UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:	)	
	)	
John A. Biewer Company of Toledo, Inc.	)	
300 Oak Street	)	
St. Clair, Michigan 48079-0497	)	
(Perrysburg Facility)	)	
	)	
U.S. EPA ID #: OHD 106 483 522; and	)	**DOCKET NO. RCRA-05-2008-0006**
	)	
John A. Biewer Company, Inc.	)	
812 South Riverside Street	)	
St. Clair, Michigan 48079; and	)	
	)	
Biewer Lumber LLC	)	
812 Riverside Street	)	
St. Clair, Michigan 48079	)	
	)	
Respondents	)	

Initial Decision Regarding Penalty

Introduction.

Respondent, John A. Biewer Company of Ohio, Inc., ("Biewer Ohio"), which was the sole initial Respondent in this matter, has admitted that the violation alleged in the Complaint occurred. In previous rulings, the Court has determined that neither of the subsequently named respondents, John A. Biewer Company, Inc., nor Biewer Lumber LLC,[1] can be held derivatively liable for the violation by Biewer Ohio. The penalty issue is the last matter to be resolved.

Background.

As Respondent correctly recounts in its post-hearing brief, a hearing regarding Complainant's proposed penalty amount for the Respondent's conceded violation of the Resource Conservation and Recovery Act ("RCRA") was held in Toledo, Ohio on February 23, 2010. Prior to the hearing, counsel for Complainant, EPA, stated that it was participating in the hearing "under protest" and it intentionally refused to produce any evidence or witnesses at the

[1] Long after discovery was completed, EPA itself finally recognized that there was no basis to hold Biewer Lumber LLC derivatively liable.

hearing. This "protest" included its refusal to present the EPA penalty calculation witness, which individual the Court had previously ordered was to be produced for cross-examination. At the hearing, EPA followed through on its refusal to present any evidence on the appropriate penalty. Respondent surmises that EPA's decision to "protest" the hearing and to refuse to present any proof stems from EPA counsel's personal belief that a respondent is not entitled to any evidentiary hearing regarding penalty, and that the administrative law judge has no choice but to accept Complainant's penalty assessment, on the theory that the procedural rules do not apply to a penalty determination and the Complainant alone, not an administrative court, dictates the penalty amount.

Given EPA Counsel's position that, despite the Court's direction that EPA make its penalty witness(es) available for examination at the hearing, it need not present any evidence regarding the proposed penalty and that a respondent is not entitled to a hearing on that issue, but rather that the process may only involve competing paper submissions of the parties' respective views of the appropriate penalty, Respondent notes, accurately, that the Court requested that the parties address the subject of whether EPA had presented *any* evidence in support of its proposed penalty in the course of this proceeding.

EPA's Post-Hearing Brief.

EPA begins its post-hearing brief with its oft-stated position that, despite the fact that it is the Complainant in this proceeding and even though EPA requested, and was granted, extensive discovery in its effort to find other respondents it hoped to hold liable for any civil penalty that might be imposed, nevertheless its participation in the civil penalty phase of the hearing was "under protest." Accordingly, while using its authority to prosecute alleged RCRA violations and using the procedural rules to accomplish that objective, and despite benefitting from those procedural rules by seeking discovery under them, Counsel for EPA elected to disregard those same rules when they did not operate to its liking. Yet, at that same moment of protest, EPA turned again to those Rules "for the purpose of preserving [*EPA's*] appeal rights." EPA Post-hearing Brief at 1.

EPA contends that the Respondent failed "to raise any genuine of material fact," (sic) *Id.* at 2. By this, EPA apparently means to say that the Respondent failed to raise any genuine *issues* of material fact. EPA's theory is that, while the Court denied EPA's Accelerated Decision Motion as to the penalty, the denial created a basis for EPA to appeal that denial as an "issue[] raised during the course of the proceeding." *Id*., citing 40 C.F.R. § 22.30(c). As EPA expresses its position, it has "determined to stand *on the pleadings* . . . and present[] *no evidence* at the hearing." *Id*. at 3 (emphasis added).

As to meeting its burden of establishing the appropriateness of its proposed penalty of nearly one third of a million dollars,[2] EPA states that it "provided a 27-page analysis explaining how the [ ] penalty amount proposed was determined." *Id.* EPA's Counsel[3] makes it clear that

[2] To be exact, EPA's pleading proposed a civil penalty of $282,649.00.

[3] The Court takes pains to note that it considers this stance as the view of EPA's Counsel, Mr. Wagner. Accordingly, the Court, at least at this juncture, believes that this strident view that

this is all the Respondent is entitled to receive on the subject and that a respondent has no right to look behind the curtain, so to speak, and inquire further about EPA's analysis "*of the evidence*" nor the application of the policy components.

At least for purposes of its post-hearing brief contentions, EPA states that the Respondent lost its opportunity to a hearing by failing to raise issues of material fact about the proposed penalty. Yet, EPA contradicts its own assertion that the Respondent made *no* challenge to the penalty calculation by admitting in the same sentence that the *Respondent challenged* the " 'degree of willfulness' and [its] 'good faith efforts to comply.'" While EPA then contends that the "Respondent cited no evidence in the record to support its assertions" that financial inability was the source of its inability to comply with the cited regulation, this claim is beyond disingenuous because EPA well knows that the Respondent had become insolvent. In recognition of that fact, EPA engaged in a lengthy period of discovery aimed at finding other Biewer Companies that it hoped to hold responsible for any civil penalty that might be imposed.

In any event, accepting for the moment the claim that the Respondent presented no material facts in dispute as to EPA's penalty calculation, and therefore supposedly lost its right to a hearing to challenge the proposed penalty, EPA insists that the "penalty amount ought to be determined 'on the documentary record.'" The problem for EPA is that, in the Court's view, there is no documentary *evidence in the record* from EPA.[4] Rather, from EPA at least, there are only pleadings. *There are no exhibits from EPA, nor did it provide any testimony.*

The absence of any exhibits is significant, as it is well-established that "[f]actual allegations in unverified pleadings are not 'evidence' to be considered in a factual inquiry." *United States v. Aguirre*, 245 Fed. Appx. 801, 802-03 (10th Cir. 2007). Thus, "[t]he government's assertions in its pleadings are not evidence." *United States v. Zermeno*, 66 F. 3d 1058, 1062 (9th Cir. 1995). *See also Olson v. Miller*, 263 F.2d 738, 740 (D.C. Cir. 1959); *Cramer v. France*, 148 F.2d 801, 804-05 (9th Cir. 1945) (distinguishing "evidence" from an exhibit which was, in fact, simply a pleading)[5]; *Pullman Co. v. Bullard*, 44 F.2d 347, 348 (5th Cir. 1930) (holding that pleadings are not evidence of alleged facts). The court explained in *Pullman* that the purpose of pleadings "is to fix the contentions of each party...[and it noted that] statements of fact in a party's pleadings are merely his contentions and are not evidence for himself." 44 F.2d at 348. Nor is an exhibit attached to a pleading evidence "unless identified and introduced in evidence as an exhibit during the period for the taking of testimony." *Bishop v. Flournoy*, 319 Fed. Appx. 897, 899 (Fed Cir. 2009). "Counsel should know [] statements and pleadings are not evidence." *Medina v. Pacheco*, 1998 U.S. App. LEXIS 22533, at *9 n.5 (10th Cir. Sept. 14, 1998). With that distinction in mind, the court reminded that its ruling must be based "on the evidence produced at trial." *Id.*

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there is no ability to test EPA's proposed penalty is confined to that lone EPA Counsel, along with the implicit concurrence of his supervisor. The Court has no basis to conclude that this represents the view of EPA's Headquarters.

