IN RE JOHN A. BIEWER CO. OF TOLEDO, INC.
IN RE JOHN A. BIEWER CO. OF OHIO, INC.

RCRA (3008) Appeal Nos. 10-01 & 10-02

FINAL DECISION AND ORDER

Decided February 21, 2013

Syllabus

U.S. EPA Region 5 ("Region") appeals from two nearly identical sets of decisions issued in two separate enforcement matters, each involving a single violation of the Resource Conservation and Recovery Act ("RCRA") as amended, 42 U.S.C. §§ 6901 to 6992k. The alleged violation involved the failure to comply with closure requirements governing drip pads at each of two wood treatment facilities. Each matter involved the same parent company, John A. Biewer Company, Inc. ("JAB Inc."), and a closely-held subsidiary who was the owner of the respective facility: John A. Biewer of Ohio ("JAB Ohio") and John A. Biewer of Toledo ("JAB Toledo"), respectively.

In each of these matters, the Administrative Law Judge ("ALJ") issued an accelerated decision on liability, concluding that JAB Inc. was neither derivatively nor directly liable for the violations at either of the facilities. JAB Ohio and JAB Toledo each conceded liability for the violation at their respective facility, after which the ALJ ordered a hearing on the appropriateness of the penalty. The Region refused to participate in that ALJ-ordered hearing, arguing that there was no genuine issue of material fact at issue with respect to the penalty and that Respondents were not entitled to a hearing. Concluding that the Region had failed to present any evidence at the hearing on penalty, the ALJ awarded a penalty of zero in each matter.

On appeal, the Region asserts that the ALJ erred in determining that the parent company could not be held liable for the violations at each facility. The Region also asserts that the ALJ erred in awarding a zero penalty against JAB Toledo and JAB Ohio. The Respondents disagree and argue that, based on the conduct of counsel for the Region, they are entitled to an award of attorneys' fees and costs.

Held: The Board concludes that a zero penalty against JAB Toledo and JAB Ohio is appropriate as a sanction in this case due to the Region's refusal to present evidence of an appropriate penalty at the penalty hearing in violation of an ALJ order. The Consolidated Rules of Practice Governing the Assessment of Civil Penalties unquestionably provide the ALJ with the responsibility and the discretion to determine an appropriate civil penalty amount based on the evidence in the record, in accordance with any statutory penalty criteria, after taking into account applicable civil penalty guidance. The rules also provide the ALJ with the authority to conduct administrative hearings, examine witnesses, and to hear and decide questions of facts, law or discretion. The Board will not condone an Agency counsel's refusal to produce evidence at a hearing on the appropriateness of a penalty when

ordered to do so by the presiding officer. To do otherwise would undermine the duly delegated authority of the ALJ, as well as call into question the fairness and impartiality of administrative enforcement proceedings of the Agency. When a Region refuses to comply with an ALJ order to present evidence at a hearing on penalty, as occurred in these matters on appeal before the Board, both the ALJ and the Board have the authority and the discretion to award a zero penalty as a sanction. Thus, under the circumstances of these matters, the Board concludes a zero penalty is appropriate based on, and as a sanction for, Regional Counsel's refusal to put on any evidence at the penalty hearing as ordered by the ALJ.

Further, because the Board concludes that a zero penalty is appropriate as a sanction for the Region's unacceptable refusal to comply with the ALJ's order, the Board concludes that it need not determine whether the ALJ erred in determining that JAB Inc. could not be held derivatively or directly liable for the violations alleged. Specifically, if the Board were to find JAB Inc. *derivatively* liable in these matters, the company would be subject to the same penalty that was assessed against its subsidiaries, which in this case was zero. Additionally, even if *direct* liability could be established, the Board is not willing to give the Region another opportunity to make its penalty case for the very same violations. Providing another opportunity for the Region to obtain a penalty on this theory would undermine the effectiveness of the sanction previously imposed for the Region's refusal to present its penalty case to the ALJ. Accordingly, considering the question of either direct or derivative liability against JAB Inc. would not materially alter the outcome given the zero penalty, and thus would represent a needless waste of agency resources.

Finally, the Board concludes that JAB Ohio and JAB Toledo are not entitled to an award of attorneys' fees and costs.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge Fraser:

I. *STATEMENT OF THE CASE*

U.S. EPA Region 5 ("Region") appeals from two nearly identical sets of decisions that Administrative Law Judge ("ALJ") William B. Moran issued in two enforcement matters, each involving a single violation of the Resource Conservation and Recovery Act ("RCRA") as amended, 42 U.S.C. §§ 6901 to 6992k.[1] The Region alleged Respondents failed to comply with closure requirements governing drip pads at each of two wood treatment facilities: one in Perrysburg, Ohio,

[1] The two matters that are the subject of this appeal involve two nearly identical dockets, and in many cases nearly identical filings. For both cases, the ALJ issued an accelerated decision as to liability, and an initial decision on penalty. For this reason, readers may presume that the citations throughout this decision are identical (as to title, filing date, and page number) and will therefore apply equally to the records in both the Washington Courthouse Facility matter, *In re John A. Biewer of Ohio, Inc.* (Docket No. RCRA-05-2008-0007) ("JAB Ohio") and the Perrysburg Facility matter, *In re John A. Biewer of Toledo, Inc.* (Docket No. RCRA-05-2008-0006) ("JAB Toledo"). To the extent that there are differences, those differences will be noted.

and the other in Washington Courthouse, Ohio. In each matter, the Region identified three respondents in the Amended Complaint. The respondents in the matter involving the "Perrysburg facility" were: (1) John A. Biewer Company of Toledo, Inc. ("JAB Toledo"); (2) John A. Biewer Company, Inc. ("JAB Inc."); and (3) Biewer Lumber LLC. The respondents in the matter involving the "Washington Courthouse facility" were: (1) John A. Biewer Company of Ohio, Inc. ("JAB Ohio"); (2) JAB Inc.; and (3) Biewer Lumber LLC.[2]

In each of these matters, the ALJ issued an accelerated decision on derivative liability, concluding that JAB Inc., the parent company of both JAB Toledo and JAB Ohio, was neither directly nor derivatively liable for the violations at the respective facilities. Order on Cross Motions for an Accelerated Decision on Derivative Liability (Oct. 5, 2009 in JAB Ohio) (Dec. 23, 2009 in JAB Toledo) (incorporating by reference the parallel Order in JAB Ohio) ("Orders on Derivative Liability").

