

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

SUPPLEMENTAL PRE-HEARING EXCHANGE
OF THE ADMINISTRATOR'S DELEGATED COMPLAINANT

The Administrator's Delegated Complainant (Complainant), by undersigned Counsel, submits this supplement to her Pre-Hearing Exchange in conformance with the Pre-Hearing Order of the Presiding Officer, entered June 27, 2008.¹

A. COMPLAINANT'S PRESENTATION AT HEARING

In its five-page Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty ("Opposition"), with no exhibits attached, dated July 30, 2009, Respondent clearly failed to meet its burden to demonstrate that it is entitled to an oral evidentiary hearing, as

¹That order provides: "After the initial exchanges, the parties may file supplements to their prehearing exchanges (including any reply or rebuttal material), without motion, until 30 days before the date scheduled for the hearing." Prehearing Order, at 2. The hearing in this matter is scheduled to commence on February 23, 2010.

required by the applicable rule of the Administrator, specifically, 40 C.F.R. § 22.20, and holdings of her published decisions, issued by the Environmental Appeals Board, interpreting and applying that rule. See In Re Green Thumb Nursery, Inc., 6 E.A.D. 782, 792 (1997), and In Re Newell Recycling Company, Inc., 8 E.A.D. 598, 625 (1999). The motion was fully briefed by the parties: it was granted with regard to Respondent's liability for the violations alleged in the Complaint and Compliance Order; but it was denied by the Presiding Officer with regard to penalty.

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

B. RESPONDENT'S PRESENTATION AT HEARING, AND COMPLAINANT'S CROSS EXAMINATION AND REBUTTAL

Complainant reserves her right, as a litigant under the Administrator's Rules, to cross-examine any witness called to testify at hearing by Respondent, and to present rebuttal evidence.

For purposes of the cross-examination of any witness called by Respondent to testify, and as rebuttal to evidence presented by Respondent, Complainant may use any pleading filed in this matter by any party, and any attachment to any pleading filed in this matter by any party. Any document so used may be tendered by Complainant as evidence.

At this point in the proceedings, Complainant is unable to identify any rebuttal witness that she may call to testify, or to provide a brief summary of expected testimony, because she does not know what Brian Biewer -- the only potential witness thus far identified by Respondent -- or any other as yet unidentified witness of Respondent is expected to say on the witness stand. Respondent has filed three pre-hearing disclosure documents, each of which, discounting its caption, consists of one page:

- (1) Respondent's Witness Disclosure (August 27, 2008);
- (2) Respondent's Supplemental Witness Disclosure, with 14 pages of Respondent's financial records attached (September 15, 2008); and,
- (3) Respondent's Prehearing Exchange (November 20, 2008).

In each document Respondent identifies Brian Biewer as a potential witness, identifies the subject matter of his testimony as compliance efforts and the financial circumstances of Respondent, and states that "Mr. Biewer may also introduce financial reports." However, in none of the three one-page documents does Respondent provide any substantive statement setting forth the content of Mr. Biewer's testimony, or what he would say about any particular financial report, as required by 40 C.F.R. § 22.19.

In the Opposition, Respondent neither identifies in the record, nor submits with the Opposition, any evidence that it would offer at hearing to put at issue any fact alleged by Complainant in support of the proposed penalty amount. Instead, Respondent merely states that it "intends to present evidence at the hearing" and that "evidence at hearing will show" certain facts and circumstance that will challenge Complainant's proposed penalty amount.

Under the circumstances, it is not possible for Complainant to prepare for efficient and effective

cross-examination and rebuttal. Consequently, as Respondent has not informed Complainant of the actual evidence it intends to present at hearing, Complainant cannot, at this time, determine whether she will present rebuttal evidence, or the nature and extent of any rebuttal evidence.

Respectfully submitted,



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

In Re John A. Biewer Company of Ohio, Inc.; John A. Biewer Company, Inc.; and
Biewer Lumber LLC
No. RCRA-05-2008-0007

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CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of a **Supplemental Pre-Hearing Exchange** in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service. I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., NW
Washington, D.C. 20005

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

January 22, 2009



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