UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. RCRA-05-2008-0007**
John A. Biewer Company of Ohio	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
	)	
U.S. EPA ID #: OHD 081 281 412	)	
	)	
Respondent	)	
_____	)	

COMPLPAINANT'S MOTION TO STRIKE, IN PART, RESPONDENT'S PRE-HEARING EXCHANGE

The Administrator's Delegated Complainant, by undersigned Counsel, hereby moves before the Presiding Officer that Respondent's Pre-Hearing Exchange, filed on November 20, 2008, be stricken, in part. That part proposed to be stricken is the following sentence: "In addition, Respondent reserves the right to cross-examine the author of the 'Penalty Rational' provided by Complainant dated August 15, 2008."

A Memorandum in Support of Complainant's Motion to Strike, in part, Respondent's Pre-Hearing Exchange is being filed with this motion.

Respectfully submitted,

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. RCRA-05-2008-0007**
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John A. Biewer Company of Ohio, Inc.	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
	)	
U.S. EPA ID #: OHD 106 483 522	)	
	)	
Respondent	)	
	)	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE, IN PART, RESPONDENT'S PRE-HEARING EXCHANGE

On November 20, 2008, Respondent filed a Pre-Hearing Exchange in this matter in which it stated, in part, as follows: "Respondent reserves the right to cross-examine the author of the 'Penalty Rationale' provided by Complainant, dated August 15, 2008." Complainant is moving before the Presiding Officer that that portion of Respondent's Pre- Hearing Exchange be stricken, as Respondent has no such right. This memorandum sets out the legal analysis in support of the Motion to Strike, in Part, Respondent's Pre-Hearing Exchange ("the Motion").

(I) NO RULE OF THE ADMINISTRATOR INVESTS IN RESPONDENT A RIGHT TO CROSS-EXAMINE THE AUTHOR OF THE PENALTY RATIONALE.

Congress invests the Administrator with exclusive authority to assess a civil penalty for violations of the Resource Conservation and Recovery Act ("RCRA"), and to determine the amount of penalty to assess ("[a]ny penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation," and "[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"). Section 3008(a)(3) of RCRA. To govern the process by which he

assesses civil penalties under the environmental statutes, the Administrator has promulgated rules, codified at 40 C.F.R. Part 40. The Administrator has stated his intention that these rules provide:

> uniform procedural rules for administrative enforcement proceedings required under various environmental statutes to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 551 et seq.

63 Fed. Reg. 9464 (February 25, 1998). The Administrator specifically provides that these rules govern his assessment of civil penalties under RCRA. 40 C.F.R. § 22.1(4) ("The [Administrator's Rules] govern all administrative adjudicatory proceedings for: . . . (4) . . . the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended . . . .").

In Section 554(d) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(d), Congress directs that "[t]he agency shall give all interested parties opportunity for" making a response to proposed agency action, and "to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title."

In Section 556(c) of the Administrative Procedure Act, Congress provides that an Administrative Law Judge ("ALJ") may be appointed to conduct any hearing that is necessary, and, in conducting any such hearing, the actions of the ALJ are "[s]ubject to the published rules of the agency and within its powers[.]"[1] This has been interpreted to mean that, on matters of law

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[1]"Agency" is defined under the APA as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and

and policy, an ALJ is subordinate to the agency in which he serves.[2] The U.S. Supreme Court has

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one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, et al., 488 U.S. 204, at 218, J. Scalia concurring (1988). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the RCRA, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

[2]Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual, at 75 (1947). In addition, the Federal Courts consistently have recognized that, on matters of law and policy, the ALJs are subordinate to the agency in which they serve. See Croplife Am. v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003) ("[T]he reality of agency operations makes it clear that ALJs *cannot* independently rule on the legality of third-party human studies, because they may not ignore the Administrator's unequivocal statement prohibiting the agency from considering such studies." (emphasis in original)); Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993)("[i]t is commonly recognized that ALJs 'are entirely subject to the agency on matters of law'"); Mullen v. Bowen, 800 F.2d 535, at 540 n.5 (6th Cir. 1986) ("Administrative law judges therefore remain entirely subject to the agency on matters of law and policy"). See also: D'Amico v. Schweiker, 698 F.2d 903, 904-906 (7th Cir. 1983) (stating that ALJs must comply with "instruction" issued by the Chief Administrative Law Judge of the agency, announcing "new policy," even though the instruction "truncated" ALJs' discretion, and ALJs believed the instruction injured social security claimants); and Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132, 1141 (D.C. Dist. 1984) (an ALJ "must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,'" but "[o]n matters of law and policy, however, ALJs are entirely subject to the agency."). Judge Ruth Bader Ginsburg, writing for the Circuit Court of Appeals for the District of Columbia, has noted that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . ." Iran Air, at 1260, quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin.L.R. 9, 12-13 (1973) (emphasis in original).

recognized that Congress intended to make ALJs "semi-independent subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment." Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, at 132-133 (1952).[3]

Consequently, it is the Administrator's Rules, and not those of any other agency, which govern the process by which the Administrator assesses civil penalties under RCRA.[4]

With regard to the cross-examination of witnesses, the Administrator provides that: "Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious." 40 C.F.R. § 22.22(b). Additionally, 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 that witness "shall be subject to appropriate oral cross-examination." 40 C.F.R. § 22.22(c). The Administrator has promulgated no rule requiring a complainant, or any other party, in an action in his civil penalty process to make available any witness for cross-

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[3]In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as administrative law judges. 95 P.L. 251; 92 Stat. 183 (March 27, 1978). Consequently, the terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. Notwithstanding the name change, no amendment was made to Sections 556 and 557 of the APA, 5 U.S.C. §§ 556 and 557, effecting the authority of this particular governmental officer. For a review of the historical development of this officer, see K. Davis, Administrative Law Treatise, 2nd Ed., § 17.11 (1980).

[4]In further support of this proposition, it should also be noted that, "[w]hen a statue limits a thing to be done in a particular mode, it includes the negative of any other mode(,)" Botany Worsted Mills v. U.S., 278 U.S. 282, at 288 (1928), and this rule of construction is equally applicable to promulgated rules of an agency. Rucker v. Wabash Railroad Company, 418 F.2d 146, at 149 (7th Cir. 1969) ("[a]dministrative regulation, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases.") Consequently, in choosing a certain set of rules to govern his penalty assessment process, the Administrator exercised his discretion to not choose other possible rules for his process.

examination other than as is stated in these two rules, and certainly has invested no "right" in a respondent to cross-examination as a witness anyone who calculates a penalty amount proposed in complaint. Consequently, unless Complainant at a hearing calls as a witness the author of the "Penalty Rationale" in Complainant's Pre-Hearing Exchange, or submits that document into evidence, Respondent has no "right" or opportunity to cross-examine the author of that document.[5]

(II) AS A MATTER OF LAW, RESPONDENT HAS NO ABSOLUTE RIGHT TO AN ORAL EVIDENTIARY HEARING.

Respondent has no absolute right to any oral evidentiary hearing. In his rules, the Administrator recognizes summary disposition, or "accelerated decision," in which a respondent can be found liable for violations, and a penalty assessed against the violator, without any witness being called at all, provided there is "no genuine issue of material fact" and a party is "entitled to judgment as a matter of law." 40 C.F.R. § 22.20. The fact that, under certain circumstances, the

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[5]Though not directly at issue in this matter, for completeness, given the citation to Section 554(d) of the APA, 5 U.S.C. § 554(d), above, at 2, Complainant would note that, in Section 557(b) of the APA, 5 U.S. C. § 557(b), Congress provides that an ALJ may only "initially decide" a case, and "on appeal from or review of the initial decision the agency has all the powers which it would have in making the initial decision," with exceptions not relevant to this discussion. The Attorney General of the United States has explained that, under Section 557(b) of the APA, an "initial decision" is "advisory" in nature, and that "[i]n making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." Attorney General's Manual on the Administrative Procedure Act, at 83 (1947). Federal Courts have held likewise. "Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to 'make any findings or conclusions which in its judgment are proper on the record,' notwithstanding a different determination by the Examiner [ALJ]." Fink v. Securities and Exchange Commission, 417 F.2d 1058, at 1059 (2nd Cir. 1969). "[T]he fact that the Board reached different factual conclusions than the administrative law judge is not as diabolic as respondent suggests[,]" the issue is "whether the Board's decision is based on substantial evidence." U.S. Soil Conditioning v. N.L.R.B., 606 F.2d 940, at 942 (10th Cir. 1979).

Administrator allows for his assessment of penalties, without providing any oral evidentiary hearing for the cross-examination of witnesses, is further support for the proposition that the Respondent has no right to cross examine the author of the "Penalty Rationale," provided in Complainant's Pre-Hearing Exchange. If, indeed, Respondent did have such a right, the Administrator could not deny an oral evidentiary hearing where "no genuine issue of material fact" is revealed by the record and a party is "entitled to judgment as a matter of law," as now provided for by rule. If Respondent had such a right, the rule itself would be unlawful, as the need for a hearing could be invoked without regard for the existence of any "genuine issue of material fact" and without regard to the law, but, rather, simply by a respondent asserting a desire to cross-examine someone.

Summary disposition long has been recognized as a legitimate and useful tool in resolving civil litigation. One hundred years ago the United States Supreme Court recognized that:

> The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition, fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law.

Hepner v. United States, 213 U.S. 103, at 115 (1909). Moreover, the Court has explicitly held that: "No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. . . ." *Ex parte* Peterson, 253 U.S. 300, at 310 (1920).

Specifically, regarding administrative agencies, the Supreme Court has stated:

> We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.' F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 143, 84 L.Ed. 656, 60 S. Ct. 437 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of

> due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.' Joint Anti-Fascist Comm. v. McGrath, 341 US, at 171-172, 95 L.Ed. 817, 712 S.Ct. 624 (Frankfurter)."

In Matthews v. Eldridge, 424 U.S. 319, at 348 (1976).

In Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA, 35 F.3d 600 (1st Cir. 1994), the Court reviewed a record revealing that U.S. EPA refused to hold an evidentiary hearing regarding its determination that a facility owned by the Petitioner must fully meet the Clean Water Act's secondary treatment requirements for publicly owned treatment works. The Administrator, citing his applicable rule analogizing Rule 56, supported his denial of an oral evidentiary hearing by noting that he had previously established secondary treatment requirements because Petitioner's facility emitted pollutants into stressed waters, and the Petitioner failed to present any genuine issue of material fact which would warrant over-turning his earlier decision. Id., at 603-604. The Court upheld the Administrator's action denying an oral evidentiary hearing, stating:

> To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless, and would suffocate the root purpose for making available a summary procedure.
>
> [S]ummary judgment is less jarring in the administrative context; after all, even under optimal conditions, agencies do not afford parties full-dress trials. Taking these factors into account, it is unsurprising that most major agencies in the federal system have opted to make available procedures for the summary disposition of adjudicatory matters. [Citations omitted, but they include citation to 40 CFR 22.20.] . . . Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way. *See [Weinberger v.] Hynson, [Westcott & Dunning, Inc.,]* 412 U.S. at 621.

Id., at 605-606.

Consequently, the Administrator is on solid legal ground in providing, by rule, 40 C.F.R. § 22.20, that a party before him who is confronted with a proposed penalty assessment order is not

entitled to an oral evidentiary hearing if it can be shown that there is no "genuine issue of material fact." Given that this is the state of the applicable law, Respondent simply does not have a right to cross-examine the author of the "Penalty Rationale" in Complainant's Pre-Hearing Exchange, an endeavor which would require that a hearing be conducted irrespective of the presence of a "genuine issue of material fact." To find the existence of such a right would nullify the Administrator's rule.

(III) TO FIND THAT THIS RESPONDENT HAS A RIGHT TO CROSS-EXAMINE THE AUTHOR OF THE "PENALTY RATIONALE" IS ARBITRARY AND CAPRICIOUS DECISIONMAKING, IN VIOLATION OF THE SECTION 706 OF THE APA.

In Section 706 of the APA, Congress provides that, on judicial review, final decisionmaking of an agency "shall" be held "unlawful and set aside" if its findings and conclusions are found to be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law."[6]

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[6]The Court of Appeals for the District of Columbia has held that:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. [Footnote omitted.] This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. [Footnote omitted.]