After JAB Ohio and JAB Toledo conceded liability for their respective violations, ALJ Moran issued an initial decision regarding penalty in each matter that ultimately awarded a penalty of zero against both JAB Toledo and JAB Ohio based on his conclusion that the Region had failed to present any evidence at a hearing on the issue of penalty. *See* Init. Decisions on Penalty at 17 (JAB Ohio), at 19 (JAB Toledo). In each of these matters, the Region appeals from both the liability determination as to JAB Inc., and the zero penalty determinations against JAB Ohio and JAB Toledo.

II. *STATEMENT OF THE ISSUES*

The Region asserts that the ALJ erred in determining that JAB Inc. could not be held liable for the violations at each facility. The Region also asserts that the ALJ erred in awarding a zero penalty against JAB Toledo and JAB Ohio. Respondent JAB Inc., on the other hand, argues that the ALJ ruled appropriately on liability. Respondents JAB Toledo and JAB Ohio argue that the ALJ appropriately awarded a zero penalty and that based on the conduct of counsel for the Region, JAB Toledo and JAB Ohio are entitled to an award of attorneys' fees and

[2] In the course of the proceedings before the ALJ, the Region conceded that there was no basis to hold Biewer Lumber LLC liable in these matters. *See* Initial Decision Regarding Penalty in each matter (Apr. 30, 2010) ("Init. Decs. on Penalty") at 1; *see also* Complainant's Brief in Support of Its Notice of Appeal ("Region's Appeal Br.") (making no reference to the liability of Biewer Lumber LLC). The length of time it took for the Region to make this concession was called into question by the ALJ in the initial decisions and forms one of the bases asserted for attorneys' fees and costs in this matter. See part VI.C., below.

costs.[3]

Accordingly, this case presents the Board with the following issues for resolution:

A. Did the ALJ err in awarding a zero penalty against JAB Toledo and JAB Ohio?

B. Did the ALJ err in determining that JAB Inc. could not be held derivatively or directly liable for the violations alleged in the complaints against JAB Toledo and JAB Ohio?

C. Are Respondents entitled to attorney's fees and costs in this matter?

III. *STANDARD OF REVIEW*

In enforcement proceedings such as this one, the Board is authorized to review *de novo* both the factual and legal conclusions of the presiding officer, in this case the ALJ. *See* 40 C.F.R. § 22.30(f) (providing that, in an enforcement proceeding, "[the Board] shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed"); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of [an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see In re Friedman*, 11 E.A.D. 302, 314 (EAB 2004) (explaining that in an enforcement proceeding, the Board reviews "the ALJ's factual and legal conclusions on a *de novo* basis"), *aff'd*, No. 2:04-CV-00517-WBS-DAD (E.D. Cal. Feb. 25, 2005), *aff'd* No. 05-15664, 2007 WL 528073 (9th Cir. Feb. 15, 2007).

The regulations authorize the Board to assess a penalty that is "higher or lower than the amount recommended to be assessed in the [Initial D]ecision

[3] The Appeal Brief of Respondents-Appellees does not specifically identify who the Respondents-Appellees are with respect to the arguments made and refers generically to "Respondents" throughout its brief. However, because the ALJ's Order on Derivative Liability pertained only to the liability of JAB Inc., and did not involve the liability of either JAB Toledo or JAB Ohio, JAB Inc. is the only possible "Respondent" to that portion of this appeal and any reference to "Respondent" in the liability portion of this decision refers only to JAB Inc. Similarly, because JAB Inc. was no longer party to the proceedings during the penalty phase, which included the request for attorneys' fees, JAB Toledo and JAB Ohio are the only possible "Respondents" to that portion of this appeal and any reference to "Respondents" in the penalty or attorneys' fees portion of this decision refers only to JAB Toledo and JAB Ohio. In all other parts of this decision, unless otherwise noted, the term "Respondents" refers to JAB Inc., JAB Toledo, and JAB Ohio.

* * * or from the amount sought in the complaint * * * ." 40 C.F.R. § 22.30(f). Notwithstanding its *de novo* review authority, the Board generally will not substitute its judgment for an ALJ's reasonable assessment of penalty, absent a showing that the ALJ has committed an abuse of discretion or a clear error in assessing the penalty. *See In re Ram, Inc.*, 14 E.A.D. 357 (EAB 2009).

IV. *SUMMARY OF DECISION*

For the reasons explained below, the Board concludes that a zero penalty against JAB Toledo and JAB Ohio is appropriate in this case as a sanction for the Region's unacceptable refusal to comply with the ALJ's order to produce evidence at the penalty hearing. Further, because the Board affirms the zero penalty and determines that, on the facts of these matters, any liability against JAB Inc. would be limited to the penalty of zero, the Board declines to exercise its discretion to review the ALJ's determination that JAB Inc. could not be held directly or derivatively liable for the violations alleged against JAB Toledo and JAB Ohio. To consider the question of liability against JAB Inc. (whether direct or derivative) would not materially alter the outcome given the sanction of a zero penalty, and thus would represent a needless waste of agency resources. Finally, the Board concludes that JAB Ohio and JAB Toledo are not entitled to an award of attorneys' fees and costs.