[4] The remainder of EPA's 13 page post-hearing brief, that is pages 5 through 13, is devoted to challenging the evidence presented at the hearing on the issue of the appropriate penalty by the only party that participated in that hearing, namely, the Respondent.

[5] While pleadings are not evidence, there is the distinction in that such pleadings are binding on the party who submits them and may be taken as admissions by the party filing them.

Although EPA touts *Newell Recycling Company*, 8 E.A.D.598 (1999) ("*Newell*") for its position that the penalty should be determined on the "documentary record," it misses two key points about the Environmental Appeals Board's ("EAB" or "Board") decision. First, unlike here, there was a documentary record in *Newell*. This consisted of the Declaration of an EPA environmental scientist. In contrast, there is no declaration here from a witness. Instead, in the present case, the penalty computation was prepared by none other than the same EPA Counsel who is its litigator.[6] The second point is that EPA glides over the very important point made by the Board, in *Newell*, where there was documentary evidence, that *it is within the Presiding Officer's discretion whether to hold an evidentiary hearing on the amount of the penalty*. As EPA knows, this Court advised early on in the proceedings that it would exercise its discretion and afford the Respondent with the opportunity to cross-examine EPA on its proposed penalty. Accordingly, even in a case very different from the situation here, where there was documentary evidence but no genuine issue of material fact in dispute, while the Court may not be under an *obligation* to hold a hearing, it still has the discretion to do so. It is this Court's view that such discretion should almost always be exercised to grant a respondent the opportunity to cross-examine EPA's penalty proposal. The reasons for this are plain. In the Court's experience of nearly thirteen years of presiding in EPA administrative litigation, far more often than not, cross-examination has disclosed flaws in EPA's penalty calculation, which flaws were not apparent on the face of the document supporting it.

It would seem there are only two ways such potential flaws can be uncovered. Discovery, that is, through a deposition of the person who performed the application of the penalty policy to the facts alleged by EPA, could be routinely granted. However, cross-examination during a hearing on the penalty issue would seem to be a more efficient means to test the soundness of EPA's application of its Policy in a given case. The other point, entirely missed by EPA's Counsel here, is that for the administrative hearing process to have legitimacy and to avoid having it appear to be a 'gamed' process, respondents routinely should have "their day in court" to inquire of EPA's penalty calculation process. As commenters on the administrative hearing process have noted, the importance of this opportunity to inquire grows as the penalty sought by EPA moves beyond a nominal penalty and certainly here the penalty EPA seeks here is quite significant.

Although EPA also looks to the Board's decision in *Green Thumb Nursery, Inc.*, 6 E.A.D. 782 (March 6, 1997) for support, the Court does not have the same view of EPA's interpretation of that decision. That is because the Board found that notwithstanding Green Thumb's failure to make a timely request for a hearing, the *Presiding Officer retained discretion to hold a hearing in his informed discretion*, as provided by 40 C.F.R. § 22.15(c). While it happened that in that instance, upon due consideration, the Presiding Officer declined to hold an evidentiary hearing with live testimony, deciding to resolve the matter based upon a documentary record to be developed by the parties, that simply reflects the particular discretion

[6] Very late in this proceeding EPA added another counsel to this litigation. That addition had no effect on the issues at hand. It is the Court's view that EPA Counsel should have been aware of, and avoided, the awkward situation he had created by placing himself in the dual role of complainant's counsel and the sole witness on the penalty calculation.

exercised by that judge on that occasion. The Board did review the judge's exercise of his discretion, finding that it was within appropriate bounds.[7]

Further, citing FIFRA section 14(a)(3); 40 C.F.R. §§ 22.14(a)(6) and 22.15(c), the Board acknowledged that respondents such as *Green Thumb* are entitled to an opportunity for a hearing. The same rights apply in RCRA matters.

Another critical distinction, in *Green Thumb*, the respondent filed a timely Answer but did not include a request for a hearing. Instead, Green Thumb "denied" the portion of the Complaint informing it of its right to a hearing. Based on that, the Board determined that the Presiding Officer correctly found that there was "no specific request by respondent for a hearing." Here, Biewer *did* formally "request a public hearing as provided by 43 U.S.C. § 6928(b), and as offered in the complaint." Biewer Answer. The Board, unlike EPA Counsel here, recognized the importance of that right, noting that it included "an evidentiary hearing where it would be allowed to present witnesses in support of its case *and to cross-examine witnesses against it*." The Board stated that the right included the ability to challenge "the appropriateness of the amount of the proposed penalty."[8]

Respondent's Contentions.

To begin, Respondent takes note that the Procedural Rules, as set forth in 40 C.F.R. Part 22 ("Rules"), provide that the complainant has the burdens of presentation and persuasion that the relief sought is appropriate . . . [and that] [f]ollowing complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense." Rules at § 22.24(a). Respondent further notes that "[e]ach matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence." Respondent's Post-hearing Brief at 1-2, citing Rules § 22.24(b). Thus, Respondent argues that the Complainant has the burden of presentation and persuasion as to her prima facie case, and that this burden includes establishing the appropriateness of the proposed penalty, which must be demonstrated by a preponderance of the evidence. *Id*. at 2.

As Respondent observes "[t]his administrative proceeding [] commenced with the filing of a Complaint and Compliance Order which contained a series of numbered factual allegations, followed by a section entitled 'Proposed Civil Penalty' in which Complainant cited to relevant

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[7] Unlike in this case, in *Green Thumb* there was an affidavit of the calculation of the penalty, and that affidavit was entered into evidence. Another distinction, the respondent in *Green Thumb* used the structure of the affidavit in making its argument that no penalty should be imposed. Further, Biewer has raised issues that it contends were not fairly considered in the penalty calculus. Thus, as the Board noted in *Green Thumb*, the judge in that case had a documentary record which had been compiled by the parties.

