UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S REPLY BRIEF

This consists of the Administrative Delegated Complainant's reply to Respondent's Post Hearing Brief, filed on March 31, 2010. Respondent addresses no more than two issues:

(1) Whether or not EPA had introduced any evidence in support of its proposed penalty.

(2) Whether Respondents, identified in the caption of this proceeding, are entitled to attorney's fees.

As this is a reply brief, Complainant will address only those issues raised by Respondent in its Post-Hearing Brief ("Resp's Brief").

I. APPROPRIATE PENALTY AMOUNT

Respondent's position is that, for Respondent's nine year failure to remove arsenic and chromium contamination from the drip pad of its closed facility, a continuing violation of the

Resource Conservation and Recovery Act ("RCRA"), an initial decision should be issued finding it appropriate that the Administrator assess a penalty of zero dollars. Respondent argues that the Presiding Officer should make this finding either as a resolution to Respondent's Motion for Entry of Decision and Motion for Immediate Consideration, submitted on February 8, 2010, or as a consequence of Complainant having presented no evidence at the hearing conducted on February 23, 2010. Resp's Brief, 1.

The transcript of the hearing conducted in this matter in Toledo, Ohio, on February 23, 2010, clearly reveals that Complainant presented no evidence at hearing. Equally clear is Complainant's statement of her penalty presentation set out in her post-hearing brief. Complainant's Post-Hearing Brief ("Comp's Brief"), 3-5. Complainant has nothing further to submit on the issue. However, Complainant must address certain statements made by Respondent in Resp's Brief.

First, Respondent persists in mis-stating Complainant's position on the process by which an appropriate penalty amount is to be determined in this matter. Respondent states that Complainant's:

> decision to 'protest' the hearing and present no proofs was based on counsel's belief that Respondent was not entitled to any evidentiary hearing regarding penalty, that the Court had no choice but to accept Complainant's penalty assessment, and that the above-cited administrative rules do not apply to a penalty determination because Complainant alone, not the Court, makes that call.

Resp's Brief, 2. Respondent makes a false statement. Citing governing law, Complainant clearly stated her position on a determination of an appropriate penalty amount when a respondent fails to raise a genuine issue of material fact in opposition to an accelerated decision motion:

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

Memorandum in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty ("Comp's Mem-Liab and Pen"), 22.

Complainant does not contend that $282,649 is an appropriate penalty amount for the Administrator to assess against Respondent for its violation because Complainant says that that amount is appropriate. Complainant contends that that amount of penalty is appropriate in that in Respondent's opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty -- a four-page memorandum, without attachments -- Respondent fails to meet its legal obligation to: (1) challenge any fact cited by Complainant in support of that penalty amount; (2) cite evidence in the record, or submit evidence with its pleadings, to support its assertions that its business failed and it was without the financial resources to comply with the law; and (3) offered no argument to challenge Complainant's proposed penalty analysis. Comp's Brief, 3-5.

Second, regarding Complainant's decision not to present evidence at hearing, Respondent states:

> had Complainant [at hearing] sought to admit any of the attachments to its December 12, 2008 Memorandum [in Support of Complainant's Motion for Accelerated Decision on Liability and Penalty] as evidence, Respondent 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.'

Resp's Brief, 6. This statement documents Respondent's refusal to recognize controlling law. In Comp's Mem-Liab and Pen, Complainant specifically puts Respondent on notice of the law applicable to accelerated decision in the Administrator's civil penalty assessment process, and Respondent's obligations under that law in making any objection to Complainant's Motion for Accelerated Decision on Liability and Penalty. Comp's Mem-Liab and Pen, 5-9. As a matter of law, in opposing that motion, Respondent was required to raise any objection it had to any evidence cited by Complainant in support of that motion, so as to raise a genuine issue of fact regarding evidence cited by Complainant. A review of Respondent's four-page opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty reveals that Respondent raises no objection to any evidence cited by Complainant in support of that motion. Having failed to raise any objection it had to evidence cited by Complainant on her accelerated decision motion in its objection to that motion, as a matter of law, Respondent is not entitled to an evidentiary hearing at which to make objections to that evidence.