Greater Boston Television Corporation v. FCC, 444 F.2d 841, at 851 (D.C. Cir. 1970). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." Id. at 852. The Court observed that "in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." Id. at 853. In addressing the even handed application of law in administrative adjudication, the Third Circuit Court of Appeals has adopted an observation that:

In a proceeding before the Administrator, the respondent challenged an initial decision of an ALJ who found, in an accelerated decision, that a civil penalty of $1.345 million, as proposed, was appropriate. Respondent argued that it was "*per se* impermissible for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing." In Re Newell Recycling Company, Inc., 8 E.A.D. 598, 625 (1999). The Administrator's final decision, issued by the Board, held that "Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." Id. In the decision, the Board went into some detail demonstrating the failure of Newell to raise any material issue of fact relating to the amount of penalty appropriate for the violations. On judicial review, the 5th Circuit Court of Appeals upheld this final decision of the Administrator. Newell Recycling Company, Inc. v. U.S. EPA, 232 F.2d 204 (5th Cir. 2000). As the Court "[could not] say that [the Administrator's] determination was arbitrary, capricious, an abuse or discretion or otherwise not in accordance with law," it upheld that part of the final decision finding Newell liable for the violations alleged in the complaint. Id., 207-208. The Court also upheld the Administrator's assessment of the full $1.345 million penalty proposed by her delegated complainant, rejecting Newell's 8th Amendment claim that the penalty amount was excessive, and rejecting Newell's "due process" claim that before a penalty could be assessed "an evidentiary hearing was 'required' in [the] matter, and that the absence of one violated Newell's right to due process of law." Id. at

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> Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to describe the system as lawless, arbitrary, or the like, even though the case assignment is random.

Santise v. Schweiker, 676 F.2d 925, at 930 (3rd Cir. 1982).

210. The Court cited two U.S. Supreme Court decisions for the proposition that "if the hearing . . . is to serve any useful purpose, there must be some factual dispute[,]" and the proposition that it is permissible for an agency to "condition an adjudicatory hearing on 'identification of a disputed issue of fact by an interested party[,]'" and found that there was "no contested issue of fact on penalty in the record" and "decline[d] to set aside the penalty[.]" Id. at 211.

In addition to assessing a $1.345 million penalty against Newell Recycling Company without a hearing being conducted, and without a witness being called on behalf of the complainant to "testify" as to how the penalty amount proposed was calculated, the Administrator has assessed the penalty amounts in the following cases without a witness being called to "testify" as to how the penalty amount proposed was calculated:

> In Re Green Thumb Nursery, 6 E.A.D. 782 (1997) ($3,000 assessed, $4,000 proposed).
>
> In Re Spitzer Great Lakes Ltd, Inc., 9 E.A.D. 302 (2000) ($165,000 assessed, same as proposed).
>
> In Re Roger Antkiewicz, 8 E.A.D. 218 (1998) ($3,500 assessed for each of two violations proven, same as proposed).
>
> In Re Federal Cartridge Company, RCRA-05-2002-003 (2004) ($225,000 assessed, $265,000 proposed).

The first three decisions were final decisions issued by the Board, the last an ALJ initial decision that became a final decision of the Administrator by operation of rule, 40 C.F.R. § 22.27(c), as neither the complainant nor respondent appealed the initial decision. The list of decisions is not meant to be exhaustive, but meant to provide an example of occasions when the Administrator has

assessed penalties -- some being substantial penalties -- without a witness "testifying" as to how the particular amount of proposed penalty was calculated.

The author of the "Penalty Rationale" has analyzed the evidence that is expected to be of record when this proceeding is closed, in consideration of the RCRA statutory penalty criteria as interpreted by the Administrator in his applicable penalty policy. That analysis is not itself evidence, but rather a thought process involving a consideration of evidence, and the language of a statute and the Administrator's policy.[7] Federal courts have recognized that "[t]he assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power." Panhandle Co-op Association v. EPA, 771 F.2d. 1149, at 1152 (8th Cir. 1985), and that, "once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." Robinson v. U.S., 718 F.2d 336, at 339 (10th Cir. 1983).

The Administrator, through his Chief Judicial Officer, has explained that, though the "quantity" of a particular chemical may be a "factual issue" bearing on the appropriateness of a penalty, as may be the "ability of the company to continue in business," whether the policy should impose a separate penalty for each chemical not reported, or whether an appropriate penalty dollar amount was selected for each box of the policy matrix "is a legal or policy issue." In Re Chautauqua Hardware Corporation, 3 E.A.D. 616, 623 (1991). Consequently, as a penalty amount determination is not an issue of fact, it is not a determination to be established by witness

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[7]This "Penalty Rationale" eventually will become the legal argument submitted by Complainant to support the penalty amount proposed, based upon an evaluation of the evidence of record in consideration of the RCRA statutory penalty criteria as interpreted in the Administrator's RCRA civil penalty policy. Depending upon events yet to be determined, that legal argument will either accompany a motion for accelerated decision, or be submitted, after hearing, in a post-hearing brief.

testimony. See River Forest Pharmacy, Inc. v. Drug Enforcement Administration, 501 F.2d 1202, 1206 (7th Cir. 1974) (witness credibility and demeanor "are irrelevant to an assessment of the seriousness of petitioner's violations and of the sanctions most appropriate for the promotion of agency policy regarding them").

The point here is that the Administrator cannot sanction a process out of which he will assess civil monetary penalties finding that some parties, such as Respondent, have a "right" to cross-examine the legal analysis of the person calculating the proposed penalty on behalf of a complainant, while other parties, such as Newell Recycling Company, are assessed a civil penalty of $1.345 without the testimony of any witness being taken, as Newell Recycling Company is found to have no right to an oral evidentiary hearing. Whether the final decision is authored by the Board, or by an ALJ, whose "initial" decision becomes a "final" decision by operation of the Administrator's rule, 40 C.F.R. § 22.27(c), the Administrator is responsible for all final decisions.[8] To the extent that the Administrator's final decisions reveal an inconsistent

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[8]The Administrator, by his Chief Judicial Officer, has recognized that

> The Administrator has the responsibility for making final decisions, which comprehends the right to review the entire record and draw his own conclusions from the evidence. [Citations omitted] *See, e.g. Mattes v. United States,* 721 F.2d 1125, 1129 (7th Cir. 1983) (The Judicial Officer is free to substitute his judgment for the ALJ's on findings of fact); *Container Freight Transp. C. v. I.C.C.,* 651 F.2d 668 (9th Cir.) (The Administrative Procedure Act does not relegate the ICC to the role of reviewing court, but rather confers on it the right to draw its own conclusions from the evidence).

In Re Martin Electronics, Inc., 2 E.A.D. 381, at 395 (1987). See also, Skokomish Indian Tribe v. General Services Administration, 587 F.2d 428, 431-32 (9th Cir. 1978) (the Administrator's delegation of his decision-making authority does "not . . . relieve him of the responsibility for action taken pursuant to the delegation."); and Greater Boston Television Corporation, 444 F.2d, at 853 ("in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision[.]")

application of procedure to respondents appearing before him, the decisions fail to comply with governing law. See Section 706 of the APA, 5 U.S.C. § 706 ("The reviewing court shall – . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]").

IV. CONCLUSION

The Administrator's Rules, consistent with long-standing principles of American law, provide that a respondent does not have an absolute right to an evidentiary hearing, but, rather, the right to an oral evidentiary hearing is to be predicated on the existence of a "genuine issue of material fact." 40 C.F.R. § 22.20. Consistent with that rule, the Administrator has assessed civil penalties without having of record a witness, providing by way of "testimony" the legal analysis of the evidence in consideration of the statutory penalty criteria, as interpreted in the Administrator's civil penalty policy, to support the penalty amount proposed by the complainant.

Given the Administrator's rules governing witnesses and cross-examination, 40 C.F.R. 22.22(b) and (c), and summary disposition, 40 C,F.R. § 22.20, and the requirement of the Section 706 of the APA, 5 U.S.C. § 776, that his final decisions be consistent and not "arbitrary" or "capricious," Respondent cannot be found to have a "right" to "cross-examine" the "author of the 'Penalty Rationale' provided by Complainant, dated August 15, 2008."

Respectfully submitted,

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	**DOCKET NO. RCRA-05-2008-0007**
John A. Biewer Company of Ohio	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
	)	
U.S. EPA ID #: OHD 081 281 412	)	
	)	
Respondent	)	
_____	)	

COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

The Administrator's Delegated Complainant, by undersigned Counsel, hereby moves before the Presiding Officer that a accelerated decision be entered in this matter, pursuant to the Administrator's Rules, specifically 40 C.F.R. § 22.20, finding:

(1) that there is no genuine issue of material fact regarding Respondent's liability for the violation alleged in the Administrative Complaint and Compliance Order, and that, as a matter of law, Respondent is liable for that violation; and,

(2) that the penalty amount of $287,441 is an appropriate amount of civil penalty for the Administrator to assess against Respondent for that violation.

A Memorandum in Support of Motion for Accelerated Decision on Liability and Penalty is being filed with this motion.

Respectfully submitted,

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

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	)	
(Washington Courthouse Facility)	)	
	)	
U.S. EPA ID #: OHD 081 281 412	)	
	)	
Respondent	)	
	)	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY AND PENALTY

Pursuant to the Administrator's Rules, specifically, 40 C.F.R. § 22.20, the Administrator's Delegated Complainant has filed in this matter a Motion for Accelerated Decision on Liability and Penalty ("the Motion"). In the Motion, Complainant asks that the Presiding Officer enter an accelerated decision in this matter, finding that there is no genuine issue of material fact requiring an evidentiary hearing, and that, based upon the arguments of the parties, in briefs submitted on the Motion, Respondent is liable for the violation alleged in the Complaint, and that the $282,649 penalty amount proposed for the violation is appropriate.

This memorandum is submitted by Complainant in support of the Motion. It will first address the law applicable to the Motion. Second, it will identify Findings of Fact and demonstrate that, as to each fact, there is no genuine material issue requiring an evidentiary hearing for resolution. Third, it will set out an analysis of the facts in consideration of the applicable law, demonstrating that Respondent is liable for the violations alleged. Finally, a separate Memorandum in Support of Penalty Amount Proposed is submitted with this

memorandum which provides an analysis of the evidence, as disclosed in the pleadings and pre-hearing exchanges, in consideration of the applicable statutory criteria, as interpreted in the Administrator's penalty policy. This analysis demonstrates that the penalty amount proposed is appropriate.

APPLICABLE LAW

The Administrator has acknowledged that his rules, codified at 40 C.F.R. Part 22, are intended to be:

> uniform procedural rules for administrative enforcement proceedings required under various environmental statutes to be held on the record after opportunity for a hearing in accordance with section 554 of the Administrative Procedure Act, 5 U.S.C. 551 et seq.

63 Fed. Reg. 9464 (February 25, 1998). In Section 554(a) of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(a), Congress provides that "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," the provisions of Section 554 apply.[1] In Section 554(c), Congress provides that hearings and determinations shall

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[1]"Agency" is defined under the APA as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, et al., 488 U.S. 204, at 218, J. Scalia concurring (1988). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the CAA, "the Administrator" is the

be "in accordance with sections 556 and 557 of" the APA.

In Section 556(c) of the APA, Congress provides that Administrative Law Judges ("ALJs") may carry out enumerated duties related to hearings "[s]ubject to the published rules of the agency and within its powers."[2] In Section 557(b) of the APA, Congress has authorized an ALJ only to "initially decide" a case, and "on appeal from or review of the initial decision the agency has all the powers which it would have in making the initial decision," with exceptions

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"authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

[2]Addressing Section 556(c) of the APA, and citing legislative history, the Attorney General of the United States has stated that "[t]he phrase 'subject to the published rules of the agency' is intended to make clear the authority of the agency to lay down policies and procedural rules which will govern the exercise of such powers by presiding officers." Attorney General's Manual, at 75 (1947). In addition, the Federal Courts consistently have recognized that, on matters of law and policy, the ALJs are subordinate to the agency in which they serve. See Croplife Am. v. EPA, 329 F.3d 876, 882 (D.C. Cir. 2003) ("[T]he reality of agency operations makes it clear that ALJs *cannot* independently rule on the legality of third-party human studies, because they may not ignore the Administrator's unequivocal statement prohibiting the agency from considering such studies." (emphasis in original)); Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993)("[i]t is commonly recognized that ALJs 'are entirely subject to the agency on matters of law'"); Mullen v. Bowen, 800 F.2d 535, at 540 n.5 (6th Cir. 1986) ("Administrative law judges therefore remain entirely subject to the agency on matters of law and policy"). See also: D'Amico v. Schweiker, 698 F.2d 903, 904-906 (7th Cir. 1983) (stating that ALJs must comply with "instruction" issued by the Chief Administrative Law Judge of the agency, announcing "new policy," even though the instruction "truncated" ALJs' discretion, and ALJs believed the instruction injured social security claimants); and Ass'n of Administrative Law Judges v. Heckler, 594 F.Supp. 1132, 1141 (D.C. Dist. 1984) (an ALJ "must 'scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts,'" but "[o]n matters of law and policy, however, ALJs are entirely subject to the agency."). Judge Ruth Bader Ginsburg, writing for the Circuit Court of Appeals for the District of Columbia, has noted that, while an ALJ must "conduct the cases over which he presides with complete objectivity and independence[,]" at the same time "he is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . ." Iran Air, at 1260, quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin.L.R. 9, 12-13 (1973) (emphasis in original).

not relevant to this discussion.[3] The U.S. Supreme Court has recognized that Congress intended to make ALJs "semi-independent subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment." Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, at 132-133 (1952).[4]

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[3]The Attorney General of the United States has explained that, under Section 557(b) of the APA, an "initial decision" is "advisory" in nature, and that "[i]n making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." Attorney General's Manual on the Administrative Procedure Act, at 83 (1947). Federal Courts have held likewise. "Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to 'make any findings or conclusions which in its judgment are proper on the record,' notwithstanding a different determination by the Examiner [ALJ]." Fink v. Securities and Exchange Commission, 417 F.2d 1058, at 1059 (2nd Cir. 1969). "[A]s the Supreme Court made clear in Universal Camera [340 U.S. 474], the agency is free to substitute its judgment for that of the ALJ." Mattes v. United States, 721 F.2d 1125, at 1129 (7th Cir. 1983). ". . . Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law. . . ." Starrett v. Special Counsel, 792 F.2d 1246, at 1252 (4th Cir. 1986). Moreover, in a final decision of the Administrator, issued by his Chief Judicial Officer, the Administrator recognized that:

> The Administrator has the responsibility for making final agency decisions, which comprehends the right to review the entire record and draw his own conclusion from the evidence. *See, e.g. Mattes v. United States,* 721 F.2d 1125, 1129 (7th Cir. 1983) (The Judicial Officer is free to substitute his judgment for the ALJ's on findings of fact); *Container Freight Transp. C. v. I.C.C.*, 651 F.2d 668 (9th Cir.) (The Administrative Procedure Act does not relegate the ICC to the role of reviewing court, but rather confers on it the right to draw its own conclusions from the evidence).

