RECEIVED
JAN 12 2009
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
John A. Biewer Company of Ohio, Inc.	)	
	)	**Docket No. RCRA-05-2008-0007**
	)	
Respondent	)	

ORDER ON EPA'S MOTION TO AMEND COMPLAINT AND COMPLIANCE ORDER AND NOTICE OF HEARING POSTPONEMENT

In this action under the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a), EPA[1] charges that the Respondent failed to comply with several requirements in connection with the closure of its drip pad and the hazardous waste associated with it. Here, EPA's Motion seeks to add alleged parent corporations Biewer Lumber, LLC and John A. Biewer Company, as respondents in this proceeding. For ease of reference, these entities will be referred to as the existing Respondent, "Biewer-Ohio;" John A. Biewer Inc. as "JAB;" and Biewer Lumber, LLC, as "Biewer Lumber." EPA contends that, as the RCRA statute extends to any person who violates its requirements, a parent corporation can be liable if it is found that it committed or participated in a violation or "if the 'corporate veil' between the parent and subsidiary can be 'pierced,'. . . ." Motion at 6.[2] For the reasons which follow, the Court grants EPA's Motion to

---

[1]Initially it was Ohio EPA ("OEPA") that began this inquiry. Later, the U.S. EPA took the reins. For simplification, the generic reference "EPA" is used. The more important point is that the U.S. EPA is now the Complainant in this proceeding.

[2]The Court advised the parties during a conference call that it would permit the Respondent to file its own reply to any *new* matters raised by EPA in its reply to the Respondent's Response to the EPA motion. Despite the limitation placed on the Respondent's reply, that it was confined to any new facts alleged or arguments raised by EPA in its reply, EPA complains that this is unfair, as it carries the burden in the motion. The Court rejected EPA's protestation. In the first place, as noted, the Respondent's reply was limited to new matters. By definition, Respondent would not have had the opportunity to answer such new contentions. Given the complex issues presented and the fact that EPA seeks a civil penalty of nearly

add JAB and Biewer Lumber as Respondents and EPA is afforded the opportunity to conduct discovery in order to learn of the relationship and activities taken by and between the three entities.

EPA's identifies three items to support its claim of parent-participation in the alleged violations: that Biewer Lumber letterhead stationary was used to communicate to EPA [3]; that correspondence to EPA bearing the Biewer Lumber letterhead vaguely referred to what "Biewer" had done and intended to do[4]; and that Respondent, Biewer Ohio, has no funds. Noting that a consulting firm, the Mannik & Smith Group, was retained to prepare a drip pad closure plan for the Washington Courthouse facility[5] of Respondent Biewer Ohio, EPA "suggests" that this was done by JAB, since the Respondent has no funds, and because the closure plan states that, "if necessary, '*John A. Biewer Company*' will reassess the remediation approach and provide the Ohio EPA with a contingent closure approach for concurrence." *Id.* at 8. (*italics* added).

$300,000, allowing a respondent the opportunity to reply to new issues is fair. Beyond that, the decision to allow further responses is inherently within the discretion of the trial judge. Unhappy with the ruling, EPA then filed a Motion to Strike Respondent's Sur-Reply. That motion will be mentioned *infra*, but only briefly, as it does not warrant more than a passing reference. Also raised during the same conference call and echoed in its Opposition to EPA's Motion, was Respondent's request for oral argument on the issues in the Motion. As the Court also explained in the conference call, allowing oral argument is rarely granted in these administrative proceedings and no compelling reason had been advanced to explain why the written submissions were an inadequate means of expression for the parties' positions. Further, allowing both sides the opportunity to reply to contentions, as the Court has done here, is another reason why oral argument is deemed unnecessary.

[3]EPA states that Brian Bewer, as the Secretary-Treasurer of Biewer-Ohio and Biewer Lumber, advised EPA, using Biewer Lumber letterhead stationary, "of 'Biewer's' management of the closed Washington Courthouse, Ohio facility . . . ." *Id.* at 7 - 8.