V. *PROCEDURAL AND FACTUAL HISTORY*

The RCRA violations underlying this action involve two wood treatment facilities that are now closed. The first, the Washington Courthouse facility, operated from 1976 until June 2001, and was located in an area that the Region referred to as an industrial and warehouse area. The facility's operations included pressure-treating wood with chromated copper arsenate and then transporting it to a drip pad on its facility grounds, where excess chromated copper arsenate either evaporated or fell off the wood onto the drop pad as waste. *See* Region's Memorandum in Support of the Penalty Amount Proposed (Dec. 12, 2008) ("Memo. in Support of Penalty"), at 10 (JAB Ohio). The second, the Perrysburg facility, operated between 1983 and 1997, was enclosed, located in an area the Region referred to as having "a limited receptor population," and was operated in the same manner as the Washington Courthouse facility. *See* Memo. in Support of Penalty, at 10, 17 (JAB Toledo).

The Region alleged that Respondents failed to remove or decontaminate any waste residues, containment system components, contaminated subsoils, and structure and equipment contaminated with waste and leakage as present under and in the vicinity of its drip pad as required by Ohio Administrative Code § 3745-69-45, in violation of Subchapter III of RCRA, 42 U.S.C.

§§ 6921-6939(f).[4] Amended Compl. at 3-6 (Jan. 29, 2009). Following a period of discovery, Complainant filed a Motion for Accelerated Decision on Liability and Penalty in each matter ("Motions re Liability and Penalty") (Dec. 12, 2008). Both Complainant and JAB Inc. filed cross-motions for an accelerated decision regarding derivative liability in each matter. *See* Complainant's Motion for Accelerated Decision on Derivative Liability (and accompanying memoranda) (CBI Redacted Version) (July 2, 2009) ("Region's Motions re Derivative Liability"); Respondents' Motion for Accelerated Decision (and accompanying memoranda) (July 2, 2009) ("JAB Inc. Motions re Derivative Liability").

The Region's motions for an accelerated decision on derivative liability argued essentially that indisputable facts proved that JAB Inc. was either derivatively liable under a theory of piercing the corporate veil, or was directly liable under an "operator" theory. *See* Region's Motions re Derivative Liability at 3-4, 8, 37 (JAB Ohio), and at 3-4, 7, 35 (JAB Toledo). JAB Inc. conversely argued that the undisputed facts entitled JAB Inc. to a determination that it was not liable for either violation at either facility. *See* JAB Inc. Memo. in Support of Motions re Derivative Liability (Jul. 2, 2009). After weighing the facts and the legal arguments submitted, the ALJ denied Complainant's Motion regarding derivative liability and granted JAB Inc.'s motion, concluding that JAB Inc. could not be held liable under any theory of derivative or direct liability. *See* Orders on Derivative Liability, at 36-37 (JAB Ohio) and at 2-3 (JAB Toledo).

In its motion for an accelerated decision on liability and penalty, the Region asserted that no genuine issue of material fact existed regarding JAB Ohio's or JAB Toledo's liability and that a penalty of $282,649 was appropriate to assess against JAB Ohio for the violation at the Washington Courthouse facility, and a penalty of $287,441 was appropriate to assess against JAB Toledo for the violation at the Perrysburg facility. *See* Memo. in Supp. of Motions re Liability and Penalty (Dec. 12, 2008), at 1. In further support of the penalty in each matter, the Region attached a 27-page Memorandum in Support of the Penalty Amount Proposed that contains an explanation of how it derived the proposed penalty. The memoranda were not sworn affidavits, and contained various attachments, including communications to and from the Ohio EPA regarding the closure requirements and the facilities' respective attempts to comply. *See* Memo. in Supp. of Motions re Liability and Penalty (and attachments).

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[4] Under RCRA section 3006, states may obtain EPA authorization to administer portions or all of RCRA subtitle C within their boundaries. 42 U.S.C. § 6926. Once authorized by EPA, a state's hazardous waste regulations operate as requirements of RCRA subtitle C in lieu of the comparable federal requirements. The state regulations are enforceable by the state, as well as by EPA independent of the state, pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a). During the relevant time period, the State of Ohio was authorized by EPA to administer its RCRA program, including the requirements of Ohio Administrative Code § 3745-69-45. *See* 40 C.F.R. §§ 272.1800, 272.1801.

Subsequently, JAB Toledo and JAB Ohio each conceded liability, but contested the penalty amount sought as excessive. *See* Memos. in Opp. to Motion re Liability and Penalty (Jul. 30, 2009), at 2. Respondents argued that their failure to carry out the drip pad closure plan stemmed from their financial inability to continue in business, as opposed to an "unwillingness" to comply, and that these factors were relevant to the amount of penalty assessed. *Id.* at 2-3.

Based on JAB Ohio's and JAB Toledo's respective concessions of liability, the ALJ issued orders granting the Region's motions as to liability, but denied an accelerated decision in each matter as to penalty, finding instead that material facts were in dispute as to the appropriate penalty amount. Order on EPA's Motion for Accelerated Decision on Liability and Penalty (Dec. 23, 2009), at 2, 14 (JAB Ohio) ("Order on Liability and Penalty").[5] In so concluding, the ALJ found that it was clear that material facts were in dispute that bore upon the correct application of the penalty policy and that a hearing on the appropriate penalty in each matter was warranted. *Id.* at 9, 14 (JAB Ohio). Among other points, the ALJ noted that the Respondents' good faith efforts to comply, as well as their degree of willfulness, negligence, ability to pay and other unique factors were relevant in the penalty determination. *Id.* at 9, 14 (JAB Ohio). The ALJ also stated that in addition to that "independent basis for denying" Respondents' motions, the ALJ was "of the view that, either through discovery or through the exercise of cross-examination, a respondent should be afforded the right to explore EPA's penalty proposal analysis, in order to make its own determination as to whether the policy was in fact properly applied. Such questioning may disclose * * * that the policy was not adhered to and consequently that the penalty should instead be derived from application of the statutory penalty criteria." *Id.* at 17 (JAB Ohio). On January 13, 2010, the ALJ issued a notice of hearing.