In Re Martin Electronics, Inc., 2 E.A.D. 381, at 395 (CJO 1987).

[4]The terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as administrative law judges. 95 P.L. 251; 92 Stat. 183 (March 27, 1978). Notwithstanding the name change, no amendment was made to Sections 556 and 557 of the APA, 5 U.S.C. §§ 556 and 557, effecting the authority of this particular governmental officer. For a review of the historical development of this officer, see K. Davis, Administrative Law Treatise, 2nd Ed., § 17.11 (1980).

The Administrator, the federal officer invested by Congress with exclusive authority to assess civil penalties for violations of the Solid Waste Disposal Act ("SWDA"), including violations of the Resource Conservation and Recovery Act ("RCRA") amendments, Section 3008 of RCRA, 42 U.S.C. §6928, has promulgated rules which govern the process by which he assesses such penalties under that statutory provision. 40 CFR 22.1(a)(4). In his rules, the Administrator provides that:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 CFR 22.20(a).[5] The Administrator further provides that:

> [i]f an accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial

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[5]The Administrator's provision for accelerated, or summary, disposition of his administrative penalty actions conforms with 100 years of American law holding that, in a civil case, no one has an absolute right to an evidentiary hearing. *Ex parte* Peterson, 253 U.S. 300, at 310 (1920) ("[n]o one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined"); Hepner v. United States, 213 U.S. 103, at 115 (1909) ("the court may withdraw a case from the jury and direct a verdict, according to the law if the evidence is uncontradicted and raises only a question of law"). Also, see Matthews v. Eldridge, 424 U.S. 319, at 348-349 (1976) (with regard to the administrative process, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that 'a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it'"); Newell Recycling Company, Inc. v. U.S. EPA, 231 F.3d 204, at 210-211 (5th Cir. 2000) (in upholding the Administrator's assessment of a $1.345 million civil penalty without conducting an evidentiary hearing, the Court said "constitutional due process doctrine requires that the person claiming the benefit of due process protections place some relevant matter into dispute"); and Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA, 35 F.3d 600, at 606 (1st Cir. 1994) ("[d]ue process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that on the available evidence, the case only can be decided one way.")

> accelerated decision . . . shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

40 C.F.R. § 22.20(b)(2). Final Decisions of the Administrator, issued by the Environmental Appeals Board ("the Board"),[6] have addressed the application of this rule.

Citing U.S. Supreme Court precedent on summary judgment under the Federal Rules of Civil Procedure, the Administrator has held in a final decision issued by the Board that "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests," and that "the constitutional right to due process requires that the person claiming the benefit of that due process must first place some relevant matter into dispute." In Re Green Thumb Nursery, Inc., 6 E.A.D. 782, at 792 (March 6, 1997).[7]

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[6]By rule, 40 CFR 22.30, the Administrator has delegated his authority to issue final orders assessing civil penalties under the various Federal environmental statutes to the Board. 57 Fed. Reg. 5320 (February 13, 1992). In the preamble of his latest promulgation of his rules, the Administrator has stated that:

> The EAB is responsible for assuring consistency in Agency adjudications by all of the ALJs and RJOs. The appeal process of the [Consolidated Rules] gives the Agency an opportunity to correct erroneous decisions before they are appealed to the federal courts. The EAB assures that final decisions represent with the position of the Agency as a whole, rather than just the position of one Region, one enforcement office, or one presiding officer.

"Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation or Suspension of Permits," 64 Fed. Reg. 40138, 40165 (July 23, 1999). Here, the Administrator clearly has stated his intention that there be consistency in rulings in his civil penalty assessment process, enabling his decisionmaking to be lawful under Section 706 of the APA, 5 U.S.C. § 706, and not "arbitary" and "capricious."

[7]The Board noted that the "principle that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing is at the heart of all procedures for summary disposition," and noted that accelerated decision under the Administrator's Rules, 40 C.F. R. § 22.20, is "similar to judicial summary judgment under Rule 56, Fed. R. Civ. P." Id., at 793.

Furthermore, "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment[,]" and "the party must demonstrate that this dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence." Id. at 793.[8] "Summary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[,]" and "the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." Id., fn.24.

The Administrator, through the Board, has ruled on a respondent's challenge to an initial decision in which an ALJ found, in an accelerated decision, that a civil penalty of $1.345 million was appropriate for the respondent's violations. Before the Board, Respondent argued that it was "*per se* impermissible for the Presiding Officer to assess a penalty against it without first conducting an evidentiary hearing." In Re Newell Recycling Company, Inc., 8 E.A.D. 598, at

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[8]Complainant would note that Respondent has made three attempts at submitting its pre-hearing exchange: Respondent's Witness Disclosure (August 27, 2008); Respondent's Supplemental Witness Disclosure (September15, 2008); and Respondent's Pre-Hearing Exchange (November 20, 2008). Discounting the caption of the filed documents, each of the three filings provides no more than one page of information. The second filing included 15 pages of financial documents, the significance of which is not explained. No other documents were submitted in any of the three filings. Though two potential witnesses are identified, only the topic of their testimony is disclosed; no information is provided as to what either witness will actually say. In the third filing, Respondent states that "[t]o the extent Respondent will rely on additional exhibits, this disclosure will be supplemented as provided in the Administrative Law Judge's Prehearing Order." Without restriction, that order freely allows each party to "file supplements to their prehearing exchanges (including any reply or rebuttal material), without motion, until 30 days before the date scheduled for the hearing." Prehearing Order, at 2 (June 27, 2008). While the order may allow a party to file a token pre-hearing exchange on the date that that exchange is due, and deliberately withhold information that party intends to use at hearing until 30 days prior to the hearing date, thereby reducing the time the opposing party has to analyze the belatedly disclosed information and determine the impact that information has on the litigation, that circumstance cannot alter Respondent's obligations, under the Administrator Rules and published decisions, in answering a motion for accelerated decision.

625 (September 13, 1999). In his final decision, issued by the Board, the Administrator held that "Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." Id.

On judicial review, the 5th Circuit Court of Appeals upheld the Administrator's final decision in Newell Recycling. Newell Recycling Company, Inc. v. U.S. EPA, 231 F. 3d 204. As the Court "[could not] say that [the Board's] determination was arbitrary, capricious, an abuse or discretion or otherwise not in accordance with law," it upheld that part of the final decision finding Newell liable for the violations alleged in the complaint. Newell, at 208. The Court also upheld the Administrator's assessment of the full $1.345 million penalty proposed by his delegated complainant, rejecting Newell's 8th Amendment claim that the penalty amount was excessive, and rejecting Newell's "due process" claim that before a penalty could be assessed "an evidentiary hearing was 'required' in [the] matter, and that the absence of one violated Newell's right to due process of law." Id. at 210-211. The Court cited two U.S. Supreme Court decisions in adopting the proposition that "if the hearing . . . is to serve any useful purpose, there must be some factual dispute[,]" and the proposition that it is permissible for an agency to "condition an adjudicatory hearing on 'identification of a disputed issue of fact by an interested party,'" and found that there was "no contested issue of fact on penalty in the record" and "decline[d] to set aside the penalty[.]" Id.[9]

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[9]While in each of these cases no evidentiary hearing was held, as it was found that there was no genuine issue of material fact, in each case the respondent penalized was first provided "notice of the case against him and opportunity to meet it," recognized by the U.S. Supreme Court to be the "essence of due process" in procedures adopted by administrative agencies. Matthews v. Eldridge, 424 U.S. at 348-349. Though there existed no genuine dispute as to the facts, each respondent was provided the opportunity to argue in support of inferences and legal

Under the law governing the Motion for Accelerated Decision filed in this matter -- Section 3008(a) of RCRA, 42 U.S.C. § 6928(a); Sections 554, 556(c) and 557(b) of the APA; and the Administrator's Rules, specifically 40 CFR 22.20, and published final decisions of the Administrator addressing 40 CFR 22.20 by adopting historical principles governing the law of summary judgment -- the motion must be presented, responded to, and decided, on the criteria set forth in the Administrator's rule, as interpreted in the Administrator's final decisions. See Iran Air, 996 F.2d at 1260. The United States Supreme Court long has recognized that:

> Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law:
>
> > 'No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.' United States v Lee 106 US, at 220, 27 LEd 171, 1 S Ct 240.'
>
> See also Marbury v Madison, 1 Cranch 137, 2 L Ed 60 (1803); Scheuer v Rhodes, 416 US, at 239-240, 40 L Ed 2d 90, 94 S Ct 1683, 71 Ohio Ops 2d 474.

Butz v. Economu, 438 U.S. 478, at 506 (1978). And, "[i]t is axiomatic that an agency must act in accordance with applicable statutes and its regulations." Paralyzed Veterans of America v. West, 138 F.3d 1434, at 1436 (Fed. Cir. 1998), citing Berkovitz v. United States, 486 U.S. 531, at 544 (1988). Moreover, "[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode[,]" Botany v. Worsted Mills v. U.S., 278 U.S. 282, at 288 (1928), and this canon of statutory construction also applies to the interpretation of the Administrator's rules and regulations. Rucker v. Wabash Railroad Company, 418 F.2d 146, at 149 (7th Cir. 1969). Though there may be other possible ways in which a particular issue, such

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conclusions contrary to those drawn by the delegated complainant of the Administrator in each of the cases.

as accelerated decision, can be addressed, the resolution of such issues in proceedings on complaints proposing that the Administrator assess civil penalties for violation of the federal environmental statutes must be addressed in consideration of the rule that the Administrator has chosen to be applicable to the issue.

Finally, federal reviewing courts have recognized the need for the consistent application of legal rules in the administrative process:

> 'Perhaps no characteristic of a procedural system is so uniformly denounced as a tendency to produce inconsistent results. When disposition depends more on which judge is assigned to the case than on the facts or the legal rules, the tendency is to descrtibe the system as lawless, arbitrary, or the like, even though the case assignment is random.'

Santise v. Schweiker, 676 F.2d 925, at 930 (3rd Cir. 1982), citing J. Mashaw et al., Social Security Hearings and Appeals: A Study of the Social Security Administration Hearing System 19 (1978).

Consequently, the Motion is to be granted, if, on the disclosure of the evidence that the parties intend to introduce at any hearing, "no genuine issue of material fact exists and a party is entitled to judgement as a matter of law[,]" 40 CFR 22.20(a), as the Administrator has done in his prior final decisions assessing civil penalties against Respondents without conducting an evidentiary hearing. See Green Thumb Nusery, Inc.; Newell Recyclying Company; and In Re Spitzer Great Lakes, Ltd., 9 E.A.D. 302 (June 30, 2000) (in an accelerated decision, the Administrator assessed civil penalty of $165,000).

It is the contention of the Administrator's Delegated Complainant that, as will be demonstrated in this memorandum, there is no genuine issue material to any fact identified in the Findings of Fact upon which the Motion is based. This will be established by citation to the

admissions made in Respondent's Answer, and to documents Respondent generated and submitted to state and federal enforcement authorities. These documents were identified in Complainant's Pre-Hearing Exchange, filed on August 25, 2008, and appear here, as attachments to this motion, bearing the same letter identification as in the Pre-Hearing Exchange. Moreover, it must be noted that, in its Pre-Hearing Exchange, filed on November 20, 2008, Respondent stated that: "Respondent further reserves the right to use as exhibits documents identified as possible exhibits by Complainant." As Respondent intends to "reserve the right" to use the same documents identified in Complainant's Pre-Hearing Exchange, there can be no genuine issue as to the authenticity of those exhibits.