[4]EPA notes that on Biewer Lumber stationary, EPA was advised that "'Biewer" has made submissions to the fire department and [LEPC] . . . [that] 'Biewer'has manifested and shipped certain hazardous materials to Alabama . . . [that] 'Biewer' retained Bluck Family Farms to do weekly inspections and repairs . . . [that] 'Biewer' removed all of the materials from the '90-day area' and [that] 'Biewer' will submit a closure plan for the drip pad and notify Ohio EPA when all of the material is removed." EPA Motion at 8.

[5]Contrary to what one might surmise, the "Washington Courthouse facility" does not mean that the facility in issue is a courthouse. Rather, it refers to the Respondent's facility which is located in the *city* of "Washington Courthouse," which is the county seat for Fayette County, Ohio.

Relying chiefly upon the Supreme Court's opinion in *United States v. Bestfoods*, 524 U.S. 51 (1998), EPA contends that decision focused on whether the parent corporation *operates* the subsidiary's facility, as opposed to its relationship with the *subsidiary, generally.* EPA asserts that the participation of the parent companies, JAB and Biewer Lumber, was "total," as one or both of those companies paid the Respondent's taxes and insurance, and because Brian Biewer, as the "Secretary-Treasurer" of all three entities, took over the affairs of the facility's drip pad obligations. EPA agrees that it must show that, regarding the alleged violations, the parents' officers were acting *as officers of those parent companies* in order for liability of that parent to attach, but it asserts that must be the case here, as the Respondent company, Biewer Ohio, had no funds. Therefore it concludes that the funds had to come from the parent compan(ies). *Id.* at 10-11. EPA adds that its "parents' participation" theory rests upon either JAB or Biewer Lumber retaining an environmental consultant to prepare a closure plan for Biewer Ohio's Washington Courthouse facility and then failing to carry through on that plan to remove any hazardous waste from it.

As to its "piercing the corporate veil" theory, EPA admits that, to apply, each case must be decided on its own facts, but with the goal of showing that the subsidiary became a "mere instrumentality" of the parent corporation. It declares that piercing is appropriate "only where an otherwise separate corporate existence has been used to 'subvert justice or cause a result that is contrary to some other clearly overriding public policy.'" *Id.* at 11.

EPA then sets about in its effort to show that Biewer Ohio is a mere instrumentality of JAB and/or Biewer Lumber and that "the Biewers" engaged in an "abuse of [the] corporate form," while adding an equitable argument by contending that to deny piercing of the corporate veil will subvert justice or produce a result clearly contrary to the overriding public policy. *Id.* at 12. However, in making this effort, EPA proceeds to talk about a vague group of individuals, which are not named in the Complaint nor in its motion to amend, the "Biewer family." With no precision, it advises that the "Biewer family" has "long experience in the manufacturing and sale of chemically treated wood" and that "the Biewers" have been treating wood with chemical solutions containing chrome and arsenic since at least 1970 . . . ." *Id.* at 12-13. EPA relates that the Respondent ceased its operations as of June 2001 and that, since then, either JAB or Biewer Lumber has paid Respondent's taxes and insurance. Beyond that, EPA asserts that JAB or Biewer Lumber has communicated with EPA regarding Respondent's "environmental violations" and "engaged in numerous tasks managing that facility, including shipping hazardous materials off-site and engaging persons to perform weekly inspections and repairs at the facility."[6] *Id.* at 14. Although EPA concedes that those actions may have been taken by officers of the Respondent company, it asserts "*of necessity*, [they] were acting as officers of JAB or Biewer

---

[6]At this point EPA's support for these claims rests upon very little: the use of "Biewer Lumber" letterhead and references to what "Biewer" was doing in connection with the Washington Courthouse facility and its presumption that the "parent company retained the services of an environmental consultant to prepare a closure plan for the . . . [Respondent's] wood treating facility . . . ." *Id.* at 14.