In response, the Region indicated that:

> [i]t is the position of Complainant that Respondent has defaulted on Complainant's Motion for Accelerated Decision on Liability and Penalty on both issues, penalty as well as liability, and that Respondent is not entitled to an oral evidentiary hearing. Therefore, Complainant will be participating in the scheduled hearing under protest. In the interest of preserving her appeal rights, Complainant will present no evidence at the hearing, and will not make

[5] In the JAB Toledo matter, the ALJ issued an Order on Complainant's Motion for Accelerated Decision on Liability and Penalty (Jan. 12, 2010), in which the ALJ incorporated by reference the Order on Liability and Penalty in JAB Ohio. *See* Order on Liability and Penalty (JAB Toledo) at 2. All remaining citations to these orders will be to the JAB Ohio order only.

> available for cross-examination any Agency personnel, or other witness.

See Supplemental Pre-Hearing Exchange of the Administrator's Delegated Complainant (Jan. 22, 2010) ("Region's Suppl. Pre-Hearing Exchange"), at 2.

Consistent with its "protest," Complainant's counsel did not present any evidence regarding penalty at the hearing or present any EPA penalty calculation witness. Transcript of Proceedings (Feb. 23, 2010) ("Tr.") at 8-9; Init. Decisions on Penalty at 1 (JAB Ohio), at 1-2 (JAB Toledo). The Region has argued extensively both before and after the hearing that Respondent raised no genuine issues of material fact, and that the Region was determined to "stand on the pleadings," in part because Respondent was not entitled to a hearing on the penalty, and the penalty assessment should be done on "documentary evidence" alone. Thus, the only evidence presented at the hearing on the issue of the appropriate penalty was a witness presented by Respondent, which Complainant's counsel did briefly cross-examine. Tr. at 60-62.

Following the hearing and a series of post-hearing briefs, the ALJ found that EPA had presented "no evidence" on the issue of penalty, and thus EPA failed to present a prima facie case, let alone meet its burden of persuasion, as to an appropriate penalty. Consequently, the Court imposed a penalty of $0.00 in both the JAB Ohio and the JAB Toledo matters. Init. Decisions on Penalty at 17 (JAB Ohio), at 19 (JAB Toledo).

The ALJ also considered JAB Toledo's and JAB Ohio's request for attorneys fees and costs that was included in the Motion for Entry of Decision (Feb. 9, 2019) filed prior to the hearing. Although the ALJ expressed that such fees and costs "should" be available, he refrained from granting such relief and instead stated that Respondents had "preserved the issue for appeal," and must "await the Board's determination of the availability of such relief." Init. Decisions on Penalty at 17 (JAB Ohio), at 19 (JAB Toledo).

VI. *ANALYSIS*

A. *A Zero Penalty Against JAB Toledo and JAB Ohio is Appropriate*

As explained above, the first question the Board considers in this appeal is whether the ALJ erred in awarding a zero penalty against JAB Toledo and JAB Ohio. As described briefly above, after JAB Ohio and JAB Toledo had conceded liability in these matters, the ALJ ordered a hearing on the appropriate penalty. The Region objected to the hearing and argued that no material facts were in dispute and that Respondents were not entitled to cross-examine witnesses on the penalty. When the Region refused to meaningfully participate in the hearing and

did not put on any evidence at the hearing, the ALJ awarded a penalty of zero. The Region appeals from the zero penalty. For the reasons below, the Board determines that a zero penalty assessment is appropriate in these cases.

The administrative assessment of civil penalties in enforcement matters is governed by the Consolidated Rules of Practice Governing the Assessment of Civil Penalties (the "*Consolidated Rules*") found in 40 C.F.R. part 22. These regulations place the burden of presentation and persuasion regarding the penalty squarely on the complainant. *See* 40 C.F.R. § 22.24(a); *see also In re New Waterbury Ltd.,* 5 E.A.D. 529, 536-43 (1994) (discussing the burden on the complainant in an administrative enforcement proceeding under the Administrative Procedure Act, as well as under part 22).

The presiding officer's role in assessing civil penalties also is set forth under the *Consolidated Rules*. The presiding officer, in this case the ALJ, is required to decide matters in controversy based on a preponderance of the evidence. *See* 40 C.F.R. § 22.24(b). The rules require the ALJ to issue an initial decision containing a recommended civil penalty assessment.[6] 40 C.F.R. § 22.27. The amount of the recommended civil penalty must be determined by the ALJ "based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The ALJ must "consider any civil penalty guidance issued under the Act [and must] * * * explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act." *Id.* Finally, "[i]f the [ALJ] decides to assess a penalty different in amount from the penalty proposed by complainant," the ALJ must "set forth in the initial decision the specific reasons for the increase or decrease." *Id.; see also In re Euclid of Virginia, Inc.*, 13 E.A.D. 616, 686-87, 689 (EAB 2008). Additionally, as the Board has explained previously, the ALJ is under no legal obligation to impose a region's recommended penalty, even if the recommended penalty takes all of the recommended statutory factors into account. *In re Employers Ins. of Wausau and Group Eight Tech., Inc.*, 6 E.A.D. 735, 758-759 (EAD 1997) (making clear that "if * * * the [p]residing [o]fficer does not agree with the [r]egion's analysis of the statutory penalty factors or their application to the particular violations at issue," the presiding officer "may specify the reasons for disagreement," and "may assess a penalty different from that recommended"). Instead, the ALJ may conduct his own analysis of the penalty, and in doing so, may consider such additional evidence as the ALJ deems necessary for an informed decision as to the appropriateness of the proposed penalty. *Id.* (explaining that the ALJ "is in no way constrained by the Region's penalty proposal," and that "nothing in Part 22 ex-

[6] A presiding officer's recommended penalty assessment becomes final "45 days after its service upon the parties and without further proceedings unless" the decision is reopened, appealed, set aside or reviewed pursuant to 40 C.F.R. § 22.27(c)(1)-(4) (describing procedures for reconsideration and appeal of an Initial Decision).

pressly limits or restricts what the [p]residing [o]fficer may consider in determining whether to adopt the [r]egion's unrebutted penalty proposal or to deviate from that proposal").

