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	)	
	)	

REPLY TO RESPONDENT'S OPPOSITION TO COMPLAINANT'S MOTION TO AMEND COMPLAINT AND COMPLIANCE ORDER

The Administrator's Delegated Complainant hereby provides his reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order ("Resp Mem") consistent with the Administrator's Rules, specifically, 40 C.F.R. § 22.16(b).

(I) IS THE MOTION DEFECTIVE AS A MATTER OF LAW?

Respondent argues that Complainant's Motion to Amend Complaint and Compliance Order ("the Motion") is defective as it "seeks nothing more than to add 'JAB Company' and 'Biewer Lumber' as respondent to this action," and "would violate 40 C.F.R. § 22.14[.]" Resp Mem, at 7-8. As a matter of law, there is no defect in the motion.

Respondent's argument actually is directed at what an amended complaint, yet to be filed, might look like, not to the Motion. By rule, the Administrator provides that, after an Answer is filed, the Complaint may only be amended "upon motion granted by the Presiding Officer." 40 C.F. R. § 22.14(c). Complainant acknowledges that, should the Motion be granted, it then must file an Amended Complaint which not only adds John A. Biewer Company, Inc., and Biewer

Lumber LLC to the caption of the Complaint, but also adds allegations to Paragraph 8 of the Complaint to put the parties on notice of the grounds upon which Complainant asserts that these two companies are liable. On service of the Amended Complaint, the parties named as respondents would have an opportunity to answer, or to otherwise respond to it.

> Respondent further argues that Complainant, by the Motion, is attempting
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> to bring claims directly against JAB Company and Biewer Lumber, but without being held to the usual pleading standards that require Complainant to allege facts in its Complaint that constitute a *prima facie* case and which must otherwise be pled only upon certification that such facts are well-grounded.

Again, it is a motion that is at issue here; if the Motion is granted, Complainant still must file an amended complaint, to which the standards of 40 C.F.R. § 22.14 will apply. Amending complaints to add related persons or companies which, because of the relationship may be liable in the action as well as the originally identified defendant or respondent, is recognized by both federal law, New York v. Solvent Chemical Company, Inc., et al., 875 F.Supp. 1015, at 1019-1020 (W.D. New York, 1995), and the Administrator's penalty assessment process. In Re Roger Antkiewicz & Pest Elimination Products of America, Inc., IF&R-V-002-95 (Initial Decision, September 25, 1997), and In Re Roger Antkiewicz & Pest Elimination Products of America, Inc., 8 EAD 218 (1999).[1]

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[1]The Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order ("Comp Mem") includes detailed factual allegations, with citation to supporting documentation, upon which Complainant asks the Presiding Officer to allow the Complaint to be amended, adding Biewer Lumber LLC and John A. Biewer Company, Inc., as respondents. This is far more information than Respondent would be provided in a complaint, filed under 40 C.F.R. § 22.14. Complainant has made the effort to provide this detail in the support of the Motion so as to demonstrate that the motion was not cavalierly made, but, rather, is the product of a credible body of information carefully analyzed.

Respondent also asserts that to allow the Motion would

> allow Complainant to engage in a speculative fishing expedition into the records of JAB Company and Biewer Lumber, without Complainant having even pled a cognizable claim against these entities and without any implicit certification by counsel that the factual allegations in the Complaint are based on reasonable inquiry.

Resp Mem, 7. Again, Respondent's protestations are misplaced. In the Motion, Complainant already has demonstrated a "cognizable claim" against John A. Biewer Company, Inc., and Biewer Lumber LLC, supported by the documented information which was submitted with the Motion. Comp Mem, at 2-4. The information submitted reveals the dominance of Respondent by its parent corporation to a degree sufficient to warrant that the parent corporation be added as Respondent in this matter, to allow the Administrator's Delegated Complainant an opportunity to prove that the "corporate veil" between Respondent and its parent should be pierced, or that the parent is liable under United States v. Best Foods, et al., 524 U.S. 51 (1998), as an "operator" of Respondent's business. Moreover, should John A. Biewer Company, Inc., and Biewer Lumber LLC be added as respondents, before Complainant can access any of their records, he must file a discovery motion under 40 C.F.R. § 22.19, which, on objection, can be permitted only on order of the Presiding Officer. Consequently, granting the Motion will not allow Complainant to engage in any "speculative fishing expedition" of the record of John A. Biewer Company, Inc., and Biewer Lumber LLC, because a non-voluntary discovery would have to be approved by the Presiding Officer.

Moreover, there is something disingenuous in Respondent on the one hand asserting that it is an entity independent of Biewer Lumber LLC and John A. Biewer Company, Inc., and that those two companies should not bear any liability Respondent may incur as a consequence of this

proceeding, while at the same time in the proceeding Respondent purports to represent the interests of Biewer Lumber LLC and John A. Biewer Company, Inc.

Given the presumed interest of both Biewer Lumber LLC and John A. Biewer Company, Inc., in the outcome of the Motion, consistent with the Administrator's Rules, specifically, 40 C.F.R. 22.5(b), Complainant served with a copy of the following:

(a) Administrative Complaint and Compliance Order, filed May 2, 2008;

(b) Answer to Administrative Complaint and Compliance Order, filed Jun 10, 2008;

(c) Motion to Amend Complaint and Compliance Order; and

(d) Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order.