[8] Clearly, the Board's focus in *Green Thumb* was that the respondent failed to make a timely request for a hearing, not that the right to a hearing was discretionary. Further, in recognition of the discretion held by the Presiding Officer, the Board went so far as to acknowledge that such Officer may exercise that "discretion to hold a hearing notwithstanding a respondent's failure to request a hearing."

statutes and a 'Penalty Policy' (which could be obtained upon request). The 'Proposed Civil Penalty' section contained no factual allegations regarding how the penalty was calculated or why the penalty amount was appropriate. Rather, it simply state[d], "The penalty amount determined appropriate for the violations alleged in this Complaint is $287,441. See attached Penalty Summary Sheet[.]"[9] Respondent's Post-hearing Brief at 3. Respondent notes that at that point in time EPA's proposed penalty was $287,441 but that it was "factually unsupported." *Id.*

Respondent notes that it "answered all of the factual allegations, and in response to Complainant's factually unsupported proposed penalty, stated that the penalty was excessive." *Id.* at 3, citing its Answer, dated June 6, 2008. Respondent's recounting of the relevant events continues by noting that "[t]wo and one-half months later, as part of Complainant's Court-ordered pre-hearing exchange of witnesses and exhibits filed August 25, 2008, counsel for Complainant announced his decision to not call any witnesses at any hearing because it would 'become apparent from a review of the Penalty Rationale included in this Pre-Hearing Exchange [that] all facts supporting . . . the appropriateness of the penalty amount proposed are established by admissions made by Respondent in documents which it generated, and are admissible in evidence in this proceeding." *Id.* (emphasis added)

However, Respondent contends that EPA's "so-called 'Penalty Rationale' was more akin to a legal brief prepared by counsel without any statement of qualification or suggestion that the 'Penalty Rationale' was supported by a witness who would be competent to testify at trial." As such, Respondent contends that Complainant's Pre-Hearing Exchange was not a 'pleading' in the sense of seeking admissions from the Respondent. The Court agrees. Respondent then adds that "[p]articularly, with respect to the 'Penalty Rationale,' the document was neither submitted to the Court as proffered "evidence" nor would it have been admissible had it been proffered because it was nothing more than a statement by trial counsel regarding what he thought the penalty should be and his method for calculating the amount." *Id.* at 3-4. Thus, Respondent concludes that it "was upon the basis of this legal argument prepared by counsel, without introduction into evidence of any of the 'admissions' referenced in her Pre-Hearing Exchange, that Complainant demanded this Court accept without any fact finding of its own the penalty amount proposed by Complainant." *Id.* at 4. The Court agrees with this statement as well.

Respondent does acknowledge that thereafter EPA filed, on December 12, 2008, its Motion for Accelerated Decision on Liability and Penalty, together with a supporting Memorandum of Law. It notes in this regard that EPA's motion acknowledges that accelerated decision is only appropriate if there is no genuine issue of material fact regarding any issues to be resolved. *Id.* at 4, citing EPA's Memorandum at p. 5. Respondent continues with the observation that the same EPA Memorandum admits that "Respondent has acknowledged 'the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to perform action requested by Ohio EPA and/or USEPA.'" This is significant, Respondent contends, as it was "one of the arguments Respondent was advancing as a basis for reducing the proposed penalty, rather than increasing it as Mr. Wagner's calculation had done." *Id.* at 4. Respondent also points out that in the one page devoted to EPA's "Proposed Civil Penalty" in its December 12,

[9] Respondent states that the Penalty Summary Sheet "was not actually attached to Respondent's copy of the Complaint." R's PH Brief at 3.

2008 Memorandum, EPA admits that "the Court is not bound by Complainant's assessment of the penalty amount, and is free to determine a different amount, either higher or lower, with [an]explanation for the difference." *Id.* at 5, citing EPA's Memorandum at p. 23. Respondent contends that this acknowledgement by EPA is tantamount to a concession that there is a right "of the Court to conduct a hearing, to hear and consider evidence other than that presented by Complainant, or to evaluate differently the evidence presented by Complainant in determining an appropriate penalty." *Id.* at 5. The Court, as expressed earlier in this Initial Decision, certainly agrees with the Respondent's view.

Respondent also notes that, along with EPA's December 12th Memorandum, EPA included a "separate Memorandum in Support of the Penalty Amount Proposed," but it contends that it, like EPA's "Penalty Rationale," is flawed, as it merely "contained *Mr. Wagner's* argument in favor of the proposed penalty amount, and attached a variety of documents which . . . did not establish or prove the appropriate amount of a penalty." *Id.* (emphasis added). Respondent continues that the "attachments to Complainant's Memorandum in Support of the Penalty Amount Proposed were not, with few exceptions, admissible evidence without additional foundation and supporting witnesses or affidavits. Nearly all of the attachments were hearsay statements, some of which were not even attributed to a particular author. The few documents which could be construed as 'admissions' as forecasted in Complainant's Pre-Hearing Exchange, do not establish sufficient evidence to support a proposed penalty amount. In fact, some of the documents authored by Respondent or its consultant and attached to Complainant's Memorandum actually supported Respondent's contention that the proposed penalty amount was excessive. (See, e.g., Attachments A, B, C, D, L showing Respondent's efforts to comply). Moreover, even several of the attached hearsay documents supported Respondent's position. See, e.g., Attachments K and O, the latter of which includes the statement by Ohio EPA that Respondent had "adequately demonstrated abatement of all violations discovered during my September 29, 1992 inspection." The Court agrees with Respondent's characterizations in this regard as well.

More importantly, Respondent notes that it opposed EPA's Motion on the basis of its good faith efforts to comply as well as upon its financial inability to perform the closure actions demanded by EPA.[10] The Respondent also argued that application of the policy considerations, even as articulated by Complainant, when applied to the facts of this case, did not support the proposed penalty. Further, in response to Complainant's related Motion to Strike Respondent's Pre-Hearing Exchange, Respondent contended that it was "entitled by the Part 22 rules to cross-examine the EPA witness who actually calculated the penalty amount."[11] *Id.* at 6.

Respondent also correctly recounts that the Court denied both of Complainant's Motions, and that it advised the parties that it would hear evidence on the penalty issue. This included the Court's oral ruling during a conference call that EPA would have to produce for cross-

[10] Respondent observes that EPA acknowledged the issue of financial inability to pay in its December 12, 2008 Memorandum at page 16, and this was supported by financial statements attached to Complainant's motion, which financial statements the Respondent did not challenge.
[11] At that time, the Court and the Respondent had not realized that Mr. Wagner was wearing two hats, acting then as EPA's sole legal counsel as well as its sole fact witness on the penalty calculation.

examination its penalty witness. Respondent emphasizes that "no 'evidence' was admitted or even sought to be admitted by EPA."[12] Respondent accurately observes that, thereafter EPA "refused to abide by the Court's ruling regarding Respondent's right to cross-examine a penalty witness, refused to follow the [Procedural] Rules, which require presentation of a prima facie case, and essentially announced, ostensibly to preserve issues on appeal, that Complainant would no longer follow either the Rules or the Court's order in completion of a trial. Thus, at no stage in this administrative proceeding did Complainant introduce one single piece of admissible evidence to support any proposed penalty." *Id.* at 7. As a consequence of EPA's actions and refusals, Respondent then filed its Motion for Entry of Decision.