To accomplish his or her role in the administrative penalty process, the *Consolidated Rules* provide the ALJ with the authority to "conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." 40 C.F.R. § 22.4(c). To accomplish this task, the ALJ may "[c]onduct administrative hearings," "[r]ule upon motions, requests, and offers of proof, and issue all necessary orders," "[e]xamine witnesses and receive documentary or other evidence," and "[h]ear and decide questions of facts, law, or discretion." *Id.* § 22.4(c)(1)-(2), (4), (7). The ALJ also may "[*o*]*rder a party,* or an officer or agent thereof*, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown draw adverse inferences against that party*," and *[d]o all other acts and take all measures necessary* for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice." *Id.* § 22.4(c)(5), (10) (emphases added).

Thus, under the regulations governing administrative enforcement proceedings, the ALJ unquestionably has both the responsibility initially to determine any penalty amount, and the discretion to order a hearing on penalty.[7] When an ALJ orders the Region to produce testimony, documents or other evidence at a hearing to meet the Agency's burden of proof, counsel for the Region is required to comply. *See id.* § 22.4(c).

Notwithstanding the ALJ's responsibility to weigh the evidence and assess a penalty in these matters, and the complainant's responsibility to prove its case, the Region refused to comply with the ALJ's order to produce evidence concerning the proposed penalties at a hearing. *See* Complainant's Post-Hearing Brief (Mar. 31, 2010), at 1-3 (acknowledging that the Region "participat[ed] in the scheduled hearing under protest," had determined that it would "stand on the pleadings," and "presented no evidence at the hearing"). Counsel for the Region attempted to justify his conduct by arguing that "Respondent[s] fail[ed] to raise any genuine issue of material fact" that would entitle Respondent to a hearing and that "there was sufficient documentary evidence in the record" from which to conclude the proposed penalty was appropriate. *Id.* at 2; *see also* Region's Appeal Br. at 64-67, 89-97. Counsel relied on the penalty analysis and recommendation he submitted

[7] ALJs also have the discretion to proceed without a hearing where an ALJ determines that no genuine issues of material fact exist and the ALJ exercises his discretion to apply the law to the unrefuted facts before him. *See In re Newell Reycling Co., Inc.,* 8 E.A.D. 598, 625 (EAB 1999); *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 792-93 (EAB 1997). Because in this case the ALJ determined a hearing was necessary, the Board's decisions in *Green Thumb* and *Newell Recycing,* on which the Region heavily relies, are inapposite.

as an attachment to the Region's memorandum in support of its Motion for Accelerated Decision on Liability and Penalty, as well as JAB Ohio's and JAB Toledo's concessions of liability for the violations, and argued that these were sufficient to meet the Region's burden of proof. Complainant's Post-Hearing Brief, at 3-5. On that basis, the Region refused to comply with the ALJ order and did not present any evidence at the hearing on penalty. *Id.*

The Region's assertion that there was "no genuine issue of material fact" requiring a hearing was not sufficient to justify the refusal to submit any evidence to support the proposed penalty at the hearing, as ordered by the ALJ. The ALJ, not counsel for the Region, is vested with the authority to determine whether genuine issues of fact exist that necessitate a hearing. 40 C.F.R. § 22.4(c). In this case, the ALJ concluded that genuine issues of fact regarding the appropriateness of the penalty did exist, and on that basis the ALJ denied the Motion for an Accelerated Decision with respect to the penalty. Order on Liability and Penalty, at 17.[8] Accordingly, the ALJ exercised his discretion and ordered a hearing on penalty for the purpose of resolving the genuine issues of fact regarding penalty, as the ALJ is authorized to do under 40 C.F.R. § 22.4(c)(5). *Id.* at 5, 17; Notice of Hearing (Jan. 13, 2010); *see also In re Lazarus, Inc.*, 7 E.A.D. 318, 334 (EAB 1997) (recognizing the importance of the presiding officer's ability to exercise discretion throughout the administrative penalty proceeding).

The Board will not condone an Agency counsel's blatant refusal to produce evidence at a hearing on the appropriate penalty when ordered to do so by the presiding officer. To do otherwise would undermine the duly delegated authority of the ALJ, as provided in 40 C.F.R. § 22.4(c), as well as call into question the fairness and impartiality of administrative enforcement proceedings of the Agency. An ALJ's role in the process is not to accept without question the Region's view of the case, but rather to determine an appropriate penalty as required by 40 C.F.R. § 22.27. As part of an ALJ's evaluation, the ALJ must ensure that in the pending case the Region has applied the law and Agency's policies consistently and fairly. To fill that role, the ALJ must have the authority and discretion to examine and weigh the evidence. In the Board's view, ensuring that EPA's regula-

[8] The Region argues that the ALJ erred in determining that a genuine issue of material fact existed necessitating the hearing on penalty. Region's Appeal Br. at 62-67; *see also* Region's Suppl. Pre-hearing Exchange at 2 (taking the position that Respondents were not entitled to a hearing because Respondents had not met their burden – presumably to raise material issues of fact). The Board declines to consider whether the ALJ erred in making that determination. If the Region believed that the ALJ had made such an error, the Region had two options: (1) it could seek an interlocutory appeal of the decision under 40 C.F.R. § 22.29; or (2) it could proceed as ordered by the ALJ, present evidence of an appropriate penalty at the hearing, along with its legal arguments for why the penalty was appropriate. Instead, the Region took the brazen and disrespectful step of refusing to comply with the ALJ's order to produce evidence at a hearing on the proposed penalty, which resulted in a zero penalty.

tions and policies are imposed consistently and fairly is critical to the administrative review process.