See Attachment. As earlier noted, the Memorandum fully sets out, in detail, the information at this time available to Complainant upon which he believes that the relationship between Respondent and Biewer Lumber LLC, and John A. Biewer Company, Inc., warrant an inquiry into the appropriateness of "piercing the corporate veil" in this matter, or applying the principle of Best Foods, et al., for the purpose of finding that Respondent's parent corporation is liable for Respondent's violations. Notwithstanding that notice, neither Biewer Lumber LLC, nor John A. Biewer Company, Inc., have chosen to enter a limited appearance to object to the Motion.[2]

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[2]Biewer Lumber LLC and John A. Biewer Company, Inc., are, obviously, the parties most likely to be adversely affected should the Motion be granted, in that one or the other might be assessed $282,649 in penalties for violations of its subsidiary, Respondent. Adding one or both as respondents in this matter cannot adversely affect Respondent; Respondent already is a party which has answered the Complaint and is currently involved in this proceeding. Rather than Biewer Lumber LLC or John A. Biewer Company, Inc., entering a limited appearance to protect their rights, it is Respondent, the subsidiary, that is left to use its supposedly limited resources to litigate over whether these companies should be held to answer for Respondent's potential liability. This situation is itself additional evidence that the interests and activities of Biewer Lumber LLC and John A. Biewer Company, Inc., and Respondent are so intertwined as to justify

(II) RESPONDENT'S COUNTER-STATEMENT OF FACTS

(A) Respondent's Corporate Relationships

In its memorandum, Respondent makes reference to its corporate arrangements and asserts that "these matters are undisputed and have been known by Complainant for many months[.]" Resp Mem, at 2. It states that "[i]t is undisputed that there is no corporate relationship whatsoever between Biewer Lumber and Biewer-Toledo." Id., at 3. It states that "Complainant admits that the 2005 drip pad closure plan prepared by the Mannik & Smith Group ("MSG") for the Biewer-Ohio facility was commissioned by Biewer-Ohio." Id., at 3-4. It states that "Complainant admits that, on its face, the MSG report was prepared for John A. Biewer Company of Ohio, showing again that neither JAB Company nor Biewer Lumber had anything to do with this report." Id., at 3. These assertions simply are not true. Respondent identifies no statement of Complainant, or the Administrator's enforcement staff, in writing or otherwise, admitting to any of these "facts" recited by Respondent, or acknowledging that any of these "facts" are not in dispute. It makes its assertions without citation to any source material to support the assertion.

At the same time, Respondent entirely fails to address certain critical information provided with Complainant's Motion, which calls into question Respondent's claim that it is an

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an inquiry into their responsibility for Respondent's violation, either by "piercing the corporate veil," or reviewing their operation of Respondent's activities at its facility drip pad after Respondent closed the facility in 2001. That Biewer Lumber LLC and John A. Biewer Company, Inc., are willing to allow Respondent to represent their interests in this legal proceeding, rather than take on that burden themselves, is evidence that parent and subsidiary are for all practical purposes the same.

independent subsidiary of Biewer Lumber LLC and John A. Biewer Company, Inc., and, consequently, that its parent should be insulated from liability for Respondent's violations.[3]

Respondent asserts that "Biewer Lumber was created on February 9, 2006." Id., at 2. However, in the Motion, Complainant clearly demonstrates that the Biewer Lumber website

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[3]Complainant attempts to add both John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents in that the true nature of the relationship of these companies with Respondent has been obscured by the business practices of the Biewers. In its memorandum, Complainant noted, and documented, that there have been two different companies for which the Biewer's have used the name "John A. Biewer Company, Inc."; that there is no separate entry in Dun & Bradstreet for a "John A. Biewer Company, Inc."; and that, though Respondent has provided copies of numerous pieces of correspondences to Complainant, none has been on "John A. Biewer Company, Inc.," letterhead. Comp Mem, at 7. Complainant would note that in its response to that memorandum, Respondent does not comment on these observations. Complainant would also note that no attachment to Respondent's memorandum is on "John A. Biewer Company, Inc.," letterhead. Moreover, though Respondent provides a copy of the Articles of Incorporation for John A. Biewer Company of Toledo, Inc., and Biewer Lumber LLC, it provides no similar document regarding John A. Biewer Company, Inc. Notwithstanding the issues raised in Complainant's memorandum, Respondent attempts to demonstrate the existence of John A. Biewer Company, Inc., and its relationship to Respondent, through nothing more than a self-serving affidavit, prepared for this litigation. Resp Mem, at 2. At this point, Complainant does not contend that these facts "prove" any ultimate issue. Rather, the suspicions evident regarding the existence and nature of the entity "John A. Biewer Company, Inc.," considered with the other facts presented relating to the Biewer companies and their relationship with each other -- including Respondent's use in its communications of Biewer Lumber letterhead and Biewer Lumber's e-mail, Comp Mem, Statement of Facts ("SOFs") 17 and 19, and Respondent's listing in Dun & Bradstreet as a 100% owned subsidiary of Biewer Lumber LLC, SOF 5 -- warrant an inquiry into who is actually responsible for the violation alleged in the Complaint. Was Respondent a truly independent subsidiary at the time Respondent is alleged to have committed the violation, or was it merely a shell operated by a parent? While enforcement staff has asked Respondent to provide information which could be expected to clarify the relationship of these companies, Resp Mem, Attachment G, No. 4, it has not submitted this information.