Further Findings and Discussion.

As the above discussion demonstrates, EPA has not introduced any *evidence* to support its penalty calculation, and indeed by the filing of Complainant's Supplemental Pre-Hearing Exchange on January 22, 2010, Complainant foreclosed the possibility that the Court could receive or admit any evidence, given that Complainant stated unequivocally that "Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness." (Supplemental Pre-Hearing Exchange, p. 2) Based upon this Supplemental Pre-Hearing Exchange, Complainant eliminated any possibility that the Court could receive evidence from Complainant, as dictated by 40 C.F.R. § 22.22(a)(1) which provides: "If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under section 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the documents, exhibit or testimony into evidence. . ."[13] (Emphasis added).

EPA, having produced no evidence on the issue of an appropriate penalty and the record being devoid of any such evidence[14], except evidence in mitigation of any penalty, as presented by the Respondent at the hearing on the penalty, the Court concluded that EPA has failed to meet its burden of presentation of a prima facie case as to an appropriate penalty. EPA Counsel having intentionally and utterly failed in this respect, the Court imposes a penalty of $0.00 (zero) dollars in this matter.

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[12] Had there been an attempt to seek the admission of documents on the issue, Respondent notes it "would have objected on a host of evidentiary grounds which would have necessitated a ruling on the objections and, Respondent believes, a trial during which Complainant would need to cure the evidentiary shortcomings regarding the substantial majority of Complainant's documentary 'support.'" Respondent's Post-hearing Brief at 6. This is moot, as the Court has determined that the record is devoid of any 'evidence' from EPA on the penalty issue.

[13] It is hoped that the EAB will not remand this matter and afford EPA's "Senior Attorney and Counsel" a second bite at the apple, as counsel knew exactly what he was doing when he elected to functionally boycott the penalty phase of the proceeding.

[14] The only evidence in the record on the issue of an appropriate penalty was presented by Respondent during the course of the penalty phase of this proceeding. With no evidence of an appropriate penalty offered by EPA, it has failed in meeting its burden of establishing a prima facie case on that issue. Therefore, no penalty may be imposed.

Given the unique posture taken by EPA's Counsel in this matter, the Court endeavored to learn where such atypical notions began. It did not take long to find the source of these views and the Court addressed this at the start of the February 23, 2010 penalty hearing. The Court began by stating that the penalty phase of this hearing was unlike anything that it had ever dealt with before in nearly 13 years of presiding in EPA administrative litigation matters. Therefore, it agreed with the Respondent's characterization that this proceeding has had its odd moments, but none more bizarre than EPA counsel's filing of a supplemental pre-hearing exchange.

The word "bizarre," in this Court's view is an apt description of other arguments advanced by EPA in this proceeding, as the Senior Counsel announced that its participation in the hearing was "under protest," and that it would present no evidence at the hearing, nor would it make available for cross-examination any agency personnel or other witnesses. In the face of the Court's rulings to the contrary, EPA maintained that the Respondent had defaulted on EPA's motion for accelerated decision as to liability and as to penalty. Oddly, EPA simultaneously announced that its decision to present no evidence and to make no witnesses available was done for the purpose of preserving its appeal rights.

The Court is of the view that EPA's approach has the effect of eliminating its appeal rights, at least substantively. As the Respondent has noted, this Court's December 23, 2009 decision clearly ruled that the Respondent was entitled to cross-examine EPA's penalty calculation witness. The Court agrees with the Respondent's characterization that EPA's position as to the penalty phase is simply untenable under any reasonable reading of the Administrative Rules and this Court's prior order.

As noted, the Respondent has correctly noted that early on in this proceeding, that is, long before December 23, 2009, the Court stated in a conference call that the Respondent was entitled to confront and cross-examine EPA's penalty calculation witness or witnesses at a hearing.
The Court also agrees that the Respondent and Respondent's parent company, John A. Biewer Company, Inc. and Biewer Lumber Company, LLC, have been dragged through very expensive litigation ending with EPA essentially announcing that it simply refuses to follow the Court's rulings or the Administrative Rules.

Because of that history, the Court invited the Respondent to brief its contention that attorney's fees should be awarded pursuant to 40 CFR 22.4(c), Subsection 10, and/or under any other supportive theory because of EPA's posture in this penalty phase of the proceeding as well as because of the contentions advanced by EPA in its effort to seek derivative liability, which contentions were in this Court's view advanced without any relevant case law support, and in the Court's view were entirely frivolous contentions. All of this needlessly cost the Respondent money to defend those aspects of Mr. Wagner's contentions.

Although EPA has maintained that the Respondent's opposition to EPA's motion for accelerated decision on liability presented no attachments, this ignores a number of facts. Respondent has long contended that, because of its financial problems, it has been unable to take care of the actions required by the cited regulation. In this context, it must be noted that there has been extensive discovery related to this issue. EPA has implicitly, but clearly, recognized

that there is merit to the Respondent's financial dire straits as that state of affairs obviously caused it to fan out and seek other respondents to be added to this litigation.

Further, the Court stated at the outset of this proceeding, in a conference call that the Respondent has a right to a hearing on the penalty proposed by EPA so that it may have the opportunity to inquire and challenge EPA's application of its penalty policy to the then alleged, and now conceded, violation. It is important to note that the Respondent's challenge is not to the underlying policy itself, but rather it is to the application of the policy to the facts in this particular case. The Court certainly agrees with the Board's expression of the impropriety of challenges to the foundation of the policy itself.

Going back to the initial steps in these proceedings, it is also noted that the Respondent in its answer both to the original and subsequently to the amended EPA complaint requested its right to a hearing pursuant to 42 United States Code, Section 6928(B). It is noteworthy that even EPA in its amended complaint, filed on January 30, 2009, informed the Respondent that, if requested, "the Administrator shall promptly conduct a public hearing." Further, EPA's amended complaint informed that, "all Respondents have the right to request a hearing to challenge the facts alleged in the complaint and the amount of the civil penalty to be assessed as proposed in the complaint." Amended Complaint at 8.