In assessing the zero penalty against each of the Respondents, the ALJ concluded that the Region "failed to produce any evidence on the issue of an appropriate penalty" and, therefore, did not meet its burden of proof. Init. Decisions on Penalty at 17 (JAB Ohio), at 19 (JAB Toledo). The Board does not agree with the ALJ's conclusion that there was no evidence in the record from which to determine a penalty.[9] Nevertheless, for the reasons that follow, the Board agrees that a penalty of zero is appropriate under the circumstances presented.

The *Consolidated Rules* provide that where a party fails to produce testimony, documents, or other non-privileged evidence as ordered without good cause being shown, the ALJ may draw adverse inferences against that party. 40 C.F.R. section 22.4(c)(5). The rules also permit the ALJ to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by [the *Consolidated Rules*]." *Id.* § 22.4(c)(10). Although the ALJ did not specifically rely on section 22.4(c) when he imposed a penalty of zero in this matter, the Board concludes he certainly could have. *See* 64 Fed. Reg. 40,138, 40,144 (Jul. 23, 1999) (explaining that the broad language of § 22.4(c)(10) "authorizes the [p]residing [o]fficer to impose a broad array of sanctions appropriate for management of cases").

Additionally, the Board reviews an ALJ's decision *de novo,* and in exercising its duties and responsibilities under Agency regulations, has the authority to "do all acts and take all measures as are necessary for the efficient, fair and impartial adjudication of issues arising in a proceeding." 40 C.F.R. § 22.4(a)(2). The rules specifically include the Board's ability to impose "procedural sanctions against a party who without adequate justification fails or refuses to comply with [the *Consolidated Rules*]," such as "denying any or all relief sought by the party in the proceeding." *Id.*; *see also* 64 Fed. Reg. at 40,145 (specifically and expressly authorizing the Board to impose procedural sanctions for failures to comply with the *Consolidated Rules*, which the Board always had considered implicit). Based on that authority, and under the specific circumstances of this case, the Board

[9] JAB Ohio and JAB Toledo conceded liability in this case and the conceded violations of RCRA, alone, can form the base range for a penalty under the RCRA penalty guidance. U.S. EPA, Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, RCRA Civil Penalty Policy at 12 (June 2003). Once the base range is determined, however, the RCRA penalty guidance provides discretion to determine where in that range the base penalty should fall. Additionally, the RCRA penalty guidance also provides the discretion to adjust a penalty up or down significantly based on various factors. *Id.* at 33 (describing a myriad of factors that may be considered in adjusting penalty up or down that are case and fact specific and that are not relevant to the initial finding of liability).

concludes that a zero penalty is appropriate based on, and as a sanction for, Regional counsel's refusal to put on any evidence at the hearing as ordered by the ALJ.[10]

The Board reaches this conclusion without considering whether there was sufficient evidence in the record to support the Agency's recommended penalty assessment. Although the Region argues that Respondents' "concession of liability and the Presiding Officer's grant of summary disposition with regard to liability converted the original 'unverified pleadings' into the uncontested facts of the case," which includes the attachments to those documents, Region's Appeal Br. at 84, the Board observes simply that the Agency's burden of persuasion as to penalty does not end with a concession of liability and a counsel's legal memorandum in support of the penalty assessment explaining how the penalty was derived. The amount of penalty assessed in a RCRA enforcement action requires consideration of a mixture of facts and law that are not necessarily established by a concession or determination of liability. For example, factors such as good faith efforts to comply or the lack thereof, the degree of willfulness involved, a history of noncompliance, ability to pay, and other unique factors, all may involve questions of fact that an ALJ must resolve in assessing a penalty. *See also* note 9, above.[11]

The Board also reaches this conclusion without regard to whether Respondents were *entitled* to a hearing or whether a hearing was required.[12] As clearly set

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[10] The Board declines to consider the penalty *de novo* based upon the Respondents' concessions of liability. That is precisely the result the Region sought when it refused to comply with an ALJ order, which the Board will not condone.

[11] On appeal, the Region acknowledges that pleadings are not by themselves evidence. *See* Region's Appeal Br. at 84 (referring to this principle as "well-established"); Init. Dec. on Penalty at 3-4 (citing, among other cases, *Pullman v. Bullard*, 44 F.2d 347, 348 (5th Cir. 1930) (explaining that the purpose of pleadings "is to fix the contentions of each party" and noting that "statements of fact in a party's pleadings * * * are not evidence for himself") and *Olson v. Miller*, 263 F.2d 738, 740 (D.C. Cir. 1959) (stating plainly that pleadings are not evidence). Rather, the Region argues that Respondents' "concession of liability and the Presiding Officer's grant of summary disposition with regard to liability converted the original 'unverified pleadings' into the uncontested facts of the case," which includes the attachments to those documents. Region's Appeal Br. at 84. Moreover, the Region does not argue that it requested that the parties stipulate that the unverified pleadings be introduced into the record, or that it so moved on its own initiative.

[12] Complainant's various motions and other filings before the ALJ make it clear that Counsel for the Region was focused on his belief that Respondents were not entitled to a hearing. *See, e.g.,* Compl. Motion to Strike, in part, Respondent's Pre-Hearing Exchange (Dec. 12, 2008); Region's Suppl. Pre-hearing Exchange at 2. To the extent that the Region was arguing further that the ALJ had no discretion to order an evidentiary hearing, Counsel went too far – for the reasons already explained. In an attempt to explain the position of Counsel for the Region, the ALJ referenced an outside journal article written by that Counsel. That article plainly states that the views expressed are not the views of the Agency and the article was not relied on or cited by the Region. Accordingly, the ALJ erred in inserting the article in the record of this decision. Because that article has no bearing on the Board's decision in this matter, the Board will not address its merits, or the lack thereof.

forth in the administrative regulations, the ALJ had the *discretion* to order the hearing, as well as the obligation to weigh the facts and reach a conclusion with respect to the penalty. When ordered to make its case with respect to the proposed penalty at a hearing, Complainant chose not to do so. Not only did Complainant fail to meet its burden to persuade the ALJ with respect to penalty, he effectively exposed the Agency to an award of a zero penalty as a sanction for failure to comply with an ALJ's order. Accordingly, and for these reasons, the Board concludes that a zero penalty against JAB Toledo and JAB Ohio is appropriate under the circumstances of these matters.

