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[3]Illinois
[4]New York
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July 30, 2009

Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

Re: John A. Biewer of Ohio, Inc.; RCRA-05-2008-0007

Dear Clerk:

Enclosed for filing you will find the following pleadings:

1. Respondents' Brief in Opposition to Complainant's Motion to Strike, In Part, Respondents' Pre-Hearing Exchange.

2. Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability.

3. Respondent John A. Biewer Company of Ohio, Inc.'s Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty.

4. Certificate of Service indicating mailing of the above to opposing counsel in the above-referenced matter.

Very truly yours,

Douglas A. Donnell

jeb
Enclosures

cc: Hon. William B. Moran (by Fed Ex and e-mail)
Richard R. Wagner (by Fed Ex and e-mail)
Douglas S. Touma, Sr. (by First Class Mail)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

John A. Biewer Company of Ohio, 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
_____/

DOCKET NO: RCRA-05-2008-0007

RESPONDENTS' BRIEF IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE, IN PART, RESPONDENTS' PRE-HEARING EXCHANGE

On December 12, 2008, Complainant filed a Motion to Strike, In Part, Respondents' Pre-Hearing Exchange, focusing solely on Respondents' statement that "in addition, Respondents reserve the right to cross-examine the author of the 'Penalty Rationale' provided by Complainant dated August 15, 2008." During a conference call held with Judge Moran, Richard Wagner and the undersigned on January 9, 2009, the issue of this motion was raised and, according to Respondents' counsel's notes, Judge Moran stated that there would not be accelerated decision on the issue of penalty and that cross-examination of the author of the Penalty Rationale would be allowed. In fairness, Respondents do not believe that there was ever any order entered to this effect, and it is unclear to Respondents whether Complainant is still pursuing this motion, or whether the Administrative Law Judge considers this issue resolved during the January 9, 2009 conference call.

In the event the Administrative Law Judge believes the issue remains open, Respondents file this short brief to address the issue raised by Complainant in its motion. .

At the crux of Complainant's motion appears to be the concept that it is sufficient for Complainant to simply inform the Court of the amount of the calculated penalty, and perhaps share a document showing how that amount was calculated, without any foundation, explanation or supporting oral testimony or even written declaration presented in lieu of oral testimony. In other words, proof without any real *evidence*. For this reason, Complainant argues that Respondents are not entitled to cross-examine the author of the Penalty Rrationale and that the Administrative Law Judge should grant accelerated decision on the issue of penalty without one bit of testimony or evidence on the issue.

Recognizing that administrative tribunals are not necessarily held to strict compliance with the Federal Rules of Evidence, it is difficult to imagine how the Administrative Law Judge would even have a factual basis to support a decision in favor of Complainant, if he were inclined to make such a decision, in the absence of either admitted evidence on the point, or a stipulation by both parties to use of the penalty calculation without sworn testimony. No such stipulation has been sought or obtained in this matter.

40 C.F.R § 22.24(a) provides that "[t]he Complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint *and that the relief sought is appropriate*." (Emphasis added.) Further, 40 C.F.R. § 22.24(b) requires that "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." Since the relief sought is a large penalty, and the apportionment of that relief must be established by evidence, Respondents cannot see how Complainant can do that without the oral or written

testimony of the individual who calculated the amount, subject to cross-examination concerning his or her reasons and rationale.

Beyond the regulations in 40 C.F.R. 22.24, the basis for denying Complainant's motion is found in its own supporting brief at pages 1 and 4. On page 4 of its brief, Complainant acknowledges that "the Administrator recognizes that a presiding officer, under certain circumstances, 'may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness['] but that the witness 'shall be subject to appropriate oral cross-examination.' 40 C.F.R. § 22.22(c)" If Complainant wishes to offer written testimony, in the form a penalty calculation, "penalty rationale," or other form of report, Respondents do not object and, pursuant to the above-cited rule, the Administrative Law Judge is entitled to receive such written testimony. But the testimony is expressly subject to the right of Respondents to cross-examine the witness on that written testimony. That is the right which was requested by Respondents in their Pre-Hearing Exchange, and which Respondents' counsel understood was recognized by the Administrative Law Judge in the January 9, 2009 pre-hearing conference call. Furthermore, Complainant's brief at page 1 acknowledges, in citing to section 3008(a)(3) of RCRA that "'[i]n assessing such a penalty, the Administrator shall take into account the seriousness of the violation *and any good faith efforts to comply with applicable requirements.*'" (Emphasis added). Respondents wish to cross-examine the author of Complainant's Penalty Rationale on this issue of good faith as well as other issues relating to the penalty calculation dated August 15, 2008.