This Court[15] then spoke further with respect to the Respondent's right to a hearing on the penalty proposed by EPA. It started with the RCRA statutory provision 42 United States Code, Section 6928, which provides that those named for alleged violations of RCRA may request a public hearing and that upon such requests, the Administrator shall promptly conduct a public hearing. Where a violation is established, the statute also directs that in assessing a penalty, the seriousness of the violation and any good faith efforts to comply are to be taken into account. The Court then turned to 40 CFR Section 22.27, which is entitled "Initial Decision." Subsection (b) of that section pertains to the amount of the civil penalty and it provides that if the Court (i.e. the Presiding Officer) determines that a violation has occurred, it shall then determine the amount of the recommended civil penalty *based on the evidence in the record* and in accordance with any penalty criteria set forth in the Act.[16]

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[15] In its statement at the hearing for the penalty phase of the proceeding, the Court noted its recognition that the term of art applied in these proceedings is Presiding Officer. It then advised that in its experience hearing cases for a significant number of other agencies, the term applied is "Administrative Law Judge," or "Presiding Official," but whatever the label, they all refer to the presiding administrative judge. EPA Counsel, Mr. Wagner, diminishes the administrative court as not a true "court," in the sense that it is not an Article III court. While it is true that this administrative court's authority is not derived from Article III of the United States Constitution, but rather from Article I, it is in august company. Other Article I tribunals include the United States Bankruptcy Courts, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the United States Tax Court, the United States Court of Federal Claims, and the Civilian Board of Contract Appeals, to name just a few.

[16] Although the Court is to consider any civil penalty guidelines issued under the Act, it is agreed by all that the penalty policies do not bind either the Administrative Law Judge or the Environmental Appeals Board. These policies do not bind the EAB or the Administrative Law

Although the Court noted that it is obligated and must also explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act, this comes into play only if there is evidence in the record on the subject. Similarly, the situation which may occur where a Court decides to assess a penalty which is different from the amount of the penalty proposed by the Complainant, and which departure must set forth the specific reasons any increase or decrease, only becomes operative where there is record evidence on the issue.

To say the least, this case is unusual because except for this EPA counsel, that is, Mr. Wagner, EPA has recognized that a respondent has a right to question the Agency about its proposed penalty, and to present its own view about an appropriate penalty, either by ascribing different values within a given penalty policy, or by advocating that the policy as applied to the facts in a particular case does not yield an appropriate penalty and consequently that the penalty should be derived from the application of the statutory criteria.

Many decisions issued by the Environmental Appeals Board shed light on this issue. *In the Matter of Sandoz*, 2 E.A.D. 324, 1987 WL 109662, (E.P.A.), February 27, 1987, (*Sandoz*) is a representative example, which is in line with the usual Agency stance on penalty determinations. In that case, the parties stipulated to limit the hearing to the appropriateness of the proposed penalty. It is noted that EPA did not take the position that a respondent is not entitled to contest the proposed penalty in the setting of a hearing. *Sandoz*, like this case, was a RCRA matter. The Board noted that the statute requires that any penalty assessment is to take into account the seriousness of the violation and any good-faith effort to comply with the applicable requirements and stated that the Presiding Officer has properly assessed a penalty if he or she takes into account the seriousness of the violation and any good faith efforts to comply, and if he or she considers at least the civil penalty guidelines which have been issued under the Act. In *Sandoz* the Board found that the Respondent came forward with credible evidence of its actual cost of compliance and that EPA failed to persuade the Court that its penalty calculation was appropriate to the facts of the case. Implicitly, this underscores the potential importance of the hearing process for respondents.

The Board emphasized in *Sandoz* that the EPA's proposed penalty is not binding on the Presiding Officer and that the proposal is a recommendation, which the Court may accept or reject. It is this Court's position that a court can not intelligently make such a consideration in most cases without the benefit of questioning EPA's basis for its particular conclusions. Typically, the respondent, as the party with a vested interest in making sure that the Agency has properly applied its policy, will be the one conducting that inquiry.

The Court's experience over its many years of presiding in EPA administrative hearings has been that such inquiries often yield valuable information, which is of assistance in determining an appropriate penalty. If a Court is to meet its obligation of articulating with reasonable clarity the reasons for its penalty determination, it must, as the Board has stated,

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Judge because the policies have not been subjected to the rule-making procedures of the Administrative Procedure Act, and therefore they lack the force of law. See, for example, *Employers Insurance of Wausau*, 6 E.A.D. 735, 1997 WL 94743, (E.P.A.) February 11, 1997, an EAB decision in 1997.

explain how the facts of a particular case fit or do not fit the policy. The Board also stated in *Sandoz* that, pursuant to 40 CFR § 22.24, *EPA has the burden of going forward with and of proving that the proposed civil penalty is appropriate*.

With the exception of EPA's Senior Attorney and Counsel in this litigation, the Court's experience has been that EPA accepts the burden of going forward with the evidence. The Board has described this as a procedural device for the orderly presentation of evidence. *Great Lakes Division of National Steel Corporation*, 5 E.A.D. 355, 1994 WL 372214 (E.P.A.) June 29, 1994, (*Great Lakes*), is another example which is representative of the Board's view on this issue. In that EPCRA case, the Board stated the Agency's burden of going forward to prove that the proposed civil penalty is appropriate and it noted that the Agency did this in the customary manner, that is, through a witness at the hearing. The witness called was the Region's Enforcement Specialist, who testified on the Region's penalty calculations. Also, unlike in this case, the penalty policy itself was admitted as an exhibit.

Another example is *M.A. Bruder and Sons*, 10 E.A.D. 598, 2002 WL 1493844, (E.P.A.), July 10, 2002. The Board found there that the Region's application of the penalty policy was erroneous. As in this case, *Bruder* admitted liability, but it disputed the Agency's proposed penalty. Again, following the customary approach, the Region put on its own penalty witness who testified as to how the Agency arrived at its proposed penalty upon application of the policy. And the Board noted again that the Presiding Officer's determination of the recommended penalty must be based *on the evidence of record*. By having that evidence of the particulars as to how the Agency applied its policy to the facts in the case, the Board was able to determine that the Agency's analysis was flawed. That fundamental opportunity to examine the agency's penalty proposal revealed that it failed to take into account the particular circumstances of the case. Consequently the Board found, armed as it was with the facts underlying the Agency's penalty analysis, that the Agency's incorrect framing of the penalty analysis produced a penalty that was unreasonable. Absent a hearing, the Board would never have been able to make such an analysis.

The Board's decision in *Johnson Pacific Incorporated*, 5 E.A.D. 696, 1995 WL 90174, (E.P.A.), (*Johnson Pacific*), a February 2, 1995 FIFRA case, is yet another example of the usual practice. The Board stated there that equity is clearly a permissible consideration in assessing penalties under the statute and that the Region was clearly wrong in arguing otherwise. As the Board pointed out, although fairness, equity and other matters as justice may require are not specifically mentioned in the penalty provisions of FIFRA, they are nonetheless fundamental elements of the regulatory scheme. As the Board asked rhetorically, *why else would the statute require the Agency to hold a hearing before imposing a penalty except to ensure that the proceedings and the penalty itself are fair.*

It is noted that FIFRA does not specifically list equity among its statutory criteria, nor does RCRA. But the Board found such a consideration inherent within the statutory criteria under either the gravity of the violation or the Respondent's ability to continue in business or perhaps under the third factor, that is, the company size. The point is that if equity can be considered under FIFRA, it certainly can be considered under RCRA, which expressly takes into account a Respondent's good faith efforts to comply.