informs the public that "it has been serving the public for more than 45 years," and attaches a copy of that announcement. Motion, at 2. Respondent's memorandum is silent regarding the statement on its website. Respondent does not explain its use of the Biewer Lumber e-mail address rather than using its own, Comp Mem, at 4, doing no more than stating its conclusion that that is an "irrelevant allegation." Resp Mem, at 6. Confronted with its use on a number of occasions of Biewer Lumber letter head, rather than its own, Comp Mem, SOFs 18 and 19, Respondent is entirely silent. Complainant documented that, when Respondent's balance sheets and income statements for Respondent were requested in September 2007 by counsel, those documents were submitted not by Respondent, but, rather, by the Chief Financial Officer of Biewer Lumber, on Biewer Lumber letterhead, Comp Mem, FOF 15, thus demonstrating that Respondent's financial records were in the custody of Biewer Lumber. Respondent's memorandum is silent on this evidence. Moreover, Respondent makes assertions that are immaterial given the time frame of the violations. Respondent asserts that, prior to 1998, "the Biewer-Toledo facility was operated by a Biewer-Toledo hired plant manager, who in turn had and exercised full authority to hire, fire, train and discipline employees of Biewer-Toledo." Resp Mem, at 2, However, the preparation of the drip pad closure plan and violation alleged occurred in 2004-2005, well after the Biewer-Toledo facility closed in 1998. Complaint, Paragraphs 24 and 27.

Complainant has demonstrated that the Biewers have operated 18 companies under the name "Biewer" or "John A. Biewer." Comp Mem, at 3, SOF 8. Respondent does not challenge the accuracy of this SOF. In its "Counter-Statement of Facts," it addresses only Respondent's relationship with Biewer Lumber LLC and John A. Biewer Company, Inc. Resp Mem, at 2-4, and

states that the number of companies that the Biewers operate is irrelevant. Id., at 6. Complainant has demonstrated that, based upon reports submitted to U.S. EPA by the companies, at least six of the 18 Biewer companies, including Respondent, conducted operations wherein they coated wood products with a solution of a chrome, copper and arsenate solution to preserve the wood products. Comp Mem, SOFs 5 and 6. Complainant does not challenge the accuracy of this fact, but rather characterizes the reports as irrelevant. Resp Mem, at 6. Complainant has demonstrated that, currently, "Biewer Lumber includes three pressure-treated lumber and distribution facilities[,]" Comp Mem, SOF 3, and that Biewer Lumber advertises itself to the public as a vendor of treated wood products, providing safety information concerning chromated copper arsenate to the public. Id., SOF 4. Respondent does not challenge these findings of fact; it acknowledges that "Biewer Lumber is merely a sales company organized for the purpose of marketing and selling the various lumber products produced by other Biewer entities." Id., at 3.

The totality of these unchallenged facts set forth in Complainant's memorandum demonstrate that the same Biewers, over the course of many years, have operated and continue to operate numerous interrelated "Biewer" companies in a vertically integrated operation from production through retail sales, providing to its customers chemically treated wood products. The facilities of several of the Biewer companies pressure treat wood with chromated copper arsenate, and the treated lumber from these Biewer companies is then sold by the Biewers' Biewer Lumber LLC. That is the over-all factual context within which the relationship between Respondent and Biewer Lumber LLC and John A. Biewer Company, Inc., must be evaluated.

In its memorandum, Complainant has identified information in certain financial documents that enforcement staff has been provided by Respondent which reveal that, between

1998 and 2006, substantial sums of money were moving between John A. Biewer Company of Ohio, Inc., and an unidentified related company. Comp Mem, at 15, fn.10. Complainant also identified information in certain of Respondent's financial documents which reveal that before closing, it had approximately $1.4 million in inventory, and, after closing, that inventory was no longer on the books and there was no record of any payment having been made to Respondent for that inventory. Id., at 17, fn.13. Complainant also observed from those records that, without any income, it appears that Respondent has been paying off debts to a related company for 5 years after it ceased operations. Id.

While, in its response to the Motion, Respondent addressed certain financial transactions between Respondent and its related companies, Resp Mem. 4-5, it is silent as to the questions raised about the reduction in Respondent's accounts receivable and inventory. What happened to Respondent's assets when it closed its drip pad is significant, because Respondent has claimed a "lack of adequate income or assets" to conduct the hazardous waste clean-up, required by law, at its closed drip pad site. Respondent's Supplemental Witness Disclosure. Assets represented by any inventory on hand or Accounts Receivable Intercompany, identified in Respondent's financial statements as of the time it closed its wood treatment facility, could have been used to pay for the required hazardous waste clean-up. As will be seen, in the Schoolcraft litigation, the Biewers were well aware that, given the nature the operations at Respondent's facility, hazardous waste was left behind at and near its drip pad causing Respondent to be exposed to potential liability for penalties and clean-up costs, and their transfer of funds from Respondent to one or more of their other corporations, thereby making Respondent unable to afford either liability, is a factual

circumstance quite ripe for analysis under a "piercing the corporate veil" theory or Best Foods "operator liability" theory.