Such inquiry is, as noted by Complainant, deemed expressly relevant to assessment of a penalty, and is an appropriate subject of cross-examination.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondents

Dated: July 30, 2009

By: _____

Douglas A. Donnell (P33187)
900 Monroe Avenue, NW
Grand Rapids, MI 49503
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

John A. Biewer Company of Ohio, 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
_____/

DOCKET NO: RCRA-05-2008-0007

RESPONDENTS JOHN A. BIEWER COMPANY, INC. AND BIEWER LUMBER LLC'S MEMORANDUM IN OPPOSITION TO EPA'S MOTION FOR ACCELERATED DECISION ON DERIVATIVE LIABILITY

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DOCKET NO: RCRA-05-2008-0007

RESPONDENT JOHN A. BIEWER COMPANY OF OHIO, INC.'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

INTRODUCTION

On May 5, 2008, Complainant initiated this action by filing an Administrative Complaint that states a claim under the Resources and Conservation Recovery Act ("RCRA") against John A. Biewer Company of Ohio, Inc. ("JAB Ohio"). The Administrative Complaint alleges that JAB Ohio violated RCRA by failing to remove contaminated soils around a drip pad after closure at its Washington Courthouse, Ohio facility ("Facility"), and otherwise did not carry out the clean-up steps outlined in a drip pad closure plan prepared for the same facility. On December 12, 2008, the Complainant moved for an accelerated decision in this matter on the issue of liability and on the issue of the proposed civil penalty. This Memorandum is submitted in opposition to such motion.

FACTUAL BACKGROUND

For 20 years, from 1980 to 2001, JAB Ohio operated its facility until it was financially unable to continue. Since 2001, JAB Ohio has had no income and no ability to fully pay off its creditors. In 2005, JAB Ohio commissioned Mannik & Smith Group ("MSG") to prepare a drip pad closure plan, using funds borrowed from its parent, John A. Biewer Company, Inc. Owing to the failure of JAB Ohio's wood treatment operations, and the lack of any income otherwise being generated by the company, JAB Ohio was unable (as opposed to unwilling) to carry out the drip pad closure plan. The foregoing events led to Complainant filing the Administrative Complaint in this matter.

ARGUMENT

Because JAB Ohio has admittedly been financially unable to complete the remedial activities called for in the drip pad closure plan, it must concede that it is not in compliance with RCRA. However, Complainant seeks more than a declaration that JAB Ohio is not in compliance – it seeks imposition of a substantial penalty. JAB Ohio vigorously contests the penalty assessment requested by Complainant, and thus opposes any accelerated decision on that aspect of the case.

Under Section 3008 of RCRA, 42 U.S.C. § 6928, whenever "the Administrator determines that any person has violated or is in violation of any requirement of [RCRA], the Administrator may issue an order assessing a civil penalty for any past or current violation." However, the Administrator does not have unbridled discretion in administering civil penalties: '[i]n assessing such a penalty, the Administrator [must] take into account *the seriousness of the violation* and any *good faith efforts to comply* with applicable requirements." *Id.*

In order to ensure compliance with the statutory mandate set forth in Section 3008, the EPA Office of Regulatory Enforcement, RCRA Enforcement Division, issued a revised RCRA Civil Penalty Policy (the "Policy") in 2003. Under the revised Policy, agency personnel are directed to

adjust penalties up or down for various case specific adjustment factors surrounding a violation. Policy, p 33. One factor expressly mentioned in the Policy is the willingness or unwillingness of the Respondent to comply with RCRA obligations. *Id.* at 36. Indeed, the Policy states that "although RCRA is a strict liability statute, there may be instances where penalty mitigation may be justified based on the lack of willfulness." *Id.*

In assessing the degree of willfulness, agency personnel are directed to consider various sub-factors. Among the sub-factors expressly mentioned are: (1) how much control the violator had over the events constituting the violation, and (2) the foreseeability of the events constituting the violation. *Id.* With respect to these two sub-factors, the Policy expressly states that "[i]f correction of the environmental problem was delayed by factors which the violator can clearly show were not *reasonably foreseeable* and were *out of his or her control* and the *control of his or her agents*, the penalty may be reduced." *Id.* The same reasoning applies, *a fortiori*, in the case where the correction of an environmental problem is not just delayed, but utterly thwarted, by factors which the violator can show were not reasonably foreseeable and were out of his or her control.