Complainant further contends that, as a matter of law, a finding is warranted that Respondent violated RCRA as alleged in the Complaint and Compliance Order, and that the penalty amount proposed is appropriate, in that the penalty amount proposed is supported by an analysis of the evidence cited in consideration of the statutory penalty criteria of Section 3008(a) of SWDA, 42 U.S.C. § 6928(a), as interpreted in the policies and calculation methodologies adopted by the Administrator, the federal official exclusively charged by Congress to "take into account" those statutory criteria in determining the amount of penalty he will assess for specific violations. Section 3008(a)(3) of RCRA, 42 U.S.C. § 3008(a)(3).[10]

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[10]Regarding "accelerated decisions," note must also be made that to conduct such a hearing in this matter, an Administrative Law Judge must travel to Ohio from Washington, D.C.; the Administrator's enforcement staff must travel from Chicago to the same location; a room must be secured for some period of time, and a court reporter retained. At a hearing, a record must be taken by the reporter, and, copies be made and paid for; briefs must then be prepared, copied and filed. Travel, hotels and meals must be paid for. While these are necessary costs of any hearing, and the price to be paid for resolving disputes by legal process, the Administrator has clearly crafted her rules addressing complaints and answers, 40 CFR 22.14 and 22.15, and pre-hearing exchanges, 40 CFR 22.19, and accelerated decisions, 40 CFR 22.20, with the intent

FINDINGS OF FACT

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

Respondent admits. Answer, Paragraph 2.

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

Respondent neither admits nor denies. Answer, Paragraph 7.

A copy of the actual letter in which notice was issued to the State of Ohio, with Certificate of Service, is attached to these Findings of Fact. Attachment _.

3. The Respondent, John A. Biewer Company of Ohio, Inc., was at all times relevant to this Complaint a corporation incorporated under the laws of Michigan. (Complaint, Paragraph 8)

Respondent admits. Answer, Paragraph 8.

4. That from 1976 until June 2001, the Respondent conducted its business in, and around, buildings located at 649 Landmark Boulevard, Washington Courthouse, Ohio. (Complaint, Paragraph 10)

Respondent admits. Answer, Paragraph 10.

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to eliminate unnecessary hearings, and eliminate the waste of public resources in conducting such hearings. The avoidance of unnecessary trials is widely recognized as a primary, and beneficial, aim of summary judgment. Bland v. Norfolk & So. R.R. Co., 406 F.2d 863, at 866(4th Cir. 1969); Washington Post Co. v. Keogh, 365 F.2d 965, at 968 (D.C. Cir. 1966), cert. denied 385 U.S. 1011; Bros, Inc. v. W.E. Grace Mfg. Co., 261 F. 2d 428, at 432 (5th Cir.).

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

Respondent admits. Answer, Paragraph 13.

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

Respondent denies this allegation as being not true. Answer, Paragraph 14. While Respondent denies this allegation, the only factual assertion it makes to the allegation is that the drip pad "was an outside drip pad," and not located in any building. Notwithstanding Respondent's obligation under the Administrator's Rules to identify in its Answer "facts which Respondent disputes," 40 C.F.R. § 22.15(b), Respondent does not challenge the accuracy of any other fact in this allegation. Given its response to other paragraphs of the Answer, specifically, Paragraphs 25-27, it is clear that Respondent acknowledges having operated the drip pad at its Washington Courthouse facility, but simply denies that it was in a building. To the extent that there is any factual issue here the issue is not material in that the rule does not differentiate between drip pads in a building and drip pads outside of a building, the rule applies to all drip pads.

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

Respondent denies this allegation.

While in its Answer Respondent denies that any of the chemical solution was wasted, claiming that it "captured and reused" the solution, Answer, Paragraph 15, its denial has no credibility in that, in the same answer, it admits that chromated copper arsenate "was cleaned off the drip pad and shipped to a hazardous waste facility was 'solid waste.'" Id., Paragraph 18. Respondent admits that "its material was listed by the Administrator as hazardous waste F035[.]" Admitted, Id., Para. 19. The regulation listing this substance is codified at 40 C.F.R. § 261.31. Moreover, the function of the Administrator's drip pad closure regulations is to assure that no hazardous waste contamination has been left behind at a closed drip pad. On February 8, 2005, the Ohio Environmental Protection

Agency (OEPA), by certified mail, served notice to Respondent that it was in violation of Ohio law governing the closure of drip pads, informing Respondent that it must "submit and implement" a drip plan closure plan for its drip pad. Attachment A. In response, on March 4, 2005, Respondent acknowledged receipt of that OEPA letter and informed OEPA that it had authorized Mannik & Smith Group (MSG), Maumee, Ohio, to work with Respondent in "preparing and implementing" a drip closure plan on Respondent's behalf, which would be submitted to OEPA for approval in May 2005, and, on being approved, would be implemented by Respondent. Attachment B. In its drip closure plan -- MSG prepared the plan, and, on behalf of Respondent, submitted it to OEPA on May 3, 2005, in response to the earlier notice of violation -- under the heading of "List of Hazardous Wastes," Respondent noted that "[]the amount of CCA [wood treatment solution of arsenic, chromium and copper] which dripped from the treated lumber was never determined." Attachment C, at 4.0. The plan itself called for the pressure washing of the drip pad two separate times, with samples of the rinseate taken after each washing analyzed to determine whether concentrations of arsenic and chromium in the rinseate exceeded rinseate remediation standards. Id., at 8.0. Moreover, analysis conducted in June and October 2005 of rinseate sampling conducted by MSG at a second facility operated by a company related to Respondent, John A. Biewer of Toledo, Inc., where the same wood treatment activities had taken place, revealed that concentrations of arsenic and chromium in the rinseate were substantially in excess of the remediation standards to be met to decontaminate the drip pad. Attachment D. Arsenic concentrations were 48% above remediation standards, and chromium concentrations 20% above such standards. Id.

Given the conditions found by Respondent at its drip pad after it ceased operations, as here documented by both Respondent and its agent, an environmental consultant, it simply cannot be true that "the excess chemical solution that fell off of the wood onto the drip pad was captured and reused." Consequently, notwithstanding Respondent's denial, there is no genuine issue of material fact which would preclude this finding of fact from being entered.

8. That in June 2001 Respondent ceased its operation as described in Findings of Fact 5-7. (Complaint, Paragraph 16)

Respondent admits. Answer, Paragraph 16. (Findings of Fact 5-7 set out herein are alleged as Paragraphs 13 through 15 in the Complaint.)

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

Respondent admits. Answer, Paragraph 17.

10. That waste material generated by the Company, identified in Paragraph 7 (Complaint, Paragraph 15), was waste listed as "hazardous," OAC 3745-51-31, and identified by U.S. EPA as hazardous waste No. F035. See 46 Fed. Reg. 4617 (January 16, 1981). (Complaint, Paragraph 19)

Respondent admits in part. Answer, Paragraph 19.

Respondent admits that its spent solution of chromated copper arsenate is listed by the Administrator as F035 hazardous waste, but is silent to the allegation that this solution, when waste, is also listed by the State of Ohio as hazardous waste. Answer, Paragraph 19. By rule the Administrator provides that the "[f]ailure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d). As Respondent has failed to answer the allegation that its solution was listed by the State of Ohio as hazardous waste, by rule, it has admitted to that allegation. Moreover, a reading of Ohio Rule 3745-51-31 reveals that Ohio has listed as F035 hazardous waste the following: "process residuals, preservative drippage, and spent formulations from wood preserving processes generated at plant that use inorganic preservative containing arsenic or chromium."

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

Respondent admits. Answer, Paragraph 25.

12. That at no time since closing its drip pad did Respondent take any action to meet its obligations to remove or decontaminate any waste residues, containment system components,

contaminated subsoils, and structure and equipment contaminated with waste and leakage, that may be present under and in the vicinity of the drip pad. (Complaint, Paragraph 26)

Respondent partially denies and partially admits. Answer, Paragraph 26.

Respondent affirmatively asserts that it "prepared a closure plan" and "removed from the site the chemical material used for wood treating." Assuming that by "chemical material used for wood treating" Respondent means useful product it had not yet used, or contained spent product, Complainant does not dispute Respondent's assertion. However, the violation alleged concerns "hazardous waste," identified in Respondent's closure plan, Attachment C, at 4.0 and 8.0, which Respondent failed to inventory and remove from its drip pad and surrounding area. Respondent not only fails to assert that it did "remove or decontaminate all waste residues," it specifically admits that "it did not remove soils, contaminant systems, all components, equipment and structures." Answer, Paragraph 26. Consequently, Respondent has admitted in its Paragraph 26 of its Answer to the substantive facts identified in this Finding of Fact, and there is no factual issue requiring an evidentiary hearing for resolution. While Respondent goes on in Paragraph 26 of its Answer to "neither admit[] or den[] that it had an obligation to do so," its obligation under the rule is a question of law and a matter for argument, not the taking of evidence.

ARGUMENT ON LIABILITY

Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 C.F.R. Part 265, Subpart W. The Administrator has clearly authorized the State of Ohio RCRA hazardous waste program, which includes these provisions. 71 Fed. Reg. 3220, 3221 (January 20, 2006).

At all times relevant to this Complaint, Section 3006(d) of RCRA, 42 U.S.C. §6926(d), provided that any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under Subchapter III of RCRA, 42 U.S.C. §§6921-6939(e). Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), the Administrator may assess a civil penalty of up to $25,000 per day of

noncompliance for each violation of a requirement of Subchapter III of RCRA (Sections 3001-3023, 42 U.S.C. §§6921-6939(e).[11]

The Ohio Rule defines "person" to include "corporation," Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and OAC 3745-50-10(88). At all times relevant to the Complaint, Respondent was a corporation incorporated under the laws of the State of Michigan. Finding of Fact 3. Consequently, as a matter of law, Respondent is a "person."

The Ohio Rule defines "facility" or "hazardous waste facility," in part, to mean "[a]ll contiguous land, and structures, other appurtenances, and improvements on the land, used for treating, storing, or disposing of hazardous waste." OAC 3745-50-10(39). At its place of business, located in Washington Courthouse, Ohio, Finding of Fact 4, Respondent pressure

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[11]Complainant would note that the rule alleged violated by Respondent in the Complaint, Ohio Rule 3745-69-45, though effective in Ohio and enforceable by Ohio after September 2, 1997, was not authorized by the Administrator as a component of the Ohio RCRA Hazardous Waste Program until January 20, 2006. 71 Fed. Reg. 3220, 3221 (January 20, 2006). Consequently, one might be inclined to question whether this particular Ohio rule could be enforced by the Administrator prior to January 20, 2006. However, Respondent's violation of Ohio Rule 3745-69- 45 is a continuing violation. A number of years ago it ceased operations at its drip pad. Finding of Fact 8. In February 2005 it was informed by Ohio that it was in violation of Ohio law for its failure to decontaminate the drip pad and surrounding area of any residual hazardous waste, as required by the rule. Complainant's Pre-Hearing Exchange, Attachment A. Though in response to that notice it hired an environmental consultant which developed a closure plan for Respondent's drip pad, Findings of Fact 11, to the present Respondent has not implemented that plan, or otherwise carried out the actual decontamination procedures necessary to meet the requirements of the rule. Finding of Fact 12. As the violation is continuing, a penalty potentially could be assessed for all days of violation within the Statute of Limitations, going back five years prior to the filing of the Complaint on May 5, 2008. However, consistent with the Administrator's applicable penalty policy, the $282,649 proposed penalty is based upon only 180 days of Respondent's failure to meet the requirements of the rule. Memorandum in Support of the Penalty Amount Proposed, at __. The 180 day period prior to the date of the Complaint being filed would commence in the first week of October 2007, a date well after the Administrator authorized, as a component of the Ohio RCRA Hazardous Waste Program, Ohio Rule 3745-69-45.

treated wood with a chemical solution of chromated copper arsenate, Finding of Fact 5, after which it moved the treated wood to a drip pad where the treated wood underwent a preservative reaction. Finding of Fact 6. As the wood underwent the preservative reaction, excess chemical solution on the wood either evaporated or fell off of the wood onto the drip pad as waste, and that waste was listed by the Administrator and the State of Ohio as "hazardous." Findings of Fact 7 and 10. Though Respondent ceased wood preservation operations at its Washington Courthouse facility in 1997, as of May of 2005 hazardous waste in the form of spent chromated copper arsenate was discovered on and around its drip pad, as documented in the decontamination plan formulated by the environmental consultant retained by Respondent for purposes of developing and implementing a Closure Activity Report for its drip pad. Findings of Fact 11, and Attachment C.