Finally, Complainant would note that Respondent cites a law review article written by the Complainant's counsel in this matter, Resp's Brief, 4, fn.1, although its purpose in citing the article in its brief is not at all clear. The Presiding Officer likewise cited and discusses this article at some length during the hearing. Hearing Transcript, 25-33. Complainant would emphasize that she has not cited that article in this proceeding, as that article has no relevance to the evidence and arguments made in this proceeding. In her Memorandum in Support of the Penalty Amount Proposed, filed with Complainant's Motion for Accelerated Decision on

Liability and Penalty, Complainant set out the law and policy affecting the penalty amount determination in this matter. Memorandum in Support of Penalty Amount Proposed, 1-7. Included in this exposition are citations to relevant provisions of RCRA; federal court decisions addressing relevant provisions of the Administrative Procedure Act ("APA") and agency assessment of civil penalties; and policies and final decisions of the Administrator which govern her determination of appropriate penalty amounts for violations of RCRA. This is the body of law which governs penalty amount determination in this matter, not a law review article. This is the body of law which must be addressed in any challenge to the penalty analysis of Complainant. This is the body of law which must be addressed in any determination of an appropriate penalty amount to be assessed by the Administrator against Respondent. An Administrative Law Judge ("ALJ") "is governed, as in the case of any trial court, by the applicable and controlling precedents[,]" and these precedents include "applicable statutes and agency regulations, the agency's policies as laid down in its *published* decisions, and applicable court decisions." Iran Air v. Kugleman, 996 F.2d 1253, 1260 (D.C. Cir. 1993), quoting Joseph Zwerdling, Reflections on the Role of an Administrative Law Judge, 25 Admin.L.R. 9, 12-13 (1973) (emphasis in original).

II. ATTORNEY'S FEES

Respondents Contentions

In comments made at the outset of the hearing, the Presiding Officer stated:

> the Court invites 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 -- any relevant case law support, and in the Court's view were frivolous contentions.

Hearing Transcript ("Trans"), 10. In its post-hearing brief, Respondent makes such a claim for attorney's fees. Respondent acknowledges that the Administrator's Rules "are silent regarding specifically the availability of an award of attorney's fees under 40 C.F.R. Part 22," but contends that "it is appropriate for this Court to look for guidance outside of the Rules." Resp's Brief, 8. Respondent argues that "[c]ourts have the inherent power to manage their own proceedings and to control the conduct of the parties appearing before them, including the inherent power to punish those who abuse the judicial process," citing Chambers v. NAXCO, Inc., 501 U.S. 32, 42-43 (1991). Resp's Brief, 10. Respondent cites various federal appellate decisions, including those of the United States Supreme Court, upholding the authority of, and setting standards for, federal district courts assessing attorney fees and litigation costs as sanctions against a party. Id., 8-10.[1]

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[1]In his invitation to Respondent to request that its attorney's fees be awarded, the Presiding Officer did not cite the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, and in its request for an award of attorney's fees from the Presiding Officer, Respondent does not argue that it is entitled to attorney's fees under the EAJA. While recognizing that the EAJA provides for the award of attorney's fees to "prevailing parties" in "certain situations," Resp's Brief, 9, fn.2, Respondent makes no demonstration that its circumstances fall within a "situation" recognized by the EAJA. Instead, Respondent distinguishes its claim for attorney's fees in its post-hearing brief from such a claim made under the EAJA, stating as follows:

> Neither the Consolidated Rules of Practice, nor the Administrative Procedures Act specifically address when a Presiding Officer or Environmental Appeals Board **may** use its discretion to award attorney's fees against the government. Therefore, Respondent argues that this Court **may**, in its discretion, apply the standards used in the Federal Rules of Civil Procedure in deciding whether it is appropriate to award Respondent its attorney's fees.

Id. (Bold in original.). As Respondent's claim for attorney's fees rests solely upon the Federal Rules of Civil Procedure and its argument that the Presiding Officer, as a "Court," has an

Complainant's Opposition to Any Award of Attorney's Fees

To provide a short response, Respondent's request for attorney's fees is pre-mature and unwarranted. As is clear from law governing this proceeding, the Presiding Officer is without authority to issue final decisions and orders, and this matter has not been reviewed by the Environmental Appeals Board, which has been delegated authority to issue final decisions and orders on behalf of the Administrator. Moreover, as will be demonstrated herein, the Presiding Officer is not a "Court." Whatever powers are held by a Presiding Officer under the Administrative Procedure Act ("APA") and the Administrator's Rules, those powers do not incorporate any "inherent" powers of a court authