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June 6, 2008

Regional Hearing Clerk (E-13J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

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

Dear Clerk:

Enclosed for filing in the above-referenced case are Answer to Complaint and Compliance Order, and Certificate of Service filed on behalf of John A. Biewer Co. of Ohio.

Very truly yours,



Douglas A. Donnell

jeb

Enclosure

cc: Douglas S. Touma, Sr.
Michael Cunningham
Richard R. Wagner
Harry Sarvis
Michael Terpinski

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0007

John A. Biewer Company of Ohio, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497
(Washington Courthouse Facility)

**ANSWER TO COMPLAINT AND
COMPLIANCE ORDER**

U.S. EPA ID #: OHD 081 281 412

RESPONDENT
_____ /

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NOW COMES Respondent, by and through its attorneys, Mika Meyers Beckett & Jones PLC,

and for its answer to EPA's Complaint and Compliance Order, states and alleges as follows:

Preliminary Statement

1. This is a civil administrative action brought by the United States Environmental Protection Agency Administrator under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. §6928(a), and pursuant to Sections 22.01(a)(4), 22.13 and 22.37 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance or Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits" (the Administrator's Rules"), 64 Fed. Reg. 40137 (July 23, 1999), codified at 40 C.F.R. Part 22 (July 1, 2000).

ANSWER: The allegations contained in paragraph 1 constitute legal conclusions for which no response is required.

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

ANSWER: Without admitting or denying any substantive allegations in the complaint, Respondent admits that the Director of Land and Chemicals Division, Region 5, is authorized to issue complaints of this type.

3. Pursuant to Sections 3001 - 3005 of RCRA, 42 U.S.C. §6921-6925, the Administrator has promulgated regulations governing generators and transporters of hazardous

waste, and governing facilities that treat, store and dispose of hazardous waste. At all times relevant to this Complaint, those regulations were codified at 40 C.F.R. Parts 260 through 279.

ANSWER: Admitted.

4. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. §6926(b), the Administrator granted the State of Ohio final authorization to administer a state hazardous waste program in lieu of the federal government's RCRA program effective, June 30, 1989. 54 Fed. Reg. 27170 (June 28, 1989). The U.S. EPA granted Ohio final authorization to administer certain Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements, effective June 7, 1991, 56 Fed. Reg. 14203 (April 8, 1991) (corrected effective August 19, 1991, 56 Fed. Reg. 28088 (June 19, 1991); September 25, 1995, 60 Fed. Reg. 38502 (July 27, 1995); and December 23, 1996, 61 Fed. Reg. 54950 (October 23, 1996). The U.S. EPA authorized Ohio regulations are codified at Ohio Administrative Code (OAC) Chapters 3745-49 through 69. See also 40 C.F.R. §272.1800 et seq.

ANSWER: The allegations contained in paragraph 4 constitute legal conclusions for which no answer is required. To the extent an answer is deemed required, the allegations in paragraph 4 are neither admitted nor denied for lack of information sufficient to form a belief as to the truth thereof.

5. At all times relevant to this Complaint, Section 3006(d) of RCRA, 42 U.S.C. §6926(d), provided that any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under Subchapter E1 of RCRA, 42 U.S.C. §§6921-6939(e).

ANSWER: The allegations contained in paragraph 5 constitute legal conclusions for which no answer is required.

6. Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), the Administrator may assess a civil penalty of up to \$25,000 per day of noncompliance for each violation of a requirement of Subchapter III of RCRA (Sections 3001-3023, 42 U.S.C. §§6921-6939(e).

ANSWER: The allegations contained in paragraph 6 constitute legal conclusions for which no answer is required. By way of further answer, Respondent denies that EPA has blanket authority to assess civil penalties up to \$25,000 per day, regardless of the nature of the alleged noncompliance and alleges that penalties, if any, must be determined on a case-by-case basis.

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

ANSWER: The allegations in paragraph 7 are neither admitted nor denied for lack of information sufficient to form a belief as to the truth thereof.

GENERAL ALLEGATIONS

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

ANSWER: Admitted.

9. That Respondent is a “person” as defined by Section 1004(15) of RCRA, 42 U.S.C. §6903(15), and OAC 3745-50-10.

ANSWER: Admitted.

10. That from approximately 1976 to June 2001, the Respondent conducted its business in, and around, buildings located at 649 Landmark Boulevard, Washington Courthouse, Ohio.

ANSWER: Admitted.

11. That the place where the Respondent conducted its business was, and is, a “facility” as defined by OAC 3745-50-10.

ANSWER: Respondent neither admits nor denies that the property located on Landmark Boulevard is actually a “facility,” but acknowledges that it has been referred to as such by both the Ohio EPA and the consultants, Mannik & Smith Group.

12. That the Respondent was the “owner” or “operator” of that facility, as defined by OAC 3745-50-10.

ANSWER: Respondent admits that it is the “owner” of the property on Landmark Boulevard, admits that it was the “operator” of the property from 1976 until 2001, and neither admits nor denies that the property is a “facility” as stated above.

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

ANSWER: Admitted.

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

ANSWER: The allegations contained in paragraph 14 are denied because they are not true. The drip pad at the Landmark Boulevard location in Washington Courthouse, Ohio, was an outside drip pad.

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

ANSWER: The allegations contained in paragraph 15 are denied because they are not true. The excess chemical solution that fell off of wood onto the drip pad was captured and reused.

16. That in June 2001 Respondent ceased its operation as described in Paragraphs 13 through 15.

ANSWER: Admitted.

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

ANSWER: Admitted.

18. That waste material generated by the Company, identified in Paragraph 15, was a "solid waste," as defined by Section 1004(27) of RCRA, and by OAC 3745-51-02.

ANSWER: The allegation contained in paragraph 18 is vague and ambiguous with regard to the phrase "waste material generated." Respondent admits that the chromated copper arsenate that was cleaned off the drip pad and shipped to a hazardous waste facility was "solid waste."

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

ANSWER: The allegation contained in paragraph 19 is vague and ambiguous with regard to the phrase "waste material generated" and, thus, the allegation is neither admitted nor denied. Respondent admits that chromated copper arsenate, if disposed of as a waste, may be a hazardous waste, depending on concentration. Respondent neither admits nor denies the accumulation of such waste at the property. By way of further response, Respondent admits that its material was listed as F035 by 46 Fed. Reg. 4617 (January 16, 1981).

20. That waste material generated by the Company, identified in Paragraph 15, was a “hazardous waste,” as defined by Section 1004(5) of RCRA, and by OAC 3745-51-03.

ANSWER: The allegation contained in paragraph 20 is vague and ambiguous with regard to the phrase “waste material generated”, and thus the allegation is neither admitted nor denied. Respondent admits that chromated copper arsenate, if disposed of as a waste may, depending on concentration, be a hazardous waste, but neither admits nor denies the accumulation of such waste at the property.

ALLEGED VIOLATION: FAILURE TO MEET CLOSURE REQUIREMENTS

21. Complainant incorporates Paragraphs 1 through 20 of this Complaint as though set forth in this paragraph.

ANSWER: Respondent repeats, as if fully set forth herein, its responses to paragraphs 1 through 20 above.

22. That Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 C.F.R. Part 265, Subpart W. See Paragraph 4.

ANSWER: The allegations in paragraph 22 constitute legal conclusions for which no answer is required.

23. That OAC 3745-69-45 provides that: “At closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and manage them as hazardous waste.”

ANSWER: The allegations in paragraph 23 constitute legal conclusions for which no answer is required. By way of further response, Respondent admits that paragraph 23, with one minor error, accurately quotes OAC 3745-69-45 (A).

24. That Respondent’s drip pad, identified in Paragraphs 14 and 15, was unlined, without a berm on its entire perimeter, and contained cracks in its surface.

ANSWER: The allegations contained in paragraph 24 are denied because they are not true. The drip pad at the Landmark Boulevard location has and had a berm. The berm was inspected by Ohio

EPA in the 1990's and no action was taken indicating there were concerns about the berm, such as the fact that it was unlined or had cracks. Cracks have occurred in the berm since the closure of the plant

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

ANSWER: Admitted.

26. That at no time since closing its drip pad did Respondent take any action to meet its obligations to remove or decontaminate all waste residues, containment system components, contaminated subsoils, and structure and equipment contaminated with waste and leakage, that may be present under and in the vicinity of the drip pad.

ANSWER: The allegations contained in paragraph 26 are partially denied and partially admitted. Respondent prepared a closure plan dated May 3, 2005 and removed from the site the chemical material used for wood treating. Respondent admits that it did not remove soils, contaminant systems, all components, equipment and structures, and neither admits nor denies that it had an obligation to do so for lack of information sufficient to form a belief as to such obligation.

27. That Respondent fails to identify in its Closure Activity Report any actions which it proposes to take to meet its obligations to remove any contaminated subsoils that may be present under and in the vicinity of the drip pad.

ANSWER: The allegations contained in paragraph 27 are denied because they are not true. The original closure plan dated May 3, 2005, called for power washing the drip pad, similar to what was proposed and approved for the Respondent's location on Eckel Junction Road. Ohio EPA asked for an amended plan that called for additional steps, including testing and removal of subsoils, and no such amended plan has been sent to Ohio EPA.

28. That in failing to have taken any steps to meet its obligations to remove any contaminated subsoils that may be present under and in the vicinity of its drip pad, as alleged in Paragraphs 26 and 27, Respondent has failed to comply with OAC 3745-69-45, thereby violating Subchapter III of RCRA, subjecting the Company to the assessment of civil penalties, as provided for in Section 3008(a) of RCRA, 42 U.S.C. §6928(a).

ANSWER: The allegations contained in paragraph 28 constitute legal conclusions for which no answer is required. To the extent an answer is required, the allegations are neither admitted nor denied for lack of information sufficient to form a belief as the truth thereof.

PROPOSED CIVIL PENALTY

By Section 3008(a) of RCRA, 42 U.S.C. §6928(a), Congress has authorized the Administrator to assess a civil penalty of up to \$25,000 per day for each violation of Subtitle C of RCRA, 42 U.S.C., Subchapter III. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. §2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and regulations promulgated thereunder, the Administrator may assess a civil penalty of up to \$27,500 per day for each such violation of RCRA occurring from January 31, 1997, to March 15, 2004, and a civil penalty of up to \$32,000 per day for each such violation of RCRA occurring after March 15, 2004. See 40 C.F.R. Part 19 (July 1, 2005).

Complainant has determined the amount of proposed civil penalty for violations alleged in this Complaint based upon an analysis of relevant evidence known to the Complainant, in consideration of Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), by which Congress requires that the Administrator, in assessing a civil penalty, take into account “the seriousness of the violation and any good faith efforts to comply with applicable requirements.” The analysis incorporated the Administrator’s adopted policy, “RCRA Civil Penalty Policy” (June 23, 2003) (“the Policy”), interpreting the RCRA penalty criteria. A copy of the Policy is available upon request. The Policy of the Administrator provides a consistent method of applying the statutory penalty factors for violations of Subtitle C of RCRA, 42 U.S.C., Subchapter El.

The penalty amount determined appropriate for the violations alleged in this Complaint is \$282,649. See attached Penalty Summary Sheet.

ANSWER: Respondent neither admits nor denies the legal allegations contained in the “Proposed Civil Penalty” portion of the complaint, and further responds that the asserted penalty of \$282,649 is excessive.

REQUEST FOR HEARING

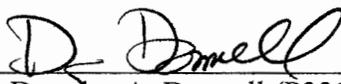
Respondent hereby requests a public hearing as provided in 43 U.S.C. §6928(b) and as offered in the complaint.

REQUEST FOR SETTLEMENT CONFERENCE

Respondent hereby requests an informal conference to discuss possible settlement of this matter.

Dated: June 6, 2008

MIKA MEYERS BECKETT & JONES ^{PLC}
Attorneys for John A. Biewer Company of Ohio, Inc.

By: 
Douglas A. Donnell (P33187)

Business Address:
900 Monroe Avenue, NW
Grand Rapids, Michigan 49503
(616) 632-8000

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US EPA REGION 4
2008 JUN -9 PM 4: 35

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0006

John A. Biewer Company of Toledo, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497
(Perrysburg Facility)

CERTIFICATE OF SERVICE

U.S. EPA ID #: OHD 106 483 522

RESPONDENT

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I, Jane E. Blakemore, hereby state that I am the secretary for Douglas A. Donnell, and that on June 6, 2008, I served a copy of:

Answer to Complaint and Compliance Order

upon the following individuals by placing the same in the U. S. Mail, first-class postage prepaid:

Michael Cunningham (LR-8J)
U. S. Environmental Protection Agency
Region 5, RCRA Branch
77 West Jackson Blvd.
Chicago, IL 60604-3590

Richard R. Wagner, Senior Attorney
Office of Regional Counsel (C-14J)
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Harry Sarvis, Manager, DHWM
Ohio EPA
P. O. Box 1049
Columbus, OH 43216-1049

Michael Terpinski
Ohio EPA, NW District Office
347 North Dunbridge Road
Bowling Green, OH 43402

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

Dated: June 6, 2008


Jane E. Blakemore