Lumber, as the Respondent company had no resources. Carrying its inference further, EPA contends that, by acting in their capacity as officers of JAB and/or Biewer Lumber, those entities "directly intervene[d]" in Respondent's management with the result that the Respondent became a "mere department" of JAB or Biewer Lumber. By virtue of those asserted parent corporation actions, JAB and/or Biewer Lumber became responsible for the Respondent's obligations which were incurred or arose during those times. *Id.* at 15. EPA maintains that the Respondent can not be viewed as an independent entity when its existence depends upon the resources of the parent companies. Consequently, should the alleged violations be established, absent piercing the corporate veil, any determination that RCRA was violated, would be meaningless, as the Respondent has no resources to pay any civil penalty. To not allow piercing the corporate form under such circumstances, EPA contends, would amount to allowing corporations to use corporate law to misuse such structures in order to avoid their obligations.

Untethered to either theory to attach liability,[7] EPA hazily concludes that it is not asserting that the violations were "committed" by Biewer Inc. and/or Biewer Lumber, but rather that those entities are responsible for the Respondent's failure to complete the hazardous waste decontamination at the Washington Courthouse facility's drip pad. *Id.* at 22.

In contrast, Respondent asserts that while EPA acts confused about the relationship between the Respondent and JAB and Biewer Lumber, actually it has long known about the nature of their association. Respondent states that Biewer Ohio is a wholly owned subsidiary of JAB and that EPA was so advised of this over a year before the present motion. It contends that an effect of this relationship between JAB and Respondent is that, by JAB owning 100% of Respondent, no other entity can have a parent-subsidiary relationship. Thus, Respondent is suggesting that Biewer Lumber is precluded from being considered as a parent of Respondent, Biewer-Ohio.[8] Further, Respondent asserts that Biewer Lumber is strictly a sales company,

---

[7]EPA's Motion drifts into subjects not pertinent to the issue in this motion by its discussion of EPA's proposed rules governing drip pads in the wood preserving industry, that "[a]ll Biewer companies are charged with notice [of those findings]" and that "the Biewers" were assessed a civil penalty for 1979 environmental violations. Thus it reasons "all . . . Biewer[] Companies" were aware of these hazards and the penalties that can be imposed for violations. *Id.* at 16. In contrast, EPA states that the Biewer wood treating operations, encompassing "at least six different" operations, are "supposedly [] separate 'independent' subsidiar[ies]." *Id.* at 20. While tipping its hat to the "well-recognized presumption that 'parent and subsidiary corporations are separate and distinct entities,'" EPA asserts that companies might create entities that are merely shells as a means to avoid environmental obligations. *Id.* at 17. From there, EPA maintains that "the Biewers," that imprecise group of individuals, have been operating the Respondent company but without providing the resources it needs to comply with the cited RCRA requirements.

[8]Respondent states that the sole member of Biewer Lumber is BT Holdings, LLC, which is a holding company which itself has but two members, Brian and Timothy Biewer. Opp. at 3.

which functions to market and sell the lumber products of other Biewer entities. Respondent adds that Biewer Lumber has never been in the wood treating or wood production business and, beyond that, did not come into existence until February 2006, which is a date after the time of the alleged violations' occurrence. Respondent also relates that Biewer-Ohio ceased wood production operations in June 2001 but up to that point in time, it was run by its own, Biewer-Ohio hired, plant manager, who had full authority over that operation. Further, sales invoices, financial statements and profit sharing plans were all carried out independent of JAB.

Respondent next addresses the other ties alleged by EPA between JAB and Biewer Lumber with Biewer-Ohio. First, regarding the Mannik & Smith Group drip pad closure plan report, Respondent states that even EPA admits that report was prepared for Biewer-Ohio. Given that, Respondent discounts the single reference in the Mannik report that "John A. Biewer Company" will reassess the report's remediation strategy and offer a contingent closure approach. It suggests that the report's one shorthand reference to John A. Biewer Company obviously refers to the Respondent, not the parent company. After all, it notes, the Respondent Company and the parent company share, in part, an identical name, with the distinction being that the Respondent's name adds "of Ohio" after the words "John A. Biewer Company."