(B) Nature of Violations and Schoolcraft Litigation

Respondent argues in its Counter-Statement of Facts that, in its motion, Complainant " is attempting to establish the 'novel' and unsupportable legal theory that the liability of a parent corporation can be established through a showing that the parent did *not* get involved with the operation of its subsidiary facilities." Resp Mem, at 5. However, Respondent is alleged to have failed to clean up any remaining residual hazardous waste from its drip-pad site after shutting-down operations. Complaint, Paragraphs 27 and 28. If it can be established that grounds exist for "piercing the corporate veil" between Respondent and John A. Biewer Company, Inc., or Biewer Lumber LLC -- or, under a Bestfoods, et al. analysis, that John A. Biewer Company, Inc., or Biewer Lumber LLC was operating Respondent's affairs -- there is nothing in the nature of the violation alleged which would preclude any finding of liability against John A. Biewer Company, Inc., or Biewer Lumber LLC. Brian Biewer, an officer in of Respondent, and of John A. Biewer Company, Inc., and Biewer Lumber LLC, was well aware of the Ohio hazardous waste rule requiring that Respondent remove any residual hazardous waste from its drip pad site and decontaminate the site. FOF 16. The liability of any of these three companies that is otherwise found responsible for the violations cannot be vitiated because the wrong is one of omission rather than commission.

Respondent also asserts that Complainant's reference to Attorney General of the State of Michigan, et al. v. John A. Biewer Company, Inc., 140 Mich. App. 1, at 5 (1985) is irrelevant. Resp Mem, 5. However, that decision documents that as early as 1970, the Biewers were pressure

treating wood with a chemical solution containing arsenic and chrome, and that as early as "August or October, 1979," it was warned by authorities that the discharge of such a solution on the ground "was illegal and should cease." Id., at 2. With that direct knowledge, from at least that point on, the Biewers, as entrepreneurs who wanted to both conduct wood treating operations and sell those treated wood products, likely would be inclined to take steps to attempt, in setting up their corporate structure, to make every attempt to isolate their environmentally risky enterprise of wood preserving from the far less risky sale of treated wood products. Should funding dedicated to the wood preserving companies be limited -- or on their closure, their remaining funds (or inventory) transferred to related companies -- they could avoid clean-up costs and potential penalties by being able to claim, as does Respondent, that it does not have sufficient income or assets to pay the costs of cleaning up the hazardous waste that it has left behind as a consequence of its prior profit-making wood preserving operations. Complainant would note that Respondent was incorporated on September 18, 1980. Resp Mem, at 2.

Determining where funds or inventory of Respondent were transferred "Intercompany," by whom, and for what reason, is relevant in that they are funds which otherwise would have been available to Respondent to meet its obligations under the law to clean up residual hazardous waste it was leaving behind at its drip pad. Respondent's failure to meet this legal obligation is the gist of the violation alleged in the Complaint, and, in challenging the Complaint, Respondent has asserted "the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to fully perform actions requested by Ohio EPA and/or U.S. EPA[.]" Respondent's Supplemental Witness Disclosure.

The environmental laws put in place to protect the environment and public health cannot be enforced, and the public protected, if the same corporate officers directing several companies, on closure of one company's drip pad, can transfer that company's assets to a related company so as to render the company responsible for the closed drip pad unable to pay the costs of cleaning up the hazardous waste its operation has left behind, and avoid paying any penalty for its failure to do so. Raised in the Motion.

(III) RESPONDENT'S ARGUMENT

(a) Is the Motion Untimely?

Respondent argues that the Motion is untimely. Resp Mem, at 8-13. It asserts that well before September 29, 2008, when the Motion was filed, "Complainant was fully aware of the relationship between the various corporate entities," and that the Motion could have been filed sooner. Id., at 11. First, Complainant still is not "fully" aware of the relationship between the various corporate entities, and has acknowledged this. Though enforcement staff has attempted to gather information from Respondent to become aware of the relationships, Resp Mem, Attachment I, Respondent has not provided this information, claiming that both John A. Biewer Company, Inc., and Biewer Lumber LLC, are independent of Respondent. Id., Attachment J.

In Attachment I, a letter from Complainant's counsel to Respondent's counsel, dated August 14, 2007, Complainant included an attachment, listing specific items of information which would document the relationship of Respondent to John A. Biewer Company, Inc., and Biewer Lumber LLC. Respondent has refused to provide that information, instead providing no more than conclusions of its counsel as to the corporate relationship of these parties, Resp Mem, Attachment J, and more recently, conclusions of it officers, generated for this litigation, as to that

relationship. Id., Attachment A. Attorney statements summarizing corporate relationships are not evidence, and summaries of records prepared for litigation are not admissible without establishing that the underlying materials upon which the summary is based are admissible in evidence, and that those materials have been made available to the opposing party for review. AMPAT/Midwest, Inc. v. Illinois Tool Works, 896 F.2d 1035, at 1045 (7th Cir. 1990); and Paddack v. Dave Christiansen, Inc., 745 F.2d 1254, at 1259 (9th Cir. 1984). Consequently, Complainant was forced to investigate and analyze independently available information, along with information that had been submitted by Respondent, regarding the corporate relationship of these parties, for the purpose of attempting to connect the "dots" represented in that information to determine whether sufficient information existed to add John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents in this matter.

In July 2008, when Respondent explicitly waived any "ability to pay" claim regarding the $282,649 penalty proposed, see Response to Motion for Partial Accelerated Decision, after having previously represented to Complainant its lack of assets to pay to clean-up its hazardous waste, or to pay a penalty, it provided a substantial "dot." The obvious inference to draw from Respondent's reversal of position is that it did have access to outside resources so as to be able to pay the penalty, or, it did not care whether such a penalty was assessed as it could later, in a collection action, as an "independent subsidiary," simply claim to be judgment proof. Other "dots" were provided in an extensive report provided to Complainant by financial analysts of Industrial Economics, Incorporated, on July 22, 2008. Comp Mem, Attachment C.