Interestingly, the Agency argued in that case that the judge lacked *adequate evidence* to categorize the business and did not set forth specific reasons for his penalty assessment, which resulted in a reduction in the amount proposed by the Agency. In that context, the Board observed that the Presiding Officer's obligation is to provide a reasoned explanation for its penalty assessment. To this Court, that requires a hearing on the penalty issue. Indeed, in *Johnson Pacific Inc.,* 5 E.A.D. 696, (EAB 1995), the Board spoke in terms of the Presiding Officer having sufficient evidence to reclassify the size of the business differently from EPA's classification. The practical purpose of holding a hearing on the penalty aspect was also evident there, as the court took testimony from the Respondent's witness, who was a certified public accountant.[17]

There are other similarities with *Johnson Pacific* to the present matter, as the Board spoke of the Complainant's zeal to exact an additional sum, which the Board described as "misguided." Such misguided zeal, in this Court's view, occurred here when EPA's Counsel, without case law authority, tried to hold additional respondents liable on grounds that one would expect to be presented from a non-lawyer.[18] That misguided zeal, in this Court's view, has now reared its head in the context of seeking to deny the Respondent its day in court to challenge the Agency's proposed penalty.

Putting aside for the moment that the statute provides for the right to a hearing, this Court's view of the fundamental right to a hearing on the penalty issue is shared by other EPA Administrative Law Judges and, implicitly, by the Board. For example, in *DIC Americas*, *Inc*., a TSCA decision, 6 E.A.D. 184, September 27, 1995, 1995 WL 646512, (E.P.A.), the presiding judge there held a hearing on the penalty issue, which hearing lasted two days. The Board noted that in order to rationally deviate from the civil penalty guidelines, the Court is obligated to provide specific reasons for doing so. Without an evidentiary hearing in which a Respondent has the opportunity to delve into the process applied by the Agency to the case being litigated, and the opportunity to present its own evidence on the appropriate penalty, it's difficult to see how the Court can identify such specific reasons for its recommended penalty as the Board requires.

Emphasizing the importance of providing a Respondent with its day in court to challenge and to present evidence, the judge in that *DIC America* case noted that not every penalty comes out just the way the Government proposes. The judge there noted a willingness to listen to any reasonable assertions with respect to why in the interest of justice particularly the penalty ought to be reduced and, in that spirit of fairness, denied EPA's motion for summary judgment as to the penalty. Significantly, the Board noted in that case that a respondent must be given a *real opportunity* to present a defense to EPA's penalty assessment, and that it is important that this right be real and not a charade.

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[17] In that instance, the judge found that the witness's testimony was reliable, with the Board noting that the testimony was unrebutted by EPA.

[18] See this Court's previous order dealing with EPA's attempt to find derivative liability, wherein the Court expressed its view of EPA's contentions. These included arguing that referring to a generic website and EPA's attempt to blur the *Biewer family* as if they were identical to and indistinguishable from corporate entities. These were examples, in the Court's view, of frivolous arguments which should not have been made by EPA, as they were outside the bounds of reasonable contentions.

Given, at least in this Court's experience, the one-of-a-kind posture taken by EPA's Senior Attorney and Counsel to the penalty phase of this matter, an attempt was made to learn of the origin for this strident perspective. The Court had been exposed to that Senior Attorney and Counsel's views some years ago when it was invited to speak to those who litigate EPA cases in Region 5. On that occasion Mr. Wagner expressed his view that not only was there was no absolute right to a hearing on liability, but that one was also not necessarily entitled to a hearing on the appropriate penalty.

Since that oral expression, EPA counsel, Mr. Wagner, has expressed his perspective in writing, publishing an article entitled "*Administrative Decision-making by Judges in the United States Environmental Protection Agency Administrative Civil Penalty Assessment Process: Whatever happened to the law?*" The Journal of the National Association of the Administrative Law Judiciary, Spring 2008 edition, Westlaw 20 JNAALJ 80.[19] ("Wagner Article"). Loftily, the article begins early on by quoting the "We the People" language from the Preamble to the United States Constitution, and then notes Congress has the authority through statutes to regulate human activity harmful to the environment. Before long, the article notes that, through such statutes, Congress has invested in the EPA Administrator the authority to assess civil penalties for their violation.

EPA Counsel expresses in that article that where Congress has entrusted in an Administrative Agency the responsibility of selecting the means of achieving the statutory policy, the fashioning of an appropriate and reasonable remedy is for the EPA Administrator, not a Court.[20] Accordingly, EPA Counsel objects to having others make the penalty determination. He has an especial objection to administrative law judges' involvement in such matters. As such, he expresses a central objection to the EAB's deference to Administrative Law Judge penalty determinations. As Mr. Wagner puts it, "[f]rom its decision-making, it would appear that **the Board has failed to heed the admonishment of Justice Frankfurter** and, indeed, has 'read the laws of Congress through the distorting lens of inapplicable legal doctrine.'" Harshly, he expresses that "the Board . . . rul[es] as if the ALJ was an independent trial judge." Wagner Article at 8, (emphasis added). The consequence of the Board's approach, EPA's Senior Attorney and Counsel maintains, is that by deferring decision-making to each of the several ALJs, the Board has issued final decisions on behalf of the Administrator that are arbitrary and capricious.[21] Instead, said Counsel contends that the Board is required to exercise its own judgment when considering appeals and not to defer to the judgment of whichever one of the several ALJs offered the initial decision.

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[19] The article is brought up in this decision because, in this Court's view, it represents more than an academic exercise. Rather, it is clear to the Court that the views expressed in the article were implemented in this litigation and therefore moved outside of the realm of mere expression. Viewing the approach taken by EPA Counsel as contrary to both the customary approach and the Court's rulings, it is considered that Counsel's actions are akin to the rogue agent, who exceeded the scope of his employment authority, and was off, in a sense, on a frolic.

[20] EPA Counsel' s example is from a Department of Agriculture case, but it is applied by analogy to EPA.

[21] This Court does not believe that is an accurate description of the Board's process and suspects that the Board would take exception to that description as well.

Perhaps the most revealing window to the thoughts of Mr. Wagner is shown by the following passage from his article in which he states that "the assessment of a penalty is not a factual finding, but the exercise of a discretionary grant of power." *Id.* at 9. With that view he expresses that as the penalty amount determination is *not* an issue of fact, it is not a determination to be established by witness's testimony, and deference to an ALJ's penalty amount determination cannot be warranted on the grounds that the judge alone had an opportunity to observe witness demeanor.[22] Among other issues, the Court considers the assertion by EPA Counsel that the assessment of a penalty is not a factual finding, but the exercise of a discretionary grant of power is that such an argument presents a false choice because it is both fact finding and the exercise of discretionary power, and more.

Penalty determinations, it would seem from EPA Counsel's perspective,[23] should shun involvement from administrative law judges. As Mr. Wagner expresses it, "one ALJ cannot match the Agency's collective training, historical experience and expertise in evaluating environmental risks and environmental harm." He adds that moreover, the "penalty policies do not require that a specific penalty amount be determined appropriate for any particular violation of any particular violator."[24] *Id.* at 9.