To EPA's claim that JAB is keeping the Respondent alive by infusions of cash, Respondent counters that any cash from JAB for the payment of Respondent's taxes or debts are commonplace between parent and subsidiary companies and that these constitute debts of the Respondent owed to JAB. Respondent states that "[n]o *supported* claim is even asserted that either JAB [] or Biewer Lumber paid for or directed environmental compliance while [Respondent] was operating or directed any closure or post-closure activities at [Respondent's] facility after operations ceased in June 2001." Opposition at 4 (emphasis added). The Court notes that, while no *supported* claim presently exists, this is an example of a reasonable area for EPA to conduct discovery in order to learn if either company did in fact pay for or direct environmental compliance either before Respondent's operations ceased or after that point in time. [9]

---

[9]Respondent detects an anomaly in EPA's attempt to reach JAB and Biewer Lumber in that the Complaint is founded upon alleged failure by Biewer Ohio regarding contaminated soil cleanup and failure to carry out the drip pad closure plan. Respondent submits that one cannot look to a parent company when the claim rests upon that parent's *failure* to act. Accordingly, it is Respondent's assertion that such a claim must arise out of a parent's negligent actions in carrying out such a cleanup. Opposition at 5. This issue may have to be addressed at some point, but it is not necessary or appropriate to resolve it now. Distinct from the EPA claims it describes as "speculative," Respondent maintains that several items EPA raises in its motion amount to "diversionary chaff." They note EPA's reference to Biewer Inc.'s payment of damages in 1985 stemming from environmental issues at Biewer Schoolcraft, Inc., responding that the Schoolcraft litigation provides no material information to the issue in this motion. Other examples of immaterial information include EPA's reference to toxic inventory reports properly filed by *other* John Biewer subsidiary companies, and the number of Biewer companies which include the word

Respondent offers additional reasons for denying EPA's Motion. As a procedural matter, it contends that, per 40 C.F.R. § 22.14, the Motion is defective in that it fails to include a statement of the factual basis for including new respondents. Such a statement would need to assert the factual basis for including those respondents under the "veil-piercing" and the direct liability theories EPA relies upon in its Motion. Simply allowing EPA to include JAB and Biewer Lumber would subvert the pleading requirement that such a claim must be well grounded and formed only after reasonable inquiry. Opposition at 7. In this connection, Respondent states that bypassing these requirements would allow EPA "to engage in a speculative fishing expedition into the records of [John A. Biewer Company] and Biewer Lumber [without complying with the complaint's reasonable inquiry requirement]."[10] *Id.* The Respondent does not correctly construe the provision. At this juncture, amendment of the Complaint requires that a motion first be filed in support of it. EPA has done this and the Court concludes that EPA has presented sufficient information to warrant the inclusion of JAB and Biewer Lumber as named Respondents and to conduct appropriate discovery. With that conclusion, EPA is now obligated by this Order to file an amended complaint which shall follow the content requirements of Section 22.14, now adding those particulars with respect to JAB and Biewer Lumber.

Respondent addresses further the two theories EPA advances to hold JAB liable, that JAB was the operator in fact of Biewer Ohio and that JAB is liable through a veil-piercing theory. Both Respondent and EPA agree that the Supreme Court's 1998 decision in *Bestfoods* is

---

"Biewer" in those corporate names. Respondent's point is that such statements do not advance the issue of the propriety of including either John Biewer Inc. or Biewer Lumber *in this litigation.* Opposition at 5-6.

[10]Respondent also contends that, per *Forman v. Davis*, 371 U.S. 178 (1962), allowing EPA to amend the Complaint at this time would unduly prejudice the opposing party. Respondent maintains that "undue prejudice" exists "where granting the motion to amend would require [the] opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute." Opposition at 9. Essentially, Respondent's argument is that EPA, having had much prior discussion and exchange of information with the Respondent as to the relationship between these entities, has waited too long to include them now. Oddly, Respondent then adds that while it is *now* too late to add Biewer Inc. and Biewer Lumber, it will not be too late at a more distant time in the future, as there is the chance that EPA could then seek to enforce any judgment against a parent corporation. In its reply EPA argues that *Forman* is not applicable, as Respondent cannot show that EPA's filing of the motion, in late September 2008, created undue prejudice. In fact, any burden would be primarily on JAB and Biewer Lumber, not the Respondent Biewer Ohio. Further, EPA maintains that Respondent has not shown any undue delay, bad faith, or dilatory motive behind the motion. It is true that adding new respondents would require filing a new complaint and that answers and discovery would ensue. While these effects should be, and have been, considered the decision on the motion ultimately must weigh all the conflicting considerations. The Court has done this.