In this case, Respondent JAB Ohio intends to present evidence at the hearing showing that there are a number of factors militating against Complainant's proposed penalty, including its financial inability, not unwillingness, to perform the drip pad closure plan. Its lack of funds stemmed from circumstances that were beyond JAB Ohio's control, namely the failure of JAB Ohio's wood treatment operations at the Facility. Prior to the failure, JAB Ohio had successfully conducted business at the Facility for a significant period of time, with no expectation that the business would fail. Furthermore, the evidence at the hearing will show that JAB Ohio borrowed

funds it would likely be unable to repay to retain MSG in the first place, evidencing good faith on the part of JAB Ohio.[1]

Although "[a]gency-issued penalty policies provide a framework that allows a presiding officer to apply his or her discretion to statutory penalty factors" (*Allegheny Power Service Corp. and Choice Insulation, Inc.*, 9 E.A.D. 636, 655 (Feb. 15, 2001) (citations omitted)), the EAB has explained that an ALJ is not required to use the Policy in making a penalty determination. Rather, "a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is . . . free not to apply them to the case at hand." *In re Employers Ins. of Wausau.*, 6 E.A.D. 735, 758 (Feb. 11, 1997); *accord* Allegheny, 9 E.A.D. at 656. Thus, should this Court determine that the Administrator's statutory mandate to consider the Respondent's good faith, as well as the seriousness of the violation, has not been met, then this Court may deviate from the Policy and apply its own discretion to the statutory penalty factors. Furthermore, the Court may assess a penalty amount that is significantly less than the penalty amount that is proposed. *In re Green Thumb Nursery, Inc.* 6 E.A.D. 782, 788, 803 (March 6, 1997).

One final note should be made with respect to Complainant's motion. Complainant does not even contend, much less establish, that there are no disputed facts pertaining to its proposed $282,649 penalty amount. It is clearly the obligation of the moving party to make such showing, and here, other than defend the correctness of its proposed penalty (see Complainant's Memorandum in Support of the Penalty Amount Proposed) there is no showing whatsoever that such penalty amount is uncontested, or that the facts relevant to its determination are all undisputed. Respondent JAB Ohio is entitled to a hearing to present evidence relevant to the Court's determination (including

[1] Note that the inability to pay defense deals a Respondent's inability to pay a proposed penalty; whereas, here, Respondent is arguing that a lack of funds was the reason that the RCRA violation occurred in the first place.

cross-examination of the author of Complainant's Penalty Rationale), which, both sides agree, entails rather broad exercise of discretion.

CONCLUSION

Should the Court find that Respondent is liable in this matter, the Court should further find, based on the RCRA Civil Penalty Policy or based on the Court's own discretionary application of the statutory penalty factors, that the proposed penalty is unfair and unwarranted and that as such the proposed penalty should be reduced in whatever amount the Court deems just.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondent

Dated: July 30, 2009

By: _____
Douglas A. Donnell
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-05-2008-0007

CERTIFICATE OF SERVICE

John A. Biewer Company of Ohio, 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
_____/

I, Jane E. Blakemore, hereby state that I am an employee of Mika Meyers Beckett & Jones PLC, and that on July 30, 2009, I served a copy of:

1. Respondents' Brief in Opposition to Complainant's Motion to Strike, In Part, Respondent's Pre-Hearing Exchange.

2. Respondents John A. Biewer Company, Inc. and Biewer Lumber LLC's Memorandum in Opposition to EPA's Motion for Accelerated Decision on Derivative Liability.

3. Respondent John A. Biewer Company of Ohio, Inc.'s Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty.

upon the following individual by Federal Express overnight 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

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

Dated: July 30, 2009

Jane E. Blakemore

Jane E. Blakemore