A reasonable inference to draw is that the hazardous waste found at Respondent's drip pad in May of 2005 by its own environmental consultant either was being stored or disposed of there by Respondent. As the drip pad was not in operation, there is simply no other explanation to account for the presence of the hazardous waste. Moreover, as Respondent has acknowledged in this proceeding that its has not decontaminated the drip pad and nearby areas, Finding of Fact 12, a reasonable inference to draw is that the hazardous waste is still there, at and near the drip pad, as it was in May of 2005. Consequently, Respondent's drip pad and surrounding area constitute a "structure" or "appurtenance" or "improvement" on its Perrysburg property used for the purpose of "storing" or "disposing of" hazardous waste, and, as such, is a "facility" or "hazardous waste facility" as a matter of law.

Regarding drip pads, Ohio Rule 3745-69-45 provides that: "At closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste."

As Respondent was clearly the "owner" of the drip pad at its Washington Courthouse facility, as well as its "operator," the only remaining issue is whether it did, in fact, "remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste."[12] Complainant has alleged that since closing its drip pad, Respondent has not performed these requirements. Complaint, Paragraph 26. While Respondent has answered this allegation with a combined admission and denial, it has not denied that it failed to remove or decontaminate all waste residues, and specifically admitted that "it did not remove soils, contaminant systems, all components, equipment and structures" of its drip pad. Answer, Paragraph 26. Moreover, in its Answer, Respondent states that it is without sufficient information to "admits" or "deny" that it was obligated to take these actions, Id., and, in Respondent's Supplemental Witness Disclosure, at 1, Brian Biewer is identified as a witness who may testify, in part, "that as a result of the lack of financial resources, John A. Biewer

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[12]It is the opinion of the Administrator's Delegated Complainant that the parent corporation of Respondent is also responsible for the violation alleged in the Complaint and Compliance Order, and to this end has filed a Motion to Amend Complaint and Compliance Order for the purpose of adding the parent corporation as respondent. As this motion has not yet been ruled upon, Complainant at this time is limited to addressing in its argument for accelerated decision only Respondent. In identifying Respondent as owner and operator of the Perrysburg, Ohio, facility, Complainant makes no admission that Respondent's parent company is not also liable for the violation.

Company of Ohio, Inc. has been unable to perform various cleanup and requirement tasks requested of it by Ohio EPA and U.S. EPA." As Respondent claims that it "lacked information sufficient to form a belief" that it was required to carry out hazardous waste remediation at its closed drip pad, Answer, Paragraph 26, and that, in any event, it has been without the financial resources to be able to carry out such hazardous waste remediation, Respondent's Supplemental Witness Disclosure, at 1, it can hardly claim that it did, in fact, carry out its hazardous waste remediation obligations at the closed drip pad at its Washington Courthouse facility.

Clearly there is no dispute here regarding Respondent's inaction. While it has generated a drip closure plan at its Washington Courthouse facility, Finding of Fact 11, Respondent has not taken the decontamination actions required by RCRA and the Ohio Hazardous Waste Regulations -- initial steps toward completing these actions are identified in its drip closure plan -- closing down its drip pad at the facility. There is nothing Respondent has pled in its Answer or can identify in its Pre-Hearing Exchange to put that fact at issue at any hearing.[13]

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[13]By rule the Administrator has provided that hearings are to be held "upon the issues raised by the complaint and answer[.]" 40 C.F.R. § 22.15(c). Respondent was specifically placed on notice of this requirement, in bold type, in the Complaint. See Complaint, at 9. Moreover, by rule, the Administrator provides that, where a party fails to provide information within its control in a Pre-hearing Exchange, the options for the Presiding Officer are to draw an adverse inference against the party; exclude the information from evidence; or issue a default order. 40 C.F.R. § 22.19(g). In a final decision of the Administrator, the Board refused to allow a Respondent to address an issue at hearing with matter which he did not include in his Pre-Hearing Exchange, and recognized that "[b]y compelling the parties to provide [all evidence to be used at hearing and other related information] in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the [ALJ] an opportunity for informed preparation for hearing." In Re JHNY, Inc., 12 E.A.D. 372, at 382 (2005). Consequently, issues not raised by Respondent, and information not provided by Respondent in its Pre-Hearing Exchange, cannot preclude the entry of an accelerated decision on issues and information that are in the record. As earlier noted, "[s]ummary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[,]" and "the mere possibility that a factual dispute may exist, without more, is

In addressing the dynamic of summary disposition, and the appropriate circumstances for the entry of such a judgment, the Circuit Court of Appeals for the District of Columbia has stated:

> There was conflict concerning interpretation of the facts and the ultimate conclusion to be drawn from them. . . . But there was none as to the facts themselves. In other words, the evidentiary facts were not substantially in dispute. . . . Conflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court. The court had before it all the facts which formal trial would have produced. Going through the motions of trial would have been futile.

Cody v. Aktiebolaget Flymo, 452 F.2d 1274, at 1281 (D.C. Cir. 1971), citing Fox v. Johnson & Wimsatt, Inc., 127 F.2d 729, at 736-737 (D.C. Cir. 1942). Here, Respondent can identify nothing that it will present at any hearing which can preclude a finding that it has failed to "remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste."[14]

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not sufficient to overcome a convincing presentation by the moving party." Green Thumb Nursery, 6 E.A.D. at 793, fn. 24.

[14]As Complainant has noted, Respondent has identified as its sole witness in its Pre-Hearing Exchange a Brian Biewer, who may testify at hearing "that as a result of the lack of financial resources, John A. Biewer Company of Ohio, Inc. has been unable to perform various cleanup and requirement task requested of it by Ohio EPA and U.S. EPA[.]" Respondent's Supplemental Witness Disclosure, at 1. Some observations concerning the record. First, though given specific notice that, under 40 C.F.R. § 22.15(b), it was required by rule to state in its Answer "[t]he circumstances or arguments which are alleged to constitute the grounds of any defense," Complaint, at 8, Respondent makes no statement in its Answer that it lacked "adequate income or assets" to carry out decontamination requirements at its drip pad. Answer, at 6-7. Second, Respondent makes no claim in its Answer that it is without "adequate income or assets" to pay the $287,441 penalty amount proposed. In fact, explicitly given the opportunity to raise a claim that it lacked resources to pay that penalty amount proposed, it specifically declined to do so. Response to Motion for Partial Accelerated Decision, date July 22, 2008. Third, though it claims to be without "adequate income or assets" to decontaminate its drip pad as required by

PROPOSED CIVIL PENALTY

Complainant separately is providing a Memorandum in Support of the Penalty Amount Proposed, which incorporates an analysis of the evidence in this matter, in consideration of the Administrator's adopted penalty policy interpreting the RCRA statutory penalty criteria, to support the $282,649 penalty amount proposed for Respondent's violations. That Memorandum is herein incorporated by reference.

Complainant would note that in determining an appropriate amount of penalty in an accelerated decision, on motion of a delegated complainant of the Administrator, the Presiding Officer is not restricted to finding appropriate the amount of penalty proposed. As is clear from the Administrator's final decision is In Re Green Thumb Nusery, Inc., the motion may be granted and a penalty amount assessed in an accelerated decision different in amount from that proposed. In Re Green Thumb Nusery, Inc., 6 E.A.D., at 788 and 803 (penalty amount proposed, $4,000, penalty amount assessed, $3,000). However, should the Presiding Officer find appropriate a different amount of penalty than that proposed, the Administrator requires that "the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b).

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law, Respondent does not include in its Pre-Hearing Exchange a shred of information documenting cost estimates it confronted had it carried out its obligations. See "Respondent's Supplemental Witness Disclosure," dated September 15, 2008. On this record, Respondent cannot even identify at hearing the amount of costs that it thinks it will need to spend to decontaminate its drip pad as required by law. Consequently, Respondent has neither legitimately raised any issue as to lacking resources which would enable it to pay for the decontamination of its drip pad, nor has it provided in its Pre-Hearing Exchange any information upon which it could prevail on any such issue at hearing. Finally, as noted, RCRA is a strict liability statute. Production Plated Plastics, Inc., 742 F.Supp., at 960. A party's claim that it is too poor to pay to clean up the hazardous waste it has created cannot be a defense to its liability for failing to clean it up.

CONCLUSION

In the civil penalty assessment action against Newell Recycling Company, earlier cited, Newell argued that it was "*per se* impermissible" for a penalty to be assessed against it, under the environmental statute alleged violated, "without first conducting an evidentiary hearing." In Re Newell Recycling Company, 8 E.A.D., at 625. In his published decision, issued by the Board, the Administrator rejected Newell's position, holding that "Newell's penalty arguments failed to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing." Id. On judicial review of this decision, the Fifth Circuit Court of Appeals upheld the Administrator's decision assessing a $1.345 million penalty against Newell, as proposed by the Administrator's Delegated Complainant, citing decisions of the U.S. Supreme Court which upheld the Administrator "condition[ing] an adjudicatory hearing 'on identification of a disputed issue of fact by an interested party[,]'" and further noted that "[i]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute[.]" Newell Recycling Company, 231 F.3d, at 210-211. Consequently, both the rule of the Administrator, 40 C.F.R. § 22.20, and his final published decision in Newell Recycling Company, are applicable and controlling precedents on this proceeding. See Iran Air, 996 F.2d, at 1260 ("applicable and controlling precedents" on a matter before an ALJ include ". . . agency regulations [and] the agency's policies as laid down in its *published* decisions. . . .").

As demonstrated by Complainant in this memorandum, Respondent, in its Answer to Complaint and Compliance Order, and its three one page attempts to file a pre-hearing exchange, has failed to demonstrate that there is any genuine issue which would preclude the entering of each of the proposed findings of fact, set out above at 12-16, as findings of fact. A substantial

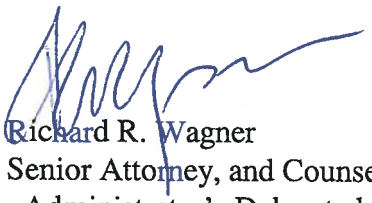
number of Complainant's proposed findings of fact have been admitted to by Respondent. Though others have been avoided or denied by Respondent, as a matter of law, on none has Respondent presented information to put the fact asserted at issue. Like Newell Recycling Company, Respondent, under the law governing this proceeding, is not entitled to an evidentiary hearing, and, on these facts, is liable for the violation alleged in the Complaint.

Complainant would note that, under 40 C.F.R. § 22.20(b)(2), if an accelerated decision "is rendered on less than all issues or claims in the proceeding," the Administrator requires that "the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted[,]" and the decision of the Presiding Officer "shall specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed."

Based upon the facts cited, and conclusions and legal and policy arguments made in Complainant's Memorandum in Support of Penalty Amount Proposed, the proposed penalty amount of $282,649, is appropriate. While Respondent may disagree with conclusions drawn and arguments made by Complainant, attacks on the validity of Complainant's conclusions and arguments can be made by Respondent's tender of its own arguments and conclusions in opposition to the Motion for Accelerated Decisions. The Presiding Officer is then in the position

of determining which of the arguments and conclusions are persuasive. As a matter of law, this exercise of decisionmaking does not require an evidentiary hearing.

Respectfully submitted,



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

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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	)	
	)	

MEMORANDUM IN SUPPORT OF THE PENALTY AMOUNT PROPOSED

This memorandum is submitted as a component of the Motion for Accelerated Decision on Liability and Penalty filed by the Administrator's Delegated Complainant.

I. THE VIOLATIONS.

The John A. Biewer Company of Ohio ("Respondent") is charged with violating the Resource Conservation and Recovery Act of 1976 ("RCRA") at its Washington Courthouse, facility in that, since closing its drip pad at the facility, it failed to take actions necessary to decontaminate all waste residues and containment system components at the drip pad. The Company's failure to take these actions is a violation of Section 3745-69-45 of the Ohio Administrative Code ("OAC"), Subchapter II of RCRA, and Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

II. LAW AND POLICY AFFECTING PENALTY AMOUNT DETERMINATION.

(a) Relevant Law, and the Policy of the Administrator

Congress invests the Administrator with exclusive authority to assess a civil penalty for violations of RCRA, and to determine the amount of penalty to assess. Section 3008(a)(3) of

RCRA, 42 U.S.C. § 6928(a)(3) ("[a]ny penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation," and "[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").

Federal reviewing courts have recognized that the determination of an appropriate amount of civil penalties for violations of a federal environmental statute is not "fact finding," but rather an exercise of discretion by the agency:

> The assessment of a penalty is particularly delegated to the administrative agency. Its choice of a sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' [Citations omitted.] The assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power.