instructive in resolving these issues, although they derive different lessons from the decision. From Respondent's perspective *Bestfoods* reinforces the principle that "mere control of a subsidiary" and "sharing of common directors between a parent and subsidiary" are inadequate bases for veil-piercing. Respondent notes the presumption that officers common to the parent and subsidiary are acting in those respective roles and accordingly one must show that the officers were in fact acting as officers of the parent when directing actions of the subsidiary if a veil-piercing claim is to be sustained. Opposition at 15. This, Respondent submits, is no easy hurdle as "it must be shown that the common officers acted 'plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.'" *Id.* at 16.

As to the alternative, direct activity, theory, Respondent offers that one must generally show direct control by the parent of the subsidiary's facility. Respondent distinguishes operation of the subsidiary from operation of the subsidiary's facility. Further, Respondent submits, that is not merely an inquiry into whether the parent engaged in the general operation of any aspect of the subsidiary's facility. Rather it must involve intervention into the facility's pollution and environmental compliance. *Id.* at 16-17.

While offering different interpretations of the decision, the parties at least do agree that *Bestfoods* should apply to this case, as there is no basis to assert that it is limited to CERCLA matters, applying equally to RCRA or other environmental statutes. Although RCRA applies to "persons" who violate its provisions, that translates into owners or operators of facilities for the treatment, storage, or disposal of hazardous wastes. For Respondent this means that liability as an operator is dependent upon showing not simply that the parent directed the subsidiary's facility but that it did so regarding pollution control and environmental compliance. *Id.* at 18. Respondent maintains that showing JAB wholly owned Biewer Ohio and that the two entities share common directors and officers proves nothing in terms of a basis for veil-piercing, as that represents nothing more than a common parent/subsidiary arrangement. Continuing with its earlier argument, Respondent asserts that JAB's *inaction* regarding the drip pad and cleanup failures effectively means that EPA cannot look to JAB. It reasons that since piercing the corporate veil requires showing violative action, and that here JAB did nothing, there are no offending *action*s by the parent can to form the basis for parental liability. By the same token, Respondent argues that claims resting on a theory of direct liability of JAB cannot survive when they stem from *inaction* by the parent. Thus, Respondent equates being an "operator" with the need to show *actions* by such operator. Using the test that it believes should be applied to EPA's Motion, Respondent asserts that all EPA has shown is that Biewer Ohio commissioned the closure report but then failed to implement it.[11] With no evidence that the parent controlled environmental decisions or that it was involved with subsidiary Biewer Ohio's operations before it stopped producing lumber, Respondent maintains that any claim of direct operator activity is empty. As expressed earlier, the Court finds that it is premature to rule on these contentions now.

---

[11]Respondent dismisses any claims such as that JAB prepared the MSG report or that it made loans to Biewer Ohio for the payment of taxes and insurance, as entirely consistent with the parent-subsidiary relationship.

As to EPA's attempt to add Biewer Lumber, Respondent reiterates that it cannot be a parent of the Respondent, as JAB owns all of Respondent's stock and there is no other corporate relationship between Biewer Lumber and Respondent. *Id.* at 21, citing Exhibits E and F. Further, Biewer Lumber did not exist until after the alleged violations occurred. Simply put, Respondent maintains that veil-piercing cannot be claimed for violations predating Biewer Lumber's existence. *Id.* at 22. It follows that Biewer Lumber could not have actually operated the Respondent's business at a time prior to Biewer Lumber's corporate creation. *Id.*