B. *In Light of the Zero Penalty, the Board Does Not Consider Whether the ALJ Erred in Determining that JAB Inc. Could Not Be Held Liable for the Violations*

In addition to appealing the ALJ's penalty decision, the Region asks the Board to overturn the ALJ's conclusion that JAB Inc., the parent company of both JAB Toledo and JAB Ohio, was not liable for the violation at either facility. *See* Region's Appeal Br. at 16-54; *see also* Orders on Derivative Liability, at 36 (JAB Ohio), and at 3 (JAB Toledo). The Region argued that JAB Inc. could be held derivatively liable under the equitable doctrine of piercing the corporate veil. *See* Region's Motions re Derivative Liability, at 3-4, 8-37 (JAB Ohio), and at 3-4, 7-35 (JAB Toledo). The Region also argued that JAB Inc. could be held directly liable based on JAB Inc.'s alleged "operation" of the facilities. *See id.* at 3-4, 37-44 (JAB Ohio), 3-4, 35-42 (JAB Toledo) (each citing *U.S. v. Bestfoods,* 524 U.S. 51 (1998)).[13]

The ALJ determined that JAB Inc. could not be held liable in either case, concluding that the Region had not advanced any substantial facts to support the liability of JAB Inc. under either theory of derivative or direct liability. *See* Orders on Derivative Liability at 36 (JAB Ohio), and at 3 (JAB Toledo).[14]

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[13] A more complete explanation of the arguments made, the law cited, and the ALJ's decision may be found in the ALJ's Orders on Derivative Liability. Because the Board is declining to reach this issue, only a brief summary is presented here.

[14] In determining whether JAB Inc. could be held derivatively liable, the ALJ stated that the Region had not established facts that would support holding JAB Inc. derivatively liable under either federal or state law, but the ALJ also determined that Ohio common law, rather than federal common law, applied. *See* Orders on Derivative Liability, at 8 (JAB Ohio) and, by incorporation, at 3 (JAB Toledo). The Board observes, however, that the U.S. Supreme Court explicitly declined to resolve the "significant disagreement among courts and commentators" on whether courts should borrow state law, or instead apply a federal common law of veil piercing in the context of enforcing CERCLA. *See United States v. Bestfoods,* 524 U.S. 51 at 64 n.9 (1998). This question remains unresolved. *Compare, e.g., United States v. General Battery Corp., Inc.,* 423 F.3d 294, 300 (3rd Cir. 2005) (stating that *Bestfoods* "cut[] in favor" of a uniform federal standard, in part because "[a]pplying a particular state's law requires a state-by-state interpretation of the federal liability statute – a result, in the case of suc-

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The Board concludes that if it were to overturn the ALJ's decision on liability and find JAB Inc. derivatively liable in these matters, the company would be subject to the same penalty that was assessed against its subsidiaries, which in this case was zero. The parent company's liability – if the corporate veil could be pierced – would be derived from the liability of its subsidiary. Because the Board has determined that the penalty assessed for the violation in this case is zero based on the Region's decision not to put on its penalty case in violation of the ALJ's order to do so, any penalty assessed against the parent company – even if it could be held derivatively liable – would be zero. Accordingly, there effectively can be no penalty against the parent company in the cases before us, and the Board's resolution of the question of derivative liability would not materially alter the outcome of this case. Under these unique circumstances, and in the interest of judicial economy and conserving Agency resources, the Board declines to consider the question of derivative liability in this matter.

Similarly, the Board declines to review the ALJ's ruling on the issue of JAB Inc.'s direct liability as an "operator" of the facilities. The Region's proposed penalty in each matter was identical as to both the parent and the subsidiary, and the penalty did not vary based on the theory of liability (derivative or direct). Amended Compl. at 7. Even if direct liability could be established, the Board is not willing to give the Region another opportunity to make its penalty case for the very same violations. Providing another opportunity for the Region to obtain a penalty on this theory would undermine the effectiveness of the sanction previously imposed for the Region's refusal to present its penalty case to the ALJ. As such, the Board concludes that an appropriate penalty under the circumstances presented is zero in both cases as to all Respondents, based on the conduct of the Region. Thus, in the interest of judicial economy and conserving Agency resources, the Board declines to consider the question of direct liability in this matter.

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cessor liability under CERCLA, that [the Third Circuit Court of Appeals] believe[d] conflicts with [CERCLA's] statutory objectives") *with Carter-Jones Lumber Co. v. Dixie Dist. Co.,* 166 F.3d 840, 847 (6th Cir. 1999) (quoting the Supreme Court in *Bestfoods* and finding it appropriate to apply state law because CERCLA "in no way addresses issues of corporate liability, and it should not therefore be presumed to alter state laws governing the liability of corporations") (footnote omitted). Although JAB Inc. argued – and the ALJ agreed – that the 6th Circuit's decision to apply state law in *Carter-Jones Lumber* should govern the RCRA matter now before us, the Board declines to determine whether the ALJ applied the appropriate law or reached the correct conclusion based on the facts before him with respect to derivative liability in this matter. Accordingly, the Board's Order in this case should not be viewed as an endorsement of the ALJ's decision on the question of whether state or federal law applies in RCRA cases involving issues of corporate liability because, as explained below, the Board declines to consider the issue of derivative liability in this case.