The Court is comforted by the fact that the ambit of EPA Counsel's criticism is wide, as his article finds fault with the decisions of the EAB, the Administrator, the Chief Administrative Law Judge for EPA and others.[25] For example, speaking to the Administrator's fulfillment of her Administrative Procedure Act responsibilities, Mr. Wagner expresses that the Administrator cannot fulfill her Administrative Procedure Act responsibilities when the Board holds that "it is clear that subsumed within the ALJ's authority to assess a penalty different than

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[22] However even EPA Counsel acknowledges that the penalty determination process must "be based on the evidence in the case." Article at page 7. This presents a problem here, as no evidence was admitted in the record. Further, EPA Counsel acknowledges that the penalty determination process requires consideration of other factors as justice may require specific to the case.

[23] It should be noted that the Court wholeheartedly supports the right of EPA Counsel to express his personal interpretation of the proper method for assessment of civil penalties in administrative litigation. The Court only takes issue where, as it believes happened in this case, Counsel puts his personal beliefs into action, in disregard of the Court's rulings.

[24] In its Reply Brief, EPA concedes that the hearing transcript "clearly reveals that Complainant presented no evidence at hearing." EPA Reply at 2. Apart from that admission, EPA stands on its initial brief on this issue, repeating the position expressed in its initial brief that the Respondent failed to raise an issue of material fact and therefore could not prevail in its opposition to EPA's motion for accelerated decision. EPA Counsel also distances himself from the law review article he authored on the basis that its penalty arguments here had nothing to do with that article but rather were based solely on RCRA provisions, case law, and EPA's penalty policy. *Id.* at 6. In the Court's view, EPA Counsel's actions speak louder than his words of denial.

[25] As the Court stated at the hearing, it acknowledged "in fairness that what [it] would describe as an understatement *writ large*, Mr. Wagner does state that the views expressed are his and not necessarily that of the Administrator, Agency, or the United States, see Footnote 3, *supra*.

one calculated under Agency guidance is the notion that Agency guidance does not limit the ALJ's authority to assess a penalty that is otherwise in accordance with the statutory factors."[26] *Id.* at 11.

When the Court considers EPA Counsel's perspective that the Administrator, the Environmental Appeals Board and the Administrative Law Judges are all in error with regard to their approach to penalty determinations, it is reminiscent of a decades-old cartoon from The New Yorker magazine depicting a mother watching her son in a parade, who notes of the marchers 'oh, look everyone is out of step, except for my son.' While such a situation is possible, it is unlikely that everyone else, save EPA Counsel, has it wrong. Thus, the Court concludes, in response to Mr. Wagner's rhetorical question in the title of his article, asking "whatever happened to the law?" that the law is operative and intact and that it is the statute itself, with its provision for a right to a hearing, which is at work. Further, in the broader sense, what is at work is the concept of due process and the importance of maintaining a system that is both viewed as, and operates with, legitimacy and fairness.

Respondent's Contention that the Court should award it costs and attorney's fees.

Respondent contends that the Consolidated Rules of Practice set forth in 40 C.F.R Part 22 ("Rules") not only provide the procedural framework for this administrative proceeding but that those Rules allow the Presiding Officer the discretion to resolve issues not explicitly addressed by them. Respondent's Brief at 7-8, citing 40 C.F.R. §§ 22.1(c), 22.4(c)(10) and *In re Martex Farms, Inc*, Docket No. FIFRA-02-2005-5301, at 3, n. 2 (August 16, 2005). Respondent notes that when the Rules do not address a particular issue, the Environmental Appeals Board has considered applicable federal procedure rules and court decisions.

Respondent observes that some federal courts have found "that the Rules of Civil Procedure themselves, having been authorized by Congress, provide the basis for a waiver of sovereign immunity where the government's actions warrant sanctions such as attorney's fees." Respondent's Brief at 8, citing *Mattingly v. United States*, 939 F.2d 816, 818 (9th Cir. 1991) Respondent refers to that Circuit's reasoning "that federal sanctions such as attorney's fees are appropriate to deter 'future government misconduct' for violations of discovery orders and further noted imposing such sanctions against the government is 'in keeping with the principle that the government must conduct its litigation with the same degree of integrity as that expected of other litigants.'" *Id.* at 8-9. Therefore, Respondent asserts that it is appropriate for this Court

[26] EPA Counsel has also taken the Chief Administrative Law Judge to task for her perspective on this issue, by expressing that the EPA litigation team proposes the amount of the penalty while the Administrative Law Judge independently determines the amount of the penalty and for the observation that ALJ's are institutionally insulated from any bias in favor of EPA's positions. EPA Counsel believes that view fails to recognize Section 556(c) of the APA and makes no distinction between factual issues and issues of law and policy. Wagner Article at 11.

to consider the standards set forth in the federal rules and applicable case law, and apply such standards to the facts before it.[27]

Here, under its contention that "the ability to require those who abuse the adjudicative process to reimburse the opposing party subjected to that process [sh]ould be included as part of this Court's ability to manage the proceedings," Respondent asserts that "this Court should award Respondents John A. Biewer Company ("JAB Company") and Biewer Lumber, LLC the attorney's fees they incurred in defending the derivative liability actions brought by the Environmental Protection Agency ("EPA") and its attorneys." *Id.* at 10. Specifically, Respondent asserts that it "incurred unnecessary and very substantial attorney's fees in three general areas: (1) responding to EPA's Motion to Amend Complaint and Compliance Order to add JAB Company and Biewer Lumber, LLC; (2) EPA's discovery process focusing entirely on JAB Company's and Biewer Lumber, LLC's finances and their relationship with John A. Biewer Company, Inc. of Toledo ("JAB Toledo") and John A. Biewer Company, Inc. of Ohio ("JAB Ohio"); and (3) the preparation of Respondents JAB Company's and Biewer Lumber, LLC's Motion for Accelerated Decision and responding to the EPA's Motion for Accelerated Decision on Derivative Liability."[28]

On the question of the appropriateness of awarding attorney's fees to the Respondent, EPA contends in its Reply Brief that the Presiding Officer is not a court and as such it has no inherent powers to rule upon Respondent's contention that attorney's fees should be awarded.

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[27] Respondent also urges that "[w]hen groundless pleadings are permitted, the integrity of the judicial process is impaired." It also contends that there is authority for the relief it seeks on the basis that a government attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." Respondent's Brief at 9, citing 28 U.S.C.A. § 1927.