The Administrator's Delegated Complainants and enforcement staff must have sound information on hand before they can serve parties with administrative complaints, proposing to

have penalties assessed against those parties. See the Administrator's Final Decision, issued by the Environmental Appeals Board in In Re Hoosier Spline Broach Corporation, 7 E.A.D. 665, at 679-682 (1998), addressing the Equal Access to Justice Act, 5 U.S.C. § 504. In Complainant's view, it did not have that information until July 2008. Given Respondent's refusal to provide direct information of its relationship with John A. Biewer Company, Inc., and Biewer Lumber LLC, requested by Complainant, and its changing position on its financial circumstances, Respondent cannot seriously claim that Complainant's efforts to otherwise secure information of that relationship, and evaluate the appropriateness of adding John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents in this matter, must be viewed as exhibiting "undue delay" or "bad faith" or "dilatory motive" on Complainant's party, warranting a denial of the motion under Foman v. Davis, 371 U.S. 178, 182 (1962), as applied by final decisions of the Administrator. See Resp Mem, at 8-9.

Respondent further states as follows:

> Now, six months after the Complaint has been filed and after the parties have completed their various disclosures, witness lists, exhibit lists, and have agreed that no discovery is necessary, Complainant seeks to add to this case the same parties identified over a year and a half ago, based on corporate relationships disclosed to Complainant at the time.

Resp Mem, at 11. There are numerous errors and mis-statements here. Respondent fails to cite any source in which Complainant or enforcement staff have "agreed that no discovery is necessary." As of November 19, 2008, five days after it made the above statement, Respondent still had not filed a Pre-Hearing Exchange in conformance with the Administrator's Rules and the

Presiding Officer's Prehearing Order, issued June 27, 2008. Pursuant to that Order, Respondent was required to file its Prehearing Exchange by August 26, 2008.[4]

Respondent filed its Pre-Hearing Exchange on November 20, 2008, including in it this statement: "To the extent Respondent will rely on additional exhibits, this disclosure will be supplemented" as provided in the Prehearing Order. The effect of these events has been to allow Respondent an extension of at least 85 days within which to file its Prehearing Exchange, and even now Respondent clearly acknowledges that it will not disclose all of the exhibits it may rely up at hearing until 30 days before the hearing, as permitted by the Prehearing Order. See Prehearing Order, at 2. Clearly Respondent statement that "the parties have completed their various disclosure, witness list, [and] exhibit lists" is not accurate.

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[4]Respondent did file "Respondent's Witness Disclosure," of little more than one page, dated August 27, 2008. On September 2, 2008, Complainant filed a Motion to Strike Respondent's Witness Disclosure, on grounds that its filing was deficient under the Administrator's Rules, specifically, 40 C.F.R. § 22.19(a)(2)(I), and the Prehearing Order, in that it consisted of nothing more than identifying one potential witness, with a one sentence statement stating that the witness "may testify regarding" efforts to comply with regulatory requirements, and discussions with the Ohio Environmental Protection Agency. The rule requires that a party file a "brief narrative summary" of a witness' expected testimony. Complainant further noted that no documents were included in Respondent's filing, and cited a final decision of the Administrator, stating the need for his process to have "one central submission" of the parties to clarify issues "to be addressed at hearing and allow the parties and the [ALJ] an opportunity for informed preparation for hearing." Motion to Strike Respondent's Witness Disclosure, filed September 2, 2008. Without addressing the Motion to Strike, Respondent filed "Respondent's Supplemental Witness Disclosure," of little more than on page, dated September 15, 2008, again doing no more than identifying the subject matter on which its witness testified. On October 7, 2008, the Presiding Officer "accept[ed] Respondent's supplement as addressing Complainant's concerns and deem[ed] Complainant's Motion to be moot." Order Denying Motion to Strike Respondent's Witness Disclosure. Later, in a telephone conference with the parties, on November 19, 2008, the Presiding Officer stated that Respondent's "witness disclosures" did not include all information required by his Prehearing Order, and said he would allow additional time for Respondent to file a Prehearing Exchange that did meet those requirements.

Respondent further objects asserting that if the motion were allowed it would delay the hearing. Resp Mem, at 12. However, the Motion had been on file for 50 days prior to the conference call between the parties and Presiding Officer, on November 19, 2008, during which a hearing date was set in February for this matter. Respondent does not explain how a motion filed on September 29, 2008, can delay a hearing date that had not been selected, and, in the event, would not be selected until November 19, 2008.

Respondent is correct in citing the U.S. Supreme Court decision in Foman v. Davis, 371 U.S. 178, at 182 (1962), which addressed the amendment of pleadings, and noting that the Administrator "has recognized that the most significant of the *Foman* factors is whether the amendment would unduly prejudice the opposing party." Resp Mem, at 8. In a final order of the Administrator, issued by the Board in In Re Asbestos Specialists, Inc., 4. E.A.D. 819, at 828 (1993), the Administrator recognized that "administrative pleadings are intended to be 'liberally construed' and easily amended.'" Again citing Foman, the Administrator further recognized that among the circumstances to be considered in deny a motion to amend were "undue delay" and "bad faith or dilatory motive on the part of the movant" and "undue prejudice to the opposite party by virtue of allowance of the amendments" and "futility of amendments," and that, among these, "prejudice to the Respondent" was the most "significant consideration." Id.