C. *Respondents Are Not Entitled to Costs and Attorneys' Fees in this Matter*

The final issue the Board considers is whether JAB Ohio and JAB Toledo are entitled to costs and attorneys' fees in this matter. JAB Ohio and JAB Toledo assert that fees and costs are warranted based on Regional Counsel's conduct in unreasonably pursuing its claims against Biewer Lumber LLC and in refusing to participate in the ALJ-ordered hearing on penalty. Appeal Brief of Respondents-Appellees ("Resp. Appeal Br.") at 109. Respondents assert that the Board has the discretion to order attorneys' fees and costs pursuant to its general authority under the *Consolidated Rules*, 40 C.F.R. §§ 22.1, 22.4(c)(10). Alternatively, Respondents assert that the Federal Rules of Civil Procedure ("FRCP") should apply analogously and that the FRCP authorizes an award of attorney fees and costs.[15] Resp. Appeal Br. at 107. Both asserted theories for attorneys' fees and costs fail as a matter of law.

First, Biewer Lumber LLC is not a party before this Board and any claim based on conduct against Biewer Lumber LLC must be pursued by that company. Second, JAB Inc. was no longer a party to the proceedings during the penalty phase and so did not seek, and would not be entitled to, any claim of fees based on the Region's actions during that phase of the proceeding. Finally, as correctly noted by Respondents, attorneys fees may be shifted to the federal government, but only where Congress has waived the federal government's sovereign immunity. Resp. Appeal Br. at 107. Any waiver of sovereign immunity must be express and is strictly construed in favor of the sovereign. *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983). Thus, the Board is not authorized to award fees and costs against the Agency based on its general authority to "resolve issues" or based on an analogous application of the FRCP.[16] Neither the *Consolidated Rules* nor the FRCP expressly authorize attorneys' fees or costs against the Agency and the Board will not construe them in such a manner.[17] Based on the foregoing, the

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[15] Although Respondent does not identify a specific rule or theory for fees and costs to be awarded under the FRCP, the Board presumes, based on Respondents' reliance on *Mattingly v. U.S.*, 939 F.2d 816, 818 (9th Cir. 1991) and *Westmoreland v. CBS*, 770 F.2d 1168, 1177 (D.C. Cir. 1985), that Respondents are referring to FRCP Rule 11 which provides for an award of fees and costs as a sanction for frivolous conduct in the context of a federal civil proceeding.

[16] The Board is not bound by the FRCP, but may in its discretion refer to them for guidance when interpreting EPA's procedural rules. *In re Pyramid Chemical Co.*, 11 E.A.D. 657, 683 n.34 (EAB 2004).

[17] The Region's appeal brief argues that Respondents are not entitled to fees under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504(a)(1), (a)(4), which does specifically provide for an award of attorneys' fees and costs against the government to a "prevailing party" under certain circumstances. *See In re Donald Cutler*, 13 E.A.D. 237, 241-43 (EAB 2007). Respondents, however, have not sought fees under that statute. *See* Motions for Entry of Decision at 5 (Feb. 9, 2010) (seeking fees
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Board denies Respondents' request for an award of attorneys' fees and costs.

VII. *CONCLUSION*

Based on the foregoing, the Board concludes that a zero penalty against JAB Toledo and JAB Ohio is appropriate under the circumstances of these cases.[18] Additionally, because the Board concludes that any penalty against JAB Inc. would be limited to the penalty imposed against JAB Toledo and JAB Ohio, and the Board has determined that a penalty of zero is appropriate as a sanction, the Board declines to address the issue of either derivative or direct liability. Finally, the Board concludes that Respondents are not entitled to an award of attorneys' fees or costs.[19]

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under 40 C.F.R. § 22.4(c)(10)); Init. Decisions on Penalty at 17 (stating that Respondents' claim for fees is based on 40 C.F.R. part 22); Respondents' Appeal Br. at 107-10 (citing 40 C.F.R. §§ 22.1(c) and 22.4(c)(10) as the basis for fees, and noting the existence of EAJA but making no claim under that statute or its implementing regulations, found in 40 C.F.R. part 17). Moreover, any request for fees under EAJA would be premature. *See* 5 U.S.C. § 504(a)(2); 40 C.F.R. §§ 17.11- .14 (prescribing the application process for fees under EAJA, as well as the timing of any such application); *see also Ryan v. U.S.*, 71 Fed. Cl. 740, 743 (Fed. Cl. 2006) (declining to rule on availability of attorneys fees before an EAJA application was properly filed). Thus, the Board does not consider an EAJA claim in this decision.

[18] Although the Complaint in this matter sought to have a compliance order imposed against the Respondents, the Region did not seek to have the compliance order imposed in its Motion for Accelerated Decision on Liability and Penalty and the ALJ's decision was silent with respect to the compliance order. On appeal, the Region did not expressly challenge the ALJ's failure to rule on the compliance order. Thus, the Board is not addressing the compliance order in this decision. The Board observes, however, that nothing prevents the Region from seeking a compliance order in the future if there is a continuing violation, if the Region determines such action is both necessary and appropriate.

[19] The Board would be remiss if it did not express its dismay at the level of animosity between the Regional Counsel and the ALJ reflected in the pleadings, the ALJ orders, and the transcript of proceedings in these matters. We certainly believe that this is an anomaly and not at all typical of the respect generally shown by and to parties and presiding officers. We do expect that in all future cases, Regional Counsel will ensure that the attorneys assigned to their respective offices will conduct cases in a manner that demonstrates a respect for the administrative process and the authority given in EPA regulations to officials who preside over matters pending before them. We also expect that presiding officers will not allow their personal frustrations with counsel to be so evident in their orders. As noted by the ALJ himself, "the [presiding officer's] analysis must be dispassionate and based on the law." Order on Derivative Liability at 30 (JAB Ohio) and 3 (JAB Toledo) (incorporating by reference the corollary order in JAB Ohio). This is equally true of orders issued by ALJ's, even under trying circumstances.

VIII. *ORDER*

The Board affirms the ALJ's penalty assessment of zero based on the Region's failure to present any evidence of an appropriate penalty at the penalty hearing in violation of the ALJ's order.

So ordered.