[28] Because the Court concludes that the EAB must first find that costs and attorney's fees can be awarded, at least in situations of egregious abuse of the administrative process, it can only note that the issue was raised, and therefore preserved, for appeal. While the Court does not agree with some of the particulars of the general areas for which the Respondent seeks relief, it certainly agrees that EPA's persistence with regard to Biewer Lumber LLC was pursued long after it was clear that it was frivolous to continue that claim. See Respondent's Brief at 11-13. Making matters worse, as Respondent appropriately notes, at the very latest, after discovery was completed, EPA continued to "push[] forward with a frivolous Motion for Accelerated Decision on Derivative Liability . . . argu[ing] that Biewer Lumber, LLC and JAB Company should be derivatively liable for the actions of JAB Ohio and JAB Toledo, using the same arguments this Court had previously rejected that were not based in fact and unsupported by case law." *Id.*at 13. The Court agrees with this characterization of EPA Counsel's action. So too, Respondent's point that long after discovery had been concluded, EPA continued to force Respondent Biewer Lumber, LLC to defend the government's derivative liability claims at an expense of over $46,000," is well taken. See Respondent's Brief at 14 and accompanying affidavit of Douglas A. Donnell. After all, EPA knew that Biewer Lumber, LLC did not exist while the Respondent was operating. Excessive zeal in pursuing a contention in the face of all the facts pointing to the contrary, is exactly the type of government conduct that should be curbed.

Further, EPA contends that any such award is premature, as the Environmental Appeals Board has not issued a final decision in this matter. EPA Reply at 7. Although EPA points out that the Respondent has not prevailed on the issue of liability,[29] Respondent's claim for attorney's fees is not based on such a claim. EPA contends that the issues on appeal; the Court's ruling on EPA's motion for accelerated decision on derivative liability; and the denial of EPA's motion for accelerated decision on the proposed penalty, have not been decided by the EAB yet and as such it is premature to talk about any award of attorney's fees.

The problem with EPA's analysis is that the Respondent's basis for seeking attorney's fees is not based, nor could it be, on prevailing on the issue of liability. After all, Respondent has conceded liability. Rather, Respondent's claim stems from its claim that EPA abused the process by continuing its discovery efforts long after it became apparent that its hopes for derivative liability were without merit.[30]

There are, in this Court's view, other problems with EPA's analysis. While it argues that the request for attorney's fees is premature, it then states that one's rights of appeal encompass only "those issues raised during the course of the proceeding and by the initial decision." *Id.* at 7. It would seem therefore that a party needs to raise the issue of attorney's fees before the Presiding Officer, at least where the claim does not stem from an Equal Access to Justice claim.

As to the Respondent's claim that there is inherent power to punish those who abuse the hearing process, EPA looks to former Associate Justice Brennan who noted that former Associate Justice Frankfurter pointed out that administrative agencies are different from Article III courts and that "wholesale transplantation" of the latter's procedures are inappropriate. Yet, in EPA's own footnote on this point, it acknowledges Justice Rehnquist's comment that "this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances the 'administrative agencies' should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." Thus, EPA's argument in this regard is that there are "differences" between administrative courts and Article III courts. That is an interesting observation, but no one asserts otherwise. The larger point is that EPA cites no authority to suggest that these "differences" operate to preclude the inherent relief Respondent seeks here.

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[29] EPA's description is a technically accurate but nevertheless misleading characterization of the issue. Respondent, Biewer never sought to "prevail" on the liability issue. From the very beginning, Respondent's position was all about its financial inability to take the steps necessary to comply with the cited regulation. EPA has known this all along and recognized its substance as well, as evidenced by its effort to look to other corporate pockets, even when it became clear that this was a dead end.

[30] Trial strategy and arguments advanced are healthy aspects of the litigation process, but that does not mean they are without bounds. Apart from this Court's view that EPA pursued its derivative liability claims long after it became clear they were hollow, EPA's Senior Counsel's arguments also suffer from a similar excess. For example, in its Reply, EPA states that "After 14 months of litigation, Respondent admitted that is committed th[e] violation[]" EPA Reply at 8. That is seriously misleading as the Respondent admitted early on to the violation, but simultaneously explained that it was not in a financial posture to comply with the regulation's dictates. In the same reordering of reality, EPA's Counsel points to the Court's determination to proceed with the penalty phase of the proceeding as if this were a major part of the expense of this litigation. That is not the case at all; the bulk of the Respondent's expenses derived from its defense of EPA's efforts to hold additional respondents responsible for liability. It is those costs that the Respondent seeks to recoup.

EPA also repeats that an "ALJ is subordinate to the agency in which he serves." This too is an interesting observation, but no one disputes that point either. Peripatetically, while providing an amusing description of ALJs as "semi-independent subordinate hearing officers" who are "creature[s] of Congressional enactment," EPA's Senior Attorney and Counsel then cites to Justice Ruth Bader Ginsburg's[31] remark that an ALJ "is governed, *as in the case of any trial court*, by the applicable and controlling precedents . . ." *Id.* at 12, n. 6 (emphasis added). The Court does not take issue with this. However, it is suggesting that the EAB consider, should it agree with the Court's view of EPA's prosecution of this case, that Respondent be awarded attorney's fees for the unwarranted excesses of EPA in this matter, as set forth in the Court's Order on EPA's Motion for derivative liability. After all, EPA Counsel has recognized the "plenary scope of agency review."[32] EPA Reply Brief at 13.

Accordingly, as the Respondent sums up the events, "EPA should not be able to defy this Court's order, refuse to follow the Part 22 rules and 'run Respondents through the mill' at Respondent's continued expense when it has no intent to participate in the trial Complainant had previously sought!" *Id*. at 15. When EPA's behavior during discovery is coupled with its refusal "to produce a witness for cross-examination regarding the proposed penalty amount . . . [such] actions unreasonably delayed and served to erode the integrity of the process set forth in the Rules, thereby equating to an abuse of said process. As the government must conduct itself with the same degree of integrity as other parties to the process, the fact that the abuse has been committed by the EPA and its attorneys should be immaterial to this Court's decision. Because the Respondents were forced to incur unnecessary attorney's fees and costs as a result of the actions taken by the EPA and its attorneys, this Court, in its discretion, should require the government to reimburse the Respondents for all unnecessary attorney's fees." The Court agrees that in such egregious situations, such reimbursement should be available to maintain the legitimacy of the administrative litigation process.

Conclusion.

On the basis of the foregoing, the Court concludes that EPA, having failed to produce any evidence on the issue of an appropriate penalty, has not met its burden on the issue and therefore no penalty should be assessed. On the subject of reimbursement for frivolous actions pursued by EPA, the Court notes that the Respondent has preserved the issue for appeal but that any relief must await the Board's determination of the availability of such relief in circumstances where EPA pursues litigation tactics when known to be meritless.

[31] The quote from Justice Ginsburg is from the time when she was on the Circuit Court of Appeals.

[32] In this regard, EPA cites to the agency's authority (in this case the EAB) to " 'make any findings *or conclusions* which in its judgment are proper on the record,'" EPA Reply at 13, n. 7.

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William B. Moran
United States Administrative Law Judge

April 30, 2010

Washington, D.C.