In its Reply, EPA asserts that its motion has provided sufficient documentation to show a cognizable claim against JAB and Biewer Lumber. Specifically, EPA maintains that the information it provided with its motion shows "dominance of Respondent by its parent corporation to a degree sufficient to warrant that the parent corporation be added as Respondent . . . to allow . . . Complainant an opportunity to prove that the 'corporate veil' . . . should be pierced, or that the parent is liable . . . as an 'operator' of Respondent's business." EPA Reply at 3. EPA acknowledges that, if the motion is granted, it would need to file a discovery motion so that it can learn more about the relationship between these companies.[12] Further, EPA does not concede that it agrees with Respondent's assertion that the Mannik & Smith report was commissioned by the Respondent nor does it concede neither JAB nor Biewer Lumber had anything to do with that report's commission or preparation. *Id.* at 5. EPA is perplexed that Dun & Bradstreet does not list a separate entry for "John A. Biewer Company, Inc." and that none of Respondent's responses to EPA in this litigation have been on "John A. Biewer Company, Inc." letterhead. Further, EPA notes that Respondent has not provided the articles of incorporation for "John A. Biewer Company, Inc.," offering only an affidavit that such entity exists. In contrast it observes that such articles of incorporation were provided for Biewer Lumber and for John A. Biewer of Toledo. It points to other conflicting information, such as a Dun & Bradstreet report identifying Biewer Lumber as owning 100% of the Respondent and three other Biewer Companies. *Id.* at 6, n. 3, citing statement of fact 5 from EPA's memorandum in support of its motion. It also observes that the information for Respondent's financial records was submitted by Biewer Lumber's CFO on Biewer Lumber letterhead.[13] *Id.* at 7. EPA does not maintain that,

---

[12]Regrettably, in its Reply, EPA manages to conflate references to a companion case in this litigation, John A. Biewer Company of Toledo, Inc., Docket No. RCRA-05-2008-0006, by referring to that facility's hiring its own plant manager and other facts distinct to that separate docket. EPA Reply at 7. Respondent has done the same, referring in its sur-reply for Biewer Ohio to "the Toledo Facility." Sur-reply at 7.

[13]EPA notes that Respondent has not challenged EPA's assertion that some 18 companies have been identified under the "Biewer" or "John A. Biewer" names, while acknowledging that the Respondent has asserted this is irrelevant to the motion. In a strict sense, the Court agrees with the Respondent that the existence of such other entities is not relevant to determining whether JAB or Biewer Lumber may be added as respondents in this litigation. However, the multitude of entities with these names provides a reasonable basis to justify further inquiry into

at this stage, it can establish the relationships between the Respondent and JAB and Biewer Lumber. Rather, it believes that it has presented sufficient information to justify amendment of the complaint to include the named respondents, which then will be followed by further inquiry into the relationship of those entities, through discovery.

As for Respondent's claim that EPA's Motion is untimely, EPA disputes that it is "fully aware" of the relationships between the Respondent and JAB and Biewer Lumber. EPA Reply at 12. In contrast, EPA observes that the Respondent has still not provided information it requested in August 2007 concerning these corporate relationships. EPA Reply at 12. EPA maintains that representations from Respondent's counsel and assertions from corporate officers cannot take the place of EPA's independent assessment of the underlying documents. Given the limited information it could gather, EPA's Motion is based upon the limited sources it had available to justify its motion to add JAB and Biewer Lumber.

Although the parties look to the Supreme Court's decision in *Bestfoods*, the application of that decision to this case is premature. While it is true that the decision provides essential guidance in parent corporation liability determinations,[14] discovery and perhaps the hearing must

---

the corporate relationship between Respondent and JAB and/or Biewer Lumber. EPA has offered other puzzle pieces to a picture which has not yet emerged. For example, it relates that certain financial documents from the Respondent show "substantial sums of money were moving between [Respondent] and an unidentified related company" and that while Respondent had some "$1.4 million in inventory" before it closed, that amount vanished from its books after it closed, and where that inventory went is not known. EPA Reply at 9.