Panhandle Co-op Association v. E.P.A., 771 F.2d 1149, at 1152 (8th Cir. 1985). Citing prior U.S. Supreme Court decisions, the Tenth Circuit has held that "once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." Robinson v. U.S., 718 F.2d 336, at 339 (10th Cir. 1983). In a published decision, the Administrator has recognized the distinction between facts upon which a penalty amount determination is based and the actual calculation of the penalty amount. In Re Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1 (June 24, 1991). While the "quantity" of a particular chemical may be a "factual issue" bearing on the appropriateness of a penalty, as may be the "ability of the company to continue in business," whether the policy should impose a separate penalty for each chemical not reported, or whether an appropriate penalty dollar amount was selected for each box of the policy matrix "is a legal or policy issue." Id., at 11.

As "the agency" here is "the Administrator,"[1] it is the "policy and discretion" of "the Administrator" that is to inform the determination of penalty amounts that he will assess for violations of RCRA.

While determining the amount of civil penalty for violations of RCRA is an exercise of discretion by the Administrator, that discretion is not open-ended, without limits. In Section 706 of the APA, Congress provides that, on judicial review, final decisionmaking of an agency, which includes final penalty orders of the Administrator, "shall" be held "unlawful and set aside" if its findings and conclusions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[2] Consequently, given that he must act through officers and staff, the

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[1]"Agency" is defined under the Administrative Procedure Act ("APA") as "each authority of the Government of the United States[.]" Section 551(1) of the APA, 5 U.S.C. § 551(1). Legislative history reveals that "'[a]uthority' means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority." Tom C. Clark, Attorney General, U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act, 9 (1947). The Attorney General's Manual is "the Government's own most authoritative interpretation of the APA" and one which the U.S. Supreme Court "[has] repeatedly given great weight[,]" [citations omitted], as it "was prepared by the same Office of the Assistant Solicitor General that had advised Congress in the latter stages of enacting the APA, and was originally issued 'as a guide to the agencies in adjusting their procedures to the requirements of the Act.' AG's Manual 6." Bowen v. Georgetown Univ. Hospitals, et al., 488 U.S. 204, at 218, J. Scalia concurring (1988). See also Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 n. 17 (D.C. Cir. 1974) ("THE ATTORNEY GENERAL'S MANUAL is entitled to considerable weight because of the very active role that the Attorney General played in the formulation and enactment of the APA."). As it is "the Administrator" that exclusively is authorized by Congress to assess civil penalties for violations of the federal environmental statutes, including the RCRA, "the Administrator" is the "authority of the Government of the United States," and, therefore, "the agency" as identified in the APA. In other statutes a "Board" or "Commission" or "Secretary" might be the "agency."

[2]The Court of Appeals for the District of Columbia has held that:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. [Footnote omitted.] This calls for insistence that the

Administrator informs his decisionmaking process through the rules he has promulgated, and the policies that he has adopted, interpreting statutory penalty criteria and establishing penalty calculation methodologies based upon those interpretations.[3]

In recognition of his obligation to assure that his final orders assessing a civil penalty for violations of the Federal environmental statutes, such as RCRA, are fair and consistent, and penalty amounts not arrived at in an "arbitrary and capricious" manner, the Administrator has exercised his discretion as Chief Executive Officer of the Agency, and, through his delegated policy-making officers, adopted penalty policies incorporating his interpretation of the various

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> agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. [Footnote omitted.]

Greater Boston Television Corporation v. FCC, 444 F.2d 841, at 851 (D.C. Cir. 1970). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." Id. at 852. The Court observed that "in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." Id. at 853.

[3] The United States Supreme Court has recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress[,]" Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 843 (1984), and that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. Moreover, in reviewing final agency action, the Court has held that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." National Railroad Passenger Corporation, et al. v. Boston & Maine Corporation et al., 503 U.S. ___, 118 L.Ed.2d 52, at 65-66 (1992).

statutory criteria, and setting forth penalty calculation methodologies to guide those who must determine appropriate penalty amounts for him to assess for violations of those statutes.[4]

In June 2003, the Administrator, through his Assistant Administrator for Solid Waste and Emergency Response, and his Assistant Administrator for Enforcement and Compliance Monitoring, issued the Administrator's revised "RCRA Penalty Policy" ("the Policy").[5] The

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[4]In 1984, for the purpose of assuring that the his penalty assessment process would result in assessed penalties which meet goals of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems," the Administrator, through his Assistant Administrator for Enforcement and Compliance Monitoring, directed that each division of the Agency issue media specific penalty policies, based upon Agency-wide principles announced on February 16, 1984. Policy on Civil Penalties (#GM-21), reissued on December 1, 1994, as PT1.1; and A Framework for Statute-Specific Approaches to Penalty Assessment (#GM-22), reissued on December 1, 1994, as PT1.2. It was further directed that:

> In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty action should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented.

#GM-21, at 1. The "consistent application of a penalty policy" was found important:

> because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

Id. at 4. It was also recognized that "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." #GM-22, at 27.

[5]The Assistant Administrator for Solid Waste and Emergency Response provides "Agencywide policy, guidance, and direction for the Agency's solid and hazardous wastes and emergency response programs," with "responsibility for implementing the Resource Conservation and Recovery Act," and, in addition, "serves as principal adviser to the Administrator" in matters pertaining to those programs. 40 CFR 1.47. The Assistant Administrator for Enforcement and Compliance Monitoring is the principal adviser to the Administrator "in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics and

purpose of the Policy is to:

> ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

The Policy, at 5. In a final decision of the Administrator, issued by the Environmental Appeals Board, the Administrator noted that: "[t]he policy implements the requirement in RCRA that in assessing a civil penalty the Agency [sic: Administrator] take into account 'the seriousness of the violation, and any good faith efforts to comply with the applicable requirements.'" In Re Everwood Treatment Company, Inc., RCRA (3008) Appeal No. 95-1, at 7 (September 27, 1996).[6] "In determining an appropriate civil penalty, the Agency (sic) must take the seriousness of the violation into account, as well as any good faith efforts to comply with the applicable requirements[,]" which are the two statutory penalty criteria. Id., at 17. The Board went on to acknowledge that:

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radiation." 40 CFR 1.35. This Assistant Administrator also "reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program." Id. The predecessor to this Assistant Administrator, on February 16, 1984, issued the Administrator's agency wide "Policy on Civil Penalties," with an accompanying "Framework for Statute-Specific Approaches to Penalty Assessment," directing that each appropriate Assistant Administrator issue a statute-specific penalty policy for the statutes which for which they are responsible. The RCRA Penalty Policy (October 1990) was issued in response to the Assistant Administrator's directive of Febraury 16, 1984. See the Policy, at 6.

[6]The U.S. Environmental Protection Agency, or, simply, "Agency," is a federal bureaucracy of approximately 15,000 officers and employees. "The Administrator" is the Agency's Chief Executive Officer. "Agency" and "the Administrator" are not one and the same. In Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Congress states that "the Administrator" is to "take into account" the statutory criteria, not "the Agency." Consequently, Complainant has used the designation "sic" in the cited passage.

> [i]n so doing, this Board (and the Chief Judicial Officer ("CJO") before it) have looked to the Agency's (sic) RCRA Civil Penalty Policy as an analytical model for determining an appropriate penalty.

Id. As this policy is the Administrator's interpretation of a statute which Congress entrusts the Administrator with administering, federal reviewing courts will give deference to the interpretation and itss application in final orders of the Administrator.[7]

Consequently, given the clear instructions from the Administrator on how he would have penalty amounts determined in his name, and the judicial review criteria which he must meet, his Delegated Complainant in this matter has analyzed the evidence in the record in consideration of the RCRA statutory penalty criteria, as interpreted in the Administrator's adopted RCRA Penalty Policy, and its calculation methodologies, to arrive at an appropriate amount of penalty to propose he assess for each violation alleged in the Administrative Complaint.

(b) <u>The Structure of the Administrator's RCRA Penalty Policy</u>

> The general formula of the policy consists of:
>
> (1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violations's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance.

RCRA Civil Penalty Policy, June 2003 ("the Policy"), at 1.

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[7]The U.S. Supreme Court has recognized a "fundamental principle" that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" <u>Butz v. Grover Livestock Commission Co.</u>, 411 U.S. 182, at 185-186 (1973). On judicial review, federal courts have recognized this deference in upholding penalty amounts assessed by the Administrator which were determined by the application of her adopted penalty policies. <u>Newell Recycling Company v. U.S. EPA</u>, 231 F.3d 204 (5th Cir. 2000); <u>Catalina Yachts, Inc. v. U.S. EPA</u>, CV99-07357 (C.D.D.C. Calif. 2000); and <u>Sultan Chemists, Inc. v. U.S. EPA</u>, 281 F.3d 73 (3rd Cir. 2002).

Gravity-Based Penalty

The initial gravity-based penalty amount, which is a measurement of the "seriousness of the violation," a statutory penalty criteria, Section 3008(a) of RCRA, is determined by reference to two factors identified on a matrix of the Policy:

(1) "Potential for Harm" (vertical axis); and

(2) "Extent of Deviation from a Statutory or Regulatory Requirement" (horizontal axis). The Policy, at 18 - 19. The "potential for harm" factor is made up of two sub-factors not shown on the matrix: the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. Id. at 12 - 16. The matrix provides three levels on which to register the "potential for harm" of a violation: major, moderate and minor. Id. at 18. The "extent of deviation from a statutory or regulatory requirement" factor accounts for the degree to which the violation renders inoperative the requirement violated. Id. at 16 -0 18. Again, the matrix provides three levels on which to register the "extent of deviation from the requirement" manifested by the violation: major, moderate and minor. Id. at 18.

Continuing Violations

Multiple violations and multi-day violations are addressed in the Policy. Id. at 20 - 27. The Policy recognizes that for violations occurring between January 30, 1997, and March 15, 2004,

> RCRA provides EPA with the authority to assess in administrative actions or seek in court civil penalties of up to $27,500 [footnote omitted] per day of non-compliance for each violation of a requirement of Subtitle C (or the regulations which implement that subtitle).

For such violations occurring after March 15, 2004, the Administrator may assess a civil penalty of up to $32,500 for each such violation. See 40 C.F.R. Part 19.

However, the Administrator recognizes that "multiple violations of the same statutory or regulatory requirement may begin to closely resemble multi-day violations in their number and similarity to each other." Id at 22 - 23. The Administrator continues:

> In these circumstances, enforcement personnel have discretion to treat each violation after the first in the series as multi-day violations (assessable at the rates provided in the multi-day matrix) if to do so would produce a more equitable penalty calculation. . . . In those cases, where multiple violations are being treated as multi-day violations, each occurrence should be treated as one day for purposes of calculating the multi-day component.

Id., at 23.

Economic Benefit

The Policy addresses any "economic benefit" realized by certain violators as a consequence of their violations. Id. at 28 - 33. The "economic benefit" must be considered to eliminate economic incentives for the regulated community to violate the act. An "economic benefit" component should be calculated and added to the gravity-based penalty component when a violation results in 'significant' economic benefit to the violator. Id. at 28. Two types of "economic benefit" are to be reviewed: first, the benefit to the violator of delaying costs he would have incurred had he been in timely compliance with the requirement; and second, the benefit the violator realized by avoiding costs he otherwise would have incurred had he been in timely compliance.

Adjustment Factors

Under the Policy, once the above factors are considered and a gravity-economic penalty amount for the violations determined, "adjustment" criteria are to be considered. The Policy, at 33 - 41. The additional adjustment criteria include:

(a) good faith efforts to comply/lack of good faith;

(b) degree of willfulness and/or negligence;

(c) history of noncompliance (upward adjustment only);

(d) ability to pay (downward adjustment only);

(e) environmental projects (downward adjustment only); and,

(f) other unique factors

III. FACTS SUPPORTING THE COMPANY'S RCRA VIOLATIONS.

Between 1976 and June 2001 the Respondent conducted its business in, and around, buildings located at 649 Landmark Boulevard, Washington Courthouse, Ohio. Finding of Fact 4. Respondent's business was to pressure- treat wood with a chemical solution, that being chromated copper arsenate. Finding of Fact 5. The constituents of chromated copper arsenate include chromic acid (CAS#7738-94-5; arsenic acid (CAS #7778-39-4; and copper oxide (CAS #1317-38-0). Finding of Fact 9. In its production process, after the Company pressure-treated the wood with the chromated copper arsenate, it transported the treated wood by rail to a drip pad on its facility grounds, outside, where the wood underwent a preservative reaction. Finding of Fact 6. As the wood underwent the preservative reaction on the drip pad, excess chromated copper arsenate on the wood either evaporated or fell off of the wood onto the drip pad as waste. Finding of Fact 7. The drip pad is outside and not covered, constructed of asphalt, and is "L" shaped, measuring approximately 8,420 square feet. Attachment B, at 3.0. Respondent ceased operating its drip pad in 2001. Finding of Fact 8.

