSWER: The allegations in paragraph 23 constitute legal conclusions for which no answer is required. By way of further response, Respondent admits that paragraph 23, with one minor error, accurately quotes OAC 3745-69-45 (A).

24. That Respondent’s drip pad, identified in Paragraphs 14 and 15, was unlined, without a berm on its entire perimeter, and contained cracks in its surface.

ANSWER: Respondent John A. Biewer of Ohio denies the allegations contained in paragraph 24 because they are not true. The drip pad at the Landmark Boulevard location has and had a berm. The berm was inspected by Ohio EPA in the 1990’s and no action was taken indicating there were concerns about the berm, such as the fact that it was unlined or had cracks. Cracks have occurred in the berm since the closure of the plant. Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC deny that either of them owned, conducted operations, or controlled operations at that location.

25. That Respondent recited its past actions in closing its drip pad, and set forth its continuing closure action plan regarding the drip pad, in a Closure Activity Report, dated May 3, 2005.

ANSWER: Respondent John A. Biewer of Ohio admits the allegations in paragraph 25. Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC deny the allegations in paragraph 25 to the extent the allegations infer that they prepared or arranged for preparation of said Report.

26. That at no time since closing its drip pad did Respondent take any action to meet its obligations to remove or decontaminate all waste residues, containment system components, contaminated subsoils, and structure and equipment contaminated with waste and leakage, that may be present under and in the vicinity of the drip pad.

ANSWER: Respondent John A. Biewer of Ohio partially denies and partially admits the allegations contained in paragraph 26. Respondent John A. Biewer of Ohio prepared a closure plan dated May 3, 2005 and removed from the site the chemical material used for wood treating. Respondent admits that it did not remove soils, contaminant systems, all components, equipment and structures, and neither admits nor denies that it had an obligation to do so for lack of information sufficient to form a belief as to such obligation. Respondents John A. Biewer Company, Inc. and Biewer Lumber, LLC deny the allegations in paragraph 26 to the extent the allegations infer that they conducted decontamination procedures.

27. That Respondent fails to identify in its Closure Activity Report any actions which it proposes to take to meet its obligations to remove any contaminated subsoils that may be present under and in the vicinity of the drip pad.

ANSWER: Respondent John A. Biewer Company of Ohio denies the allegations in paragraph 27 because they are not true. The original closure plan dated May 3, 2005, called for power washing the drip pad, similar to what was proposed and approved for John A. Biewer Company of Toledo's location on Eckel Junction Road. Ohio EPA asked for an amended plan that called for additional steps, including testing and removal of subsoils, and no such amended plan has

been sent to Ohio EPA. Respondent John A. Biewer, Inc. and Biewer Lumber, LLC deny that they were responsible for or undertook cleanup activities at the Landmark Boulevard location.

28. That in failing to have taken any steps to meet its obligations to remove any contaminated subsoils that may be present under and in the vicinity of its drip pad, as alleged in Paragraphs 26 and 27, Respondent has failed to comply with OAC 3745-69-45, thereby violating Subchapter III of RCRA, subjecting the Company to the assessment of civil penalties, as provided for in Section 3008(a) of RCRA, 42 U.S.C. §6928(a).

ANSWER: The allegations in paragraph 28 constitute legal conclusions for which no answer is required. To the extent an answer is required, as they relate to John A. Biewer of Ohio, the allegations are neither admitted nor denied for lack of information sufficient to form a belief as the truth thereof. The allegations, as they may relate to John A. Biewer Company, Inc. or Biewer Lumber, LLC, are denied.

PROPOSED CIVIL PENALTY

By Section 3008(a) of RCRA, 42 U.S.C. §6928(a), Congress has authorized the Administrator to assess a civil penalty of up to \$25,000 per day for each violation of Subtitle C of RCRA, 42 U.S.C., Subchapter III. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and regulations promulgated thereunder, the Administrator may assess a civil penalty of up to \$27,500 per day for each such violation of RCRA occurring from January 31, 1997, to March 15, 2004, and a civil penalty of up to \$32,000 per day for each such violation of RCRA occurring after March 15, 2004. See 40 C.F.R. Part 19 (July 1, 2005).

Complainant has determined the amount of proposed civil penalty for violations alleged in this Complaint based upon an analysis of relevant evidence known to the Complainant, in consideration of Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), by which Congress requires that the Administrator, in assessing a civil penalty, take into account “the seriousness of the violation and any good faith efforts to comply with applicable requirements.” The analysis incorporated the Administrator’s adopted policy, “RCRA Civil Penalty Policy” (June 23, 2003) (“the Policy”), interpreting the RCRA penalty criteria. A copy of the Policy is available upon request. The Policy of the Administrator provides a consistent method of applying the statutory penalty factors for violations of Subtitle C of RCRA, 42 U.S.C., Subchapter El.

The penalty amount determined appropriate for the violations alleged in this Complaint is \$282,649. See attached Penalty Summary Sheet.

ANSWER: Respondent John A. Biewer of Ohio, Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC neither admit nor deny the legal allegations contained in

the "Proposed Civil Penalty" portion of the complaint, and further respond that the asserted penalty of \$282,649 is excessive.

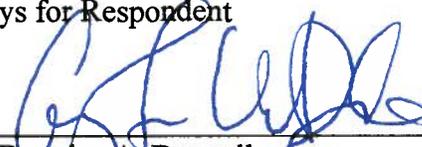
REQUEST FOR HEARING

Respondent John A. Biewer of Ohio, Respondent John A. Biewer Company, Inc., and Biewer Lumber LLC hereby request a public hearing as provided in 43 U.S.C. §6928(b) and as offered in the complaint.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: February 23, 2009

By: 

Douglas A. Donnell
Amy L. Van Dyke
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-000# 22.

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

CERTIFICATE OF SERVICE

U.S. EPA ID #: OHD 106 483 522
and

John A. Biewer Company, Inc.
812 South Riverside Street
St. Clair, Michigan 48079

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and

Biewer Lumber LLC
812 Riverside Street
St. Clair, Michigan 48079

Respondents
_____ /

I, Jane E. Blakemore, hereby state that I am the secretary for Douglas A. Donnell, and that on February 23, 2009, I served a copy of:

Respondent's Answer to Amended Complaint and Compliance Order

upon the following individuals by placing the same in the U. S. Mail, first-class postage prepaid:

Hon. William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mailcode: 1900L
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001
via first-class mail

Richard R. Wagner, Senior Attorney
Office of Regional Counsel (C-14J)
U. S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, IL 60604-3590
via first-class mail and e-mail

I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: February 23, 2009


Jane E. Blakemore