A review of that part of Respondent's memorandum which addresses the Foman considerations reveals that Respondent articulates no ground whatsoever to support a determination that, if the Motion were allowed, it would be "unduly prejudiced." Resp Mem, at 9-12. Indeed, in "applying the [justice] standards to the present motion," Respondent immediately asserts that the Motion must fail as "there is no legitimate reason" for Complainant's delay in

filing the motion. Id., at 10. This is an assertion directed toward Complainant's actions, not "prejudice" to the Respondent. The Motion does not make any new allegation against Respondent for which it will have to prepare a defense, it seeks to add two additional parties, John A. Biewer Company, Inc., and Biewer Lumber LLC as respondents in this matter. Respondent articulates no reason why it is worse off by having these two parties added as respondents. Moreover, as earlier noted, both of these parties have been served with the Administrative Complaint and Answer, as well as the Motion and Complainant's Memorandum in Support of the Motion, and neither have entered any limited appearance to object to the Motion. See above, at 4.

Given the Biewers' complicated corporate arrangements and Respondent's failure to provide credible and probative documentation to Complainant to demonstrate its relationship with John A. Biewer Company, Inc., and Biewer Lumber LLC, with the result that Complainant had to carry on an independent investigation, Respondent makes no showing of "undue delay, bad faith or dilatory motive on the part of the movant." Moreover, the record clearly demonstrates that Respondent itself has been the source of "undue delay" in having failed to file its Pre-Hearing Exchange in a timely manner, and states that it may have more information it will use at hearing, but will not disclose that until 30 days before the hearing. Under the circumstances, Respondent has not demonstrated that it is necessary to depart in this instance from the Administrator's general rule that "pleadings are intended to be liberally construed and easily amended." Asbestos Specialists, Inc., 4 E.A.D., at 828.[5]

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[5]In a final decision of the Administrator in In Re Carroll Oil Company, 10 E.A.D. 635 (2002), the Board reviewed and upheld an order of the ALJ denying a motion of Complainant to amend the complaint to add parties for several "procedural reasons." Id., at 647. However, there are substantial differences between the circumstances in this case as contrasted with Carroll Oil Company. In Carroll Oil Company, on March 29, 2000, a hearing was set in the matter for May

(b) Granting the Motion is Futile

Respondent argues that granting the Motion is futile, as neither John A. Biewer Company, Inc, nor Biewer Lumber LLC can be found liable under a "piercing the corporate veil" theory, or

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18 and 19, 2000. Id. The ALJ noted that Complainant "unduly waited until March 31, 2000, at the 'eleventh hour' to file its Motion to Amend to add new parties[.]" Id., at 647. By contrast, in this matter, the Motion was filed on September 29, 2008, 51 days before Respondent filed its pre-hearing exchange in conformance with the Administrator's Rules and the Presiding Officer's Pre-hearing Order, on November 20, 2008, see below at 15, and 50 days before a February hearing date was set in this matter, on November 19, 2008. Id. It hardly is fair to characterize the Motion as filed by the Complainant at the "eleventh hour" when it would be another 50 days before the hearing date even would be set, and 51 days before Respondent would file its pre-hearing exchange. Moreover, in Carrol Oil Company, the ALJ observed that granting the motion to amend "would cause the hearing, of necessity, to be postponed," noting that respondents "would not have sufficient time to prepare an appropriate defense." Id., at fn.14. Respondent in this matter can hardly raise the same claim given that the Motion was filed some 51 days prior to Respondent filing its pre-hearing exchange, and 50 days before a hearing date three months into the future would be set. Also, in Carroll Oil Company, Complainant apparently failed to make some necessary allegations in its motion to amend. There was no allegation that "Carroll Oil was a sham corporation"; there was no attempt to "pierce the corporate veil"; there was no attempt to obtain "additional discovery" under 40 C.F.R. § 22.19; and documents to support the motion to amend were not attached to the motion. Id., 647. In contrast to the record in Carroll Oil Company, the Motion in this matter clearly and in detail sets out the grounds for initiating an inquiry into "piercing the corporate veil" of Respondent, in 20 specific Statement of Fact, each supported by attached documents. Resp Mem, at 2-5. Regarding "other discovery," the Administrator's Rules limit "other discovery" to a period of time "[a]fter the information exchange provided for in paragraph (a) of this section" has been made. 40 C.F.R. § 22.19(e). As already noted, Respondent did not file its pre-hearing exchange until 51 days after the Motion was filed; Complainant could not move for further discovery before it made that filing. Finally, whatever "prejudice" may have been demonstrated by Carroll Oil Company, Respondent here has failed to demonstrate prejudice. If the Motion is allowed, all factual allegations against Respondent will remain the same as in the original Complaint, as will the proposed penalty amount. The Motion asks only that two additional parties be made to answer the same Complaint. While those parties may be "prejudiced" if the Motion is granted, as they will have to answer, be subject to discovery, and further litigation, Respondent fails to identify an burden that it would endure beyond that that it already faces. Moreover, notwithstanding having been provided notice of the Complaint, Answer, Motion and Memorandum in Support of the Motion, both John A. Biewer Company, Inc., and Biewer Lumber LLC have not entered any limited appearance to object to the Motion. See above, at __.

the "operator theory" delineated in Bestfoods. Resp Mem, at 13-22. This argument is quite premature.