Respondent failed to implement its drip closure plan by taking actions necessary to determine the level of hazardous waste contamination present at its drip pad and the surrounding

area, and, if necessary, decontaminate or remove all waste residues and containment system components found there. Respondent's failure to take this action is a violation of the OAC 3745-69-45, and, consequently, Section 3008(a) of RCRA.

IV. APPLICATION OF LAW AND POLICY TO THE COMPANY'S DRIP PLAN CLOSURE VIOLATIONS.

(a) Gravity Based Penalty Amount

(1) Potential for Harm

(A) *Risk of Exposure*

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. The Administrator noted:

> Arsenic is a proven carcinogen (Class A), has caused skin and lung cancer in humans. . . . Chromium compounds are acute systemic toxicants, mainly affecting the skin and mucous membranes. Lead is an accumulative poison; it can cause a number of human physiological effects including kidney damage and reproductive disorders.

Id., 53305.[8]

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[8]The Department of Health and Human Services, Agency for Toxic Substances & Disease Registry ("ATSDR"), has issued Public Health Statements for chromium and arsenic, which document the potential for harm to the environment and public health caused by the release of elevated levels of these substances. Attachments F and G. These statements are based upon the Toxicological Profiles for each substance, prepared by the ATSDR. Id. Section 104(i)(2)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 104(i)(2)(A), as amended by the Superfund Amendments and Reauthorization Act, requires that

Regarding the **"probability of exposure,"** the Administrator provides that "[t]he risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents" and "the degree of such potential exposure." The Policy, at 13. Where actual management of waste is involved, "a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions posing a threat of exposure to hazardous waste or waste constituents." Id. "The determination of the likelihood of a release should be based on whether the integrity and/or stability of the waste management unit or waste management practice is likely to have been compromised." Id.

In Respondent's circumstances, it ceased operation at its Washington Courthouse facility in 2001. Prior to that, and subsequent to the date that the Administrator's RCRA regulations governing drip pads became effective, June 6, 1991, Respondent's operation of its drip pad was not

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the Administrator and ATSDR:

> prepare a list, in order of priority, of substances that are most commonly found at facilities on the National Priorities List (NPL) and which are determined to pose the most significant potential threat to human health due to their known or suspected toxicity and potential for human exposure at these NPL sites.

"By Congressional mandate," the ATSDR "produces 'toxicological profiles' for hazardous substances found at" National Priority List sites. Attachment H. The "profiles" are developed in two stages: first, there is publication of a "draft" in the Federal Register, inviting public comment, and second, on consideration of the comments received, a "profile" is finalized and published. Attachments I and J. The "profile" for each substance "succinctly characterizes the toxicologic and adverse health effects information for the hazardous substance described"; each "profile" is peer reviewed; and "key literature that describes a hazardous substance's toxicologic properties" is reviewed. Id. Each profile includes "a Public Health Statement that summarizes in nontechnical language, a substance's relevant properties." Id.

permitted under RCRA, nor did it have interim status, nor has it ever demonstrated that it met conditions necessary so as to be exempt from the RCRA permitting requirement.

In the past 7 years since it ceased operations there, Respondent has not completed closure of the drip pad at its Washington Courthouse facility consistent with RCRA requirements. Though it did prepare a drip pad closure plan, Attachment C, Respondent has done nothing to implement the drip closure plan. On receipt of its plan, OEPA requested that, in addition to the power washing called for in the plan, Respondent "conduct soil sampling in order to confirm that [chromated copper arsenic] and other drip pad materials did not migrate off of and/or through the drip pad." Attachment E. In making the request, OEPA noted that "the pad does not have a liner"; there were "cracks in the drip pad"; a "fresh layer of asphalt was poured across the drip pad after the facility had closed"; and it "appeared as if the berm was recently poured along with the fresh layer of asphalt and does not surround the entire drip pad." Id. In its Answer, Respondent admits that "Ohio EPA asked for an amended plan that called for additional steps, including testing and removal of subsoils," and, without explanation, simply states that "no such amended plan has been sent to Ohio EPA." Answer, Para. 27. Respondent admits that "it did not remove soils, contaminant systems, all components, equipment and structures," Answer, Para. 26, justifying its failure to do so asserting its "lack of information sufficient to from a belief" that any such removal was necessary. Id. Respondent's omissions relate directly to its management of hazardous waste left behind as a consequence of its drip pad operations over the course of seven years, and the integrity of its drip pad as a waste management unit.

Several circumstances present themselves to demonstrate the high probability of an increased likelihood that "human or other environmental receptors" would be exposed to hazardous waste and/or its constituents as a consequence of Respondent's mismanagement of its drip pad. First, the Nation's historical experience with the wood preservation industry: the Administrator has found that past mismanagement of hazardous waste at wood preservation facilities "has led to off-site contamination of ground water, surface, water, and soils." See above, at 11. Second, the historical experience of Respondent's owners, the Biewers: where a related company of Respondent -- in a companion case with this one, represented by the same attorneys and the same Biewers -- conducted the same wood coating activities as Respondent over a number of years, and then closed, analysis of rinseate sampling from pressure washing of the drip pad revealed elevated levels of chromium and arsenic in the rinseate. Attachment D. Third, Respondent's drip pad was not lined, had cracks and was not completely surrounded by a berm. Attachment E. Fourth, Respondent has no idea how much hazardous waste was released onto the drip pad during the course of its operations. Attachment C, 4.0.

Moreover, analyzing the circumstances which existed during Respondent's operation of its drip pad is relevant to the "probability of exposure" created by the Respondent's violations. To prevent the tracking of hazardous waste from treated wood drip pads, the Administrator proposed a standard in his rules which required that

> generators must have equipment (e.g., forklifts, tram cars, etc.) that is dedicated for use on each drip pad and that does not leave the pad. Personnel working on drip pads should decontaminate any clothing or shoes before they are taken off a drip pad site.

53 Fed. Reg., 53309. As Respondent was without a permit or interim status, specifically applying this standard to the operation of its drip pad -- nor did it ever make any demonstration that it met

the conditions for exemption from permitting requirements -- it is uncertain whether Respondent ever met this standard. Not being able to document that this standard historically had been met at its facility leads to a fair inference that, in the operation of its facility's drip pad, there was a greater likelihood that hazardous waste was tracked off of, or otherwise escaped, the drip pad than there would have been were it known that Respondent met the standard.[9] This greater likelihood of hazardous waste having escaped the drip pad during Respondent's wood processing operation heightened the need for Respondent to take appropriate management measures, at closure, to assure

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[9]Providing added weight to support this conclusion is the fact that, in the past, chromic and arsenic solution waste was mishandled by other John A. Biewer Companies involved in the same wood processing activities as Respondent. Regarding a Washington Courthouse facility, operated by John A. Biewer of Ohio, Inc. -- this Biewer company lists the same corporate headquarters address as Respondent, with the same Brian Biewer representing both companies in communications with OEPA -- in October 1992, OEPA documented the Biewer's failure at that facility to do a hazardous waste determination on drippage from its treated wood; its failure to mark containers of hazardous waste as hazardous waste, and with the date the hazardous waste was initially accumulated in the containers; its failure to label drip pad sweepings with the words "hazardous waste"; and, its failure to conduct adequate inspections and test its emergency equipment every week. Attachment M. Though in December 1992 OEPA determined that Respondent adequately demonstrated abatement of all these violations, Attachments N and O, the deficiencies noted by OEPA constitute evidence that the Biewers' management of hazardous waste was not always in conformance with requirements meant to provide for care and accountability in the handling of hazardous waste. At a Michigan wood treating facility, where John A. Biewer Company, Inc., pressure treated lumber with a chemical solution -- this is another company related to Respondent -- the company's mishandling of hazardous waste resulted in groundwater being contaminated with hazardous waste, constituents of which included chrome and arsenic. Attorney General of the State of Michigan,et al. v. John A. Biewer Co., Inc., 140 Mich.App. 1, 363 N.W.2d 712 (1985). The Biewer's inadequate management of hazardous waste at drip pads at these facilities makes it more likely that hazardous waste was similarly handled by the Biewers at Respondent's drip pad, and that contamination remains at and near the drip pad. This circumstance, in turn, increases the need for adequate closure measures to be taken at that drip pad to determine the presence of any hazardous waste, and to remove it, so as to protect human health and the environment vestiges of Respondent's drip pad operations.

that any hazardous waste contamination at and near its drip pad would be detected, removed and properly disposed of in the closure process.

Each of these factual circumstances has increased the probability that hazardous waste remains at or escaped from the drip pad, thereby increasing the potential for Respondent's hazardous waste to harm human or other environmental receptors, and aggravating the degree of potential expose created by Respondent's hazardous waste.

It is apparent that Respondent has exercised little or no management control over its drip pad after generating an inadequate drip pad closure plan. It has allowed the unenclosed drip pad and adjacent areas, exposed to all atmospheric conditions over the course of many years, to continue to remain in existence without searching for contamination and completing necessary closure requirements. In doing so, Respondent has created a great risk that the environment and human health would be exposed to the arsenic and chromium contamination it left behind at its drip pad more than seven years ago. The Administrator provides that

> [a] larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases of hazardous waste and constituents.

The Policy, at 13. Here, Respondent has done nothing at all at its drip pad to detect the extent of hazardous waste at and around its drip pad, and to contain and remove it. Consequently, the **"probability of exposure"** regarding Respondent's violations is registered as **substantial.**

In evaluating the **"potential seriousness of contamination,"** the Policy provides that the "quantity and toxicity of wastes (potentially) released" is to be considered, as well as the "likelihood or fact of transport by way of environmental media (e.g., air and groundwater)" and the "existence, size, and proximity of receptor populations (e.g., local resident, fish, and wildlife,

including threatened or endangered species) and sensitive environmental media (e.g., surface wastes and aquifers)." The Policy 13-14.

The constituents of chromated copper arsenate, the solution used by Respondent in its wood treating process, include chromic acid (CAS #7738-94-5); arsenic acid (CAS #7778-39-4) and copper oxide (CAS #1317-38-0). Finding of Fact 9. The dangers presented to the environment and human health by exposure to these substances has already been addressed. See above, at 11-12. Because Respondent never determined the amount of chemical solution which dripped from the treated lumber at Respondent's drip pad, the quantity of toxic waste involved in Respondent's violations cannot be determined. However, it is most likely that the *quantity* of toxic waste involved is not great, but, rather, consists of residual amounts of waste that may have clung to the soil, or to piping or tank components. At the same time, as the drip pad was not protected against atomospheric conditions for a number of years, escape of these toxic substances would more likely occur into the soil under the drip pad, and migration away from the area. Due to Respondent's failure to gather information it is required by law to gather, it cannot be said with certainty that these substances have been released into the environment, however, under the Policy "emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred." Id. at 14.

Maps reveal that there is a creek near Respondent's Washington Courthouse facility. Attachment A. The area appears, generally, to be an industrial and warehouse area, with the nearest residential dwellings being approximately 2,000 feet away, to the Northwest. Id.

Although the consequences of exposure to the hazardous waste involved could be serious, given the limited amount of the waste, and the fact that the drip pad was in an industrial and warehouse area, the **"potential seriousness"** of contamination is considered **minor**.

(B) ***Harm to the RCRA Regulatory Program***

The Administrator has recognized that "[t]he objectives of RCRA are to promote the protection of human health and the environment and to conserve valuable material and energy resources[,]" and that Sections 2002(a), 3001, 3002, 3003, 3004 and 3005 of the Solid Wasted Disposal Act, as amended by RCRA, "fosters these objectives by "providing for the identification of hazardous wastes, the establishment of a 'cradle to grave' hazardous waste tracking system, and the development of standards and permit requirements for the treatment, storage, and disposal of hazardous waste." 45 Fed. Reg. 12724, 12724-12725 (February 26, 1980). "[A]ll regulatory requirements are fundamental to the continued integrity of the RCRA program[,]" and violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program." The Policy, at 14.

As a fundamental purpose of RCRA is to establish a "'cradle to grave' hazardous waste tracking system," drip pads used in the wood preserving industry, when removed from use, must be closed consistent with the closure requirements of the RCRA regulations. If that is not done, there will not be an accounting for all hazardous waste resulting from the operation of the drip pad, whether on the pad itself, in the soil around and under the pad, or in any pattern of migration away from the pad. As Respondent continues to fail] to account for all hazardous waste that it may have generated during the operation of its drip pad, it has allowed that hazardous waste to escape "cradle

to grave" tracking, as intended by RCRA. Consequently, the degree of **"harm to the RCRA regulatory program"** presented by its violation must be registered as **substantial.**

(2) Extent of Deviation

"The 'extent of deviation' from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated." The Policy, at 16. While the Policy specifically addresses a party's failure to have a closure plan, noting that there may be a range of "extent" levels on which to register the violating conduct, based upon whether the party has no plan, a plan with minor deficiencies, or a plan with major deficiencies, the violation alleged against Respondent is that it "failed to take actions necessary to decontaminate all remaining waste residues and containment system components at its drip pad." Complaint, Para. 27. As Respondent's Washington Courthouse facility closed in 2001, long ago Respondent should have complied with the law, searching for, and, if found, decontaminating the drip pad and surrounding area of all remaining arsenic and chromium waste residues.