[14]It is noted that the issue before the Court in *Bestfoods* was "whether a parent corporation *that actively participated in, and exercised control over*, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Id.* at 55 (emphasis added). The Court held that there are two bases for parental liability to occur in such circumstances. First, there is *derivative liability*, which occurs when the corporate veil may be pierced. In such circumstances, the parent corporation may be held liable. The second basis for liability is *direct liability*. This arises if the parent corporation actively participated in and exercised control over the operations *of the facility itself*. If that obtains, then the parent may be held directly liable. The Court affirmed that only when the corporate veil may be pierced may the parent corporation be charged with derivative liability for its subsidiary's actions. It also stated that nothing in CERCLA bars a parent corporation from *direct liability* for its own actions in operating a facility owned by its subsidiary. *Id.* at 64. That involves situations when the parent is directly a participant, through the actions of its agents, in the alleged wrongdoing. Thus, that theory is about the parent's *own* actions regarding the wrongdoing. Speaking to the direct liability basis, the Court noted that, under CERCLA, any such violative act in operating a corporate subsidiary's facility, done on behalf of the parent corporation, makes the parent liable, because that act applies to "any person" who operates a polluting facility. *Id.* at 65. Accordingly, those that actually participate in the wrongful conduct are liable when they act as

occur before those issues can be resolved.

In this regard it is noted that EPA's reaction to the Respondent's contention that granting the motion would be futile, as neither JAB or Biewer Lumber could be liable under either the "veil-piercing" or "operator" theory, is that these contentions cannot be resolved until discovery is completed. Thus EPA's central contention at this stage is that it need not conclusively establish that JAB and/or Biewer Lumber are liable for any violations under either of those theories, but rather that it has put forth a sufficient basis to warrant the inclusion of those entities as named respondents on the Complaint. Application of the general rule that complaints and pleadings are to be liberally construed and easily amended remains appropriate at this stage of the proceedings. None of the reasons to deny an amendment exist at this stage, as there has been no undue delay, bad faith shown nor will any undue prejudice result. *Foman v. Davis*, 371 U.S. 178 (1962). While the Court's determination allowing discovery will result in a postponement of the hearing, this delay is outweighed by the importance of determining the appropriate respondents.

The Court agrees with EPA's expression of its burden at this stage of the proceedings and it is noted that other courts have applied the same approach. Thus, in *Aerotel, Ltd. v. Sprint*, 100 F. Supp. 2d 189, 193-194 (S.D. N.Y. 2000), the court allowed additional discovery "to determine the precise level of interrelatedness between parent and subsidiaries." At this stage only pleading in good faith is required. By seeking to add JAB and Biewer Lumber, upon filing an amended complaint, EPA will have satisfied the notice required at this stage by identifying the respondents and the theories for their liability. Later, after discovery is completed, there must be sufficient facts to establish a *prima facie* showing of parental liability. *Ball v. Metallurgie Hoboken-Overpelt*, 902 F. 2d 194, 196-197 (2d Cir. 1990). For now, the Court employs its discretion to allow EPA the opportunity to learn the degree of interrelatedness between the Respondent and the other entities it seeks to hold responsible as respondents in this matter. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). *See also, Melikian v. Corradetti*, 791 F.2d at 281-282 (3d Cir. 1986). A ruling on the relationship and activities and consequent potential liability of those entities vis-a-vis Respondent Biewer Ohio will occur either in subsequent, post-discovery, motions or perhaps a final ruling will need to be deferred until after the evidentiary hearing has been completed.

Based on the foregoing, EPA is directed to file an amended complaint, adding as respondents JAB and Biewer Lumber, along with the inclusion in that complaint of the necessary

---

operators. The Court makes a point of this by quoting approvingly from a law review article presenting the circumstance where "the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator . . . [as when] a parent who strictly observed corporate formalities, avoided intertwining officers and directors, and adequately capitalized its subsidiary, yet provided active, daily supervision and control over hazardous waste disposal activities of the subsidiary. Such a parent should not escape liability just because its activities do not justify a piercing of the subsidiary's veil." *Id.* at 66, n.12.