At this stage of the proceeding it is not incumbent upon Complainant to prove liability under either theory cited, and Complainant is not asserting that it has met that burden. However, the Administrator's process clearly recognizes that a "corporate veil" can be pierced to hold a person or corporation related to the offending corporation liable for the offense. In Re Safe & Sure Products and Lester J. Workman, IF & R 04-907003 (Initial Decision, June 26, 1998); In Re Safe & Sure Products and Lester J. Workman, 8 E.A.D. 517 (1999). In determining whether to do so, among the circumstances which are to be considered are the following: absence of corporate assets or undercapitalization; failure to maintain, or the absence of, adequate corporate records or minutes; commingling of funds and other assets or affairs; failure to observe required formalities; the nature of the corporation's ownership and control; disregard of legal formalities and the failure to maintain an arms-length relationship among related entities; and other shareholder acts or conduct ignoring, controlling or manipulating the corporate form. Safe & Sure Products, Initial Decision, at 22. Moreover, "Respondent can hardly be justified in asserting that there is a lack of evidence of asset commingling . . . when it is the Respondent who has failed to provide this other financial information to EPA, despite being requested to do so." Id., at 23-24. Finally,

> once the proponent has provided sufficient evidence to justify piercing the corporate veil, one cannot continue to merely assert that the burden of proof lies with the EPA when the financial records remain in Respondent's possession, available to exculpate or inculpate.

Id., at 24.

Given the information provided to support the Motion, Comp Mem, at 2-5, including evidence that assets of Respondent were transferred to a related company on the closing of its

wood treatment facility, Id., at 17, Fn.13, rather than those assets being used to meet Respondent's legal obligation to clean up residual hazardous waste that it was leaving behind at the facility, coupled with Respondent's refusal to provide enforcement staff with additional information to reveal the relationship between Respondent and John A. Biewer Company, Inc, and Biewer Lumber LLC, it cannot be said that, notwithstanding further discovery, it is not possible for Complainant to prevail on a "piercing the corporate veil" theory, or on parent company liability under a Bestfoods analysis.

V. CONCLUSION

In proposing RCRA rules to govern the operation of drip pads in the wood preserving industry, the Administrator found that "[w]astes from the preservation of wood with inorganic formulations or arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead." 53 Fed. Reg. 53282, 53284 (December 30, 1988). He further found that "[p]ast mismanagement of these wastes has led to off-site contamination of ground water, surface, water, and soils[,]" and recognized the "known toxicity and/or carcinogenicity of these metals[.]" Id.

Going back to 1979, the Biewers were well aware that their operations involving the chemical treatment of wood posed serious problems for the environment, and the escape of waste chemical solution into the ground was illegal. Attorney General of the State of Michigan, et al. v. John A. Biewer Co., Inc., 140 Mich. App. 1 (1985). Indeed, the trial judge noted that as early as 1975, John A. Biewer Co., Inc., was aware of the "dangerous nature" of the arsenic and chrome compound that it used in it pressurized treatment of lumber. Id., at 2-5. Consequently, in setting up at least six subsidiaries for the purpose of conducting their wood treatment operations, Comp

Mem, SOF 5-6, the Biewers were well aware of the potential exposure that these operations would have for environmental violations.

Generally speaking, there was nothing wrong with the Biewers setting up several subsidiary corporations for the purpose of doing the "dirty work" necessary to produce the chemically treated wood for sale by another company which the same Biewers had organized, in a vertically integrated operation. In Respondent's words, "Biewer Lumber is merely a sales company organized for the purpose of marketing and selling the various lumber product produced by other Biewer entities." Resp Mem, at 3. The law generally allows business men and women to set up whatever corporate arrangements it chooses. However, in the Biewers vertically integrated operation, they have closed down Respondent's wood preservation facility, leaving behind hazardous waste contamination Respondent, by law, is required to clean-up. Instead of sending treated wood product from Respondent's facility to Biewer Lumber LLC for sale, the Biewers continue to operate other wood preservation facilities to supply product to Biewer Lumber LLC. Comp Mem, FOFs 3-5. At the same time, the Biewers claim that Respondent is without sufficient resources to comply with environmental laws, designed to protect the environment and public health for the treat presented by Respondent's contamination.

There is evidence that after they closed down Respondent's operations in 1997, someone - - presumably one of the Biewers who were shareholders -- transferred Respondent's funds, and, perhaps, inventory, to another Biewer company, leaving Respondent with insufficient assets to clean up the hazardous waste it is leaving behind. [citation]. The proceeds from these transfers would have been funds available to Respondent for the purpose of meeting its legal requirements in closing down its drip pad, and in paying penalties for its failure to do so. Having closed down

their wood preserving operations as John A. Biewer of Ohio, Inc., the Biewers continue to conduct such operations under the names of three other Biewer companies.

If no inquiry is made as to the corporate relationship of Respondent and John A. Biewer Company, Inc, and Biewer Lumber LLC, the Administrator, responsible for the administration of RCRA in order to protect the environment and public health from hazardous waste contamination, is almost certain to have the litigation process in this matter terminate without any effective order. The Biewers will have succeeded in insulating themselves from liability for failing to clean-up hazardous waste left behind at the Respondent's wood preserving facility drip pad by it clever use of their corporate organization methods, only to carry-on the same operations at their other wood preserving facilities, with the preserved wood products from all facilities going to Biewer Lumber LLC, set up by the same Biewers, for sale.