However, this is not a situation where Respondent simply walked away from its wood preserving facility, abandoning it and whatever hazardous waste it accumulated at the facility. On the closure of the facility, the Company did remove all treated lumber, as well as any chromated copper arsenate solution that it had on site. Its violation is that it did nothing to the implement the decontamination process at the drip pad as instructed in its drip pad closure plan.

Under the circumstances, Respondent's violation was neither a low level deviation nor a substantial deviation from the applicable requirement. Rather, Respondent significantly deviated from some closure requirements, while implementing others. It did not complete the required work. Consequently, an **"extent " level of moderate** is assigned to the Company's violation.

(3) Total Gravity Based Penalty

In selecting an appropriate penalty amount from a cell in the gravity based matrix, there is discretion to consider: the seriousness of the violation in relation to other violations which would fall within the same cell; efforts at remediation or the degree of cooperation evidenced by the facility, to the extent that they are not considered elsewhere in the penalty amount calculation; the size and sophistication of the violator; the number of days of violation; and other relevant matters. The Policy, at 19.

On considering the factual basis of these particular violations of Respondent, no adjustment is made with regard to any of these factors, as none of the factors legitimately affect the "seriousness of the violation." For example, the potential for harm from exposure and harm to the RCRA regulatory program presented by this particular violation -- failing to take actions necessary to decontaminate all waste residues and containment system components at its drip pad -- does not vary based upon the size and sophistication of the violator. Certainly, given that the gist of the violation is that Respondent has not implemented remediation work at its drip pad site as required by law, no downward adjustment is warranted in consideration of Respondent's "efforts at remediation" or "cooperation." By law the drip pad should have been decontaminated and closure realized 7 years ago.

Under the Policy, **Multi-Day Penalties** are mandatory for the second through the 180th day of a continuing violation designated major-major or major-moderate, subject to being waived in "highly unusual cases" with prior U.S. EPA Headquarter's consultation; multi-day penalties are discretionary for those violations otherwise characterized on the matrix. Id., at 25.

While a multi-day penalty component for Respondent's violations is "discretionary" under the Administrator's policy, given the facts and circumstances of its violating conduct, a multi-day is appropriate. Here, the number of days that Respondent's violating conduct continued can be documented. Id., at 23. Moreover, each day the potential contamination in and around Respondent's drip pad existed, the opportunity for migration of that contamination was enhanced. Consequently, a multi-day component from the Penalty Policy's Multi-Day Matrix of Minimum Daily Penalties is found appropriate for days 2-181 of Respondent's violating conduct. It should be noted that all days of violation accounted for in this penalty determination occurred after OEPA served Respondent with its February 8, 2005, notice that Respondent was in violation of RCRA, as it had failed to submit a drip closure plan, addressing how it would decontaminated all waste residue, subsoils, etc., and manage them as hazardous waste, Attachment A, and after Respondent submitted its March 4, 2005, response to that notice. Attachment L.

Under the circumstances set out, the **Total Gravity Penalty Amount Calculation** which follows is appropriate:

Failure to Complete Drip Pad Closure Requirements (OAC 3745-69-45; 40 CFR 265.445).

Risk of Exposure	Moderate	(high range)
Probability of Exposure	Substantial	
Potential Seriousness of Contamination	Minor	
Harm to Regulatory Program	Substantial	
Extent of Deviation	Moderate	(mid range)

A Moderate-Moderate reading in the Penalty Assessment Matrix, Policy, at 18, between the mid range and high range, appropriate to Respondent's violation on day 1 would be $8,768.00.

This high range value in the Moderate-Moderate box for "Potential for Harm" is appropriate as an average among two penalty components being "substantial" and one being "minor."

A Moderate-Moderate reading in the Multi-Day Matrix of Minimum Daily Penalties, Policy, at 26, between the mid range and high range appropriate to Respondent's violation for days 2 through 180, would be $1,367.00. This high range value in the Moderate-Moderate box for "Potential for Harm" likewise is appropriate, for the reasons stated above. The penalty calculation is: $8,760 + $244,693 ($1,367 x 179) = $253,461.00.

(b) Adjustment FactorsGravity Based Penalty Amount

(1) Good Faith Efforts to Comply

As a matter of policy, the Administrator provides for a presumption that there should be no downward adjustment to an otherwise appropriate penalty amount "for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations . . . since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA['s] discovery of a violation." Penalty Policy, at 35-36. The Administrator further provides, specifically, that: "no downward adjustment should be made because respondent lacked knowledge concerning either applicable requirements or violations committed by respondent." Id.

Having gone seven years without completing decontamination and closure of its Washington Courthouse drip pad, and surrounding area, notwithstanding specific notices from OEPA to do so, no downward adjustment is warranted in the any penalty amount to be assessed against Respondent for violations alleged in the Complaint.

(2) Degree of Willfulness/Negligence

The Administrator's policy provides that a penalty amount found appropriate for RCRA violations "may be adjusted upward for willfulness and/or negligence." The Policy, at 36. An upward adjustment of 10% in the penalty amount proposed for Respondent's violation has been made considering this penalty criteria. There is no question that Respondent was well aware of its legal obligations on the closing of its drip pad. As already noted, in February 2005, OEPA provided specific notice to Respondent of the requirements of the law concerning the closure and removal of any hazardous waste left behind from the operation of its Washington Courthouse drip pad. Attachment A. A month later, Respondent acknowledged that notice. Attachment B. In addition, there is no evidence to support a finding that Respondent ever had anything other than complete control of the events out of which the violations arose.[10] Consequently, a upward adjustment is warranted in Respondent's penalty for its degree of willfulness and/or negligence, as there is no apparent reason that it could not comply with the law.

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[10]As Respondent had failed to alleged that it did not have an ability to pay the proposed penalty of $250,000 in its Answer, on June 26, 2008, the Administrator's Delegated Complainant filed a Motion for Partial Accelerated Decision asking the Presiding Officer to enter a finding that Respondent waived any claim that it is unable to pay the penalty amount proposed. Respondent did not object to the proposed finding being entered. Response to Motion for Partial Accelerated Decision, dated July 22, 2008. Consequently, at least up to the amount of approximately $250,000, there is no evidence in the record in this matter that Respondent could not afford to pay for the tasks necessary to complete closure requirements of the law. Moreover, though it identifies in Respondent's Supplemental Witness Disclosure a witness who "may also testify regarding" its "lack of income or assets" to enable it to fully perform hazardous waste decontamination requirements, it fails to provide any documentation of the expected extent of hazardous waste contamination at its drip pad and the expected costs of it meeting the law's requirements. Consequently, there is no evidence upon which to find that Respondent was without the resource to have completed the decontamination procedures required by law.

(3) History of Noncompliance

The Policy provides only for an upward adjustment to the gravity based penalty in consideration of this factor, if there is evidence that a respondent has a history of noncompliance. As the Agency is unaware of any reasonably recent prior history of RCRA noncompliance by Respondent, it has not increased the gravity based penalty amount in consideration of this penalty factor. Penalty Policy, at 37 -38.

(4) Ability to Pay

The Administrator issued a published decision on the application of this factor in the determination of penalty amounts he would assess for violations of the Federal environmental statutes. When authorized staff are preparing and issuing an administrative complaint for civil penalties on the Administrator's authority, they can "presume" that a respondent has an ability to pay the amount of civil penalty proposed until the respondent's ability to pay "is put in issue by a respondent." In Re New Waterbury, 5 E.A.D. 529, at 15 (1994). Moreover, in RCRA penalty actions, as "ability to pay" is not a designated penalty criteria which Congress, in the statute, requires that the Administrator consider in determining a penalty amount, the Company itself has the burden of presentation and persuasion on the issue. In Re Carroll Oil Company, 10 EAD 635, 662-668 (2002).

As Respondent in its Answer contested the penalty amount proposed, but did not raise therein a claim regarding its "ability to pay" the penalty amount, on June 26, 2008, the Administrator's Delegated Complainant filed a Motion for Partial Accelerated Decision asking that a finding be entered that Respondent had waived any claim that it is unable to pay the penalty

amount proposed. On July 22, 2008, Respondent filed a response stating that it did not object to the motion, and, on August 6, 2008, the motion was granted.

Consequently, no adjustment has been made to the gravity based penalty in consideration of this penalty factor at this time. The Policy, at 38-40.

(5) Environmental Projects and Other Unique Factors

No adjustment has been made in the penalty amount proposed in consideration of these criteria, as there is no evidence before the Administrator relevant to the criteria. The Policy 39-41.

(6) Economic Benefit

In the Policy, the Administrator recognizes that his "1984 Policy on Civil Penalties mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law." The Policy, at 28. Specific violations identified for which "significant economic benefits" may accrue to a violator include the failure to meet "closure/post-closure" requirements. Id.

In a Closure Activity Study, dated May3, 2005, prepared on Respondent's behalf by its environmental consultant, the Mannik & Smith Group, Inc., the consultant identified $19,800 as the total estimated costs for closure of the Perrysburg drip pad. Attachment C, at 11.0. Consequently, at the time enforcement staff first calculated the penalty amount proposed in the Complaint, which was filed on May 5, 2008, it used that estimated cost in determining an "economic benefit" component in the proposed penalty for Respondent, using the BEN computer model, as directed by the Policy. Policy, at 30-33. Using the computer model, enforcement staff determined that Respondent has realized an economic benefit of $3,842 as a result of not having

timely carried out its closure obligations at the drip. That amount is added to the Gravity Based/Multi-Day penalty amount.

Since the filing of the Complaint, two events have occurred which make it likely that the penalty component determined appropriate by Complainant significantly understates Respondent's economic benefit. First, in a pleading filed in this matter, Respondent has explicitly waived its claim that it is unable to pay the amount of penalty proposed, that being $282,649. See Motion for Partial Accelerated Decision, filed June 26, 2008, and Response to Motion for Partial Accelerated Decision, dated July 22, 2008. Consequently, it is fair to infer that Respondent has had available at least $282,649 to pay for taking the actions necessary to meet the closure requirements of the law at its facility's drip pad. Two months after waiving any claim that it is unable to pay the proposed $282,649 penalty, Respondent filed Respondent's Supplemental Witness Disclosure, dated September 15, 2008, in which it stated that Brian Biewer "may also testify regarding the lack of adequate income or assets of [Respondent] to fully perform actions requested by Ohio EPA and/or U.S. EPA[.]" As Respondent has waived any claim that it lacks an ability to pay a $282,649 penalty, but, at the same time, asserts that it does not have sufficient resources to pay to decontaminate its drip pad of hazardous waste as required by law, it is fair to draw an inference that the actual costs for decontaminating Respondent's drip pad is not $19,800, as earlier estimated, but more than $282,649.

If one were to calculate Respondent's economic benefit component based upon the avoidance of spending $282,649 to decontaminate its drip pad, rather than $19,800, that component would be well over the $3,842 used here. Further disclosures by Respondent may corroborate the inferences drawn here, and necessitate an upward adjustment in the economic

benefit component of the proposed penalty, as well as the total amount of proposed penalty. However, for the purpose of resolving this matter by accelerated decision on the current administrative record in this matter, Administrator's Delegated Complainant will use the economic benefit component as originally calculated.

V. TOTAL PENALTY FOR THE VIOLATIONS

The total penalty amount proposed for violations alleged in the Administrative Complaint is $282,649. This incorporates the Gravity Based Penalty Amount of $8,768; the multi-day component of $244,693; a 10% upward adjustment for "willfulness/negligence" $25,346; and an economic benefit component of $3,842.

To put this penalty amount in perspective, note should be made that the Administrator is authorized by Congress to assess up to "$25,000 per day of noncompliance for each violation of a requirement" of RCRA. Section 3008(a)(3) of RCRA. For 180 days of violation, the maximum penalty amount would be $4,500,000. As all violations occurred after March 15, 2004, adjusted for inflation, see 40 C.F.R. § 19.4, the maximum penalty amount for the Company's violations would be $5,760,000. Consequently, the penalty amount proposed for the Company's violations is approximately 4% of the maximum penalty, adjusted for inflation, authorized by Congress.

Richard R. Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant
Region 5

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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 following:

(1) **Complainant's Motion to Strike, in Part, Respondent's Pre-Hearing Exchange;**

(2) **Memorandum in Support of Complainant's Motion to Strike, in Part, Respondent's Pre-Hearing Exchange;**

(3) **Complainant's Motion for Accelerated Decision on Liability and Penalty;**

(4) **Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty; and**

(5) **Memorandum in Support of Penalty Amount Proposed.**

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
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

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

December 12, 2008

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