essential allegations against those entities. Following that, discovery is to commence promptly with the goal of completing it within sixty days. Although the Court may ultimately conclude that Biewer Lumber is not an appropriate Respondent in this proceeding, EPA is entitled to learn through discovery of the nature of the relationship of that entity with JAB and the Respondent. Other matters, such as the details of contract(s) and contact(s) between the respondents and the Mannik & Smith Group, inquiries into those who were directing and operating Biewer Ohio, and the entity for which they were acting as officers when engaged in such actions, and the movement of funds in and among these entities would all seem to be examples of appropriate areas of inquiry. A new date for the start of the hearing will be made following discovery and orders on any motions which may ensue in its wake.[15] Although the subject of a distinct docket, the case of John A. Biewer of Toledo, RCRA 05-2008-0006, is impacted by the rulings in this Order because of the factual similarities in the two cases and the nearly identical arguments involving the same issue of adding JAB and Biewer Lumber as Respondents in the Biewer

---

[15]As alluded to *supra* at note 1, EPA's Senior Attorney and Counsel, Mr. Wagner, filed a motion to strike the Respondent's sur-reply, contending that it is unfair to EPA to permit the Respondent to submit a sur-reply because EPA carries the burden in its motion and also because the consolidated rules, 40 C.F.R. Part 22, do not expressly provide for them. EPA Counsel believes that "consideration of [a] Respondent's sur-reply is contrary to the intent of the Administrator's Rule that a motion be fully briefed." Motion to Strike at 3. Yet, as explained, the Court made this decision to achieve that very goal – that the motion be fully briefed. EPA also asserts that the Respondent raised a new argument itself in its sur-reply and that it is now EPA that is prejudiced, left without the opportunity to respond to it. According to EPA, the Respondent's "new" argument is that EPA was required to submit a proposed amended pleading with its motion to amend the complaint but failed to do so. EPA Motion to Strike Respondent's Sur-Reply at 3. However, the Respondent did raise this in earlier filed memorandum in opposition to EPA's motion, noting that if the amendment were granted "[a]n amended complaint . . . would need to be filed." Respondent's Opposition at 12. Thus, it was not a new argument. Beyond that, EPA has lost sight of the fact that the Court limited the sur-reply to new issues raised by EPA. Therefore, EPA suffered no prejudice. As noted, the Court's decision to allow the Respondent to file a sur-reply was based on its goal of fairness in these proceedings. Guided by that it determined that fairness would best be achieved by allowing a full airing of the parties' positions on a complex matter by permitting Respondent Biewer Ohio to respond to any new issues raised by EPA in its Reply. While EPA suggests that something is out of the ordinary because it "received no notice that its objection and the overruling of the objection appear of record in this matter in the file of the Region 5 Hearing Clerk," this is nonsensical. Counsel's very assertion confirms that he had notice that a sur-reply was allowed. Rather, EPA's Counsel seems to think that oral orders are not permitted or that they do not constitute notice until a written confirmation of the ruling is made and filed with the Regional Hearing Clerk. However, the Consolidated Rules do not prohibit oral orders. Rather, those rules require that where *documents* are issued, they are to be so filed. 40 C.F.R. § 22.6. For simple and brief procedural determinations involving the Court's discretion, oral orders are a practical, and fully effective, method of communicating those decisions.

Toledo matter. A separate Order will be issued shortly for the Biewer Toledo matter, but the parties are advised that the same outcome will be directed and the hearing will be postponed in that case as well.

Accordingly, Complainant's Motion to amend the Complaint and Compliance Order is GRANTED, according to the terms of this Order.

William B. Moran
William B. Moran
United States Administrative Law Judge

Dated: January 7, 2009
Washington, DC

In the Matter of John Biewer
Docket No. RCRA-05-2008-0007

RECEIVED
JAN 12 2009
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on EPA's Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponement**, dated, January 7, 2009, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Tywanna Green
Acting Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd., E-13J
Chicago, IL 60604-3590

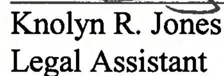
Copy by Regular Mail and facsimile to:

Attorney for Complainant:

Richard Wagner, Esq.
Office of Regional Counsel
U.S. EPA - Region 5
77 W. Jackson Blvd., E-13J
Chicago, IL 60604-3590

Attorney for Respondent:

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



Knolyn R. Jones
Legal Assistant

Dated: January 7, 2009