Under the circumstances, there is genuine reason to believe that whoever is the true Biewer parent corporation of Respondent, a Biewer subsidiary, is liable for Respondent's violations, and that the Motion should be granted and John A. Biewer Company, Inc., and Biewer Lumber LLC added as respondents in this matter.

Respectfully submitted,

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

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Motion to Amend Complaint and Compliance Order, and Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order** 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 further certify that I then caused true and correct copies of the filed documents to be served by certified mail to the following:

John A. Biewer Company, Inc.
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

I further certify that 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

Attachment

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of this **Certificate of Service** 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, and served it on the following parties, as indicated:

By certified mail to the following:

John A. Biewer Company, Inc.
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

By U.S. Mail 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

I further certify that on this day I caused true and correct copies of:

(1) the **Administrative Complaint and Compliance Order**, filed in this matter on May 2, 2008;

SENDER: COMPLETE THIS SECTION

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- Print your name and address on the reverse so that we can return the card to you.
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1. Article Addressed to:

Registered Agent TIMOTHY BIEWER
BIEWER LUMBER LLC
812 S. RIVERSIDE STREET
ST. CLAIR, MI 48079

COMPLETE THIS SECTION ON DELIVERY

A. Received by (Please Print Clearly) Dan Mitchell
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☐ Agent
☐ Addressee

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RICHARD WAGNER (C-14J)
OFFICE OF REGIONAL COUNSEL, REGION 5
U.S. ENVIRONMENTAL PROTECTION AGENCY
77 W. JACKSON BLVD.
CHICAGO, IL 60604-3590

U.S. ENVIRONMENTAL PROTECTION AGENCY
OCT 07 2008
OFFICE OF REGIONAL COUNSEL

RCRA-05-2008-0007

SENDER: *COMPLETE THIS SECTION*

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1. Article Addressed to:

JOHN A. BIEWER COMPANY, INC.
812 S. RIVERSIDE STREET
ST. CLAIR, MI 48079
Registered Agent Richard Biewer

COMPLETE THIS SECTION ON DELIVERY

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C. Signature
X Pam MacLeod ☐ Agent ☐ Addressee

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RICHARD WAGNER (C-14J)
OFFICE OF REGIONAL COUNSEL, REGION 5
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77 W. JACKSON BLVD.
CHICAGO, IL 60604-3590

U.S. ENVIRONMENTAL PROTECTION AGENCY
OCT 06 2008
OFFICE OF REGIONAL COUNSEL

RCRA-05-2008-0006

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 106 483 522	)	
	)	
Respondent	)	
	)	

COMPLAINANT'S REQUEST TO REVISE NOTICE OF HEARING

On November 21, 2008, the Presiding Officer in this matter issued a Notice of Hearing. It set a hearing in this matter to commence on February 18, 2009. The Notice further provided that: "No dispositive motions may be filed after December 12, 2008, such as motions for accelerated Decisions."

Given the outstanding Motion to Amend Complaint and Compliance Order ("the Motion"), which would add John A. Biewer Company, Inc., and Biewer Lumber LLC -- companies alleged in the Motion to be related to Respondent -- as respondents in this action, Complainant requests that the due date for filing dispositive motions, such as motions for accelerated decision, be set back until after a ruling is made on the Motion to Amend Complaint. Otherwise, Complainant will be required to file dispositive motions before knowing who all will be a party in this matter, and any such motion filed may be incomplete.

On September 29, 2008, Complainant filed the Motion with a supporting memorandum and attachments, and served it on Respondent, as well as on the parties Complainant seeks to add as respondents. On October 8, 2008, Respondent requested an extension of time within which to

respond to the Motion, to November 7, 2008. Complainant did not object, and on October 22, 2008, the Presiding Officer granted Respondent's requested extension. On November 5, 2008, Respondent requested an additional extension of time, to November 14, 2008. Complaint did not object. No ruling was made on Respondent's second extension request.

Respondent submitted its opposition to the Motion on November 14, 2008, which was received by Complainant on November 18, 2008. By rule, 40 C.F.R. § 22.16(b), Complainant, as movant, may file a written reply "within 10 days after service of such response[.]" Consequenlty, Complainant's reply must be filed no later than November 28, 2008. In a November 19, 2008, telephone conference call with Complainant and Respondent, the Presiding Officer stated that he would allow Respondent an opportunity to respond to Complainant's reply. Complainant objected to Respondent having that opportunity as the Administrator's Rules, which govern this proceeding, do not provide for briefing on motions beyond a movant's reply to any objection made to the motion, 40 C.F.R. 22.16(b), and, given that Complainant, as movant, has the burden of persuasion on the Motion, Complainant ought to have the opportunity to reply to any objection Respondent has to the Motion prior to it being ruled upon. Complainant's objection was noted, and over-ruled.

Complainant does not file this request for purposes of delay, but, rather, to assure that it will have the opportunity to address the motion to all who may be respondents. Nor could

the filing of the Motion cause any delay in the hearing, as the hearing date was not selected until 51 days after the Motion was filed.

Respectfully submitted,

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

In Re John A. Biewer Company of Ohio, Inc.
No. RCRA-05-2008-0007

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Reply to Respondent's Opposition to Complainant's Motion to Amend Complaint and Compliance Order,** and **Complainant's Request to Revise Notice of Hearing,** 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 further certify that I then caused true and correct copies of the filed documents to be served by certified mail to the following:

Honorable William B. Moran
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Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

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/November 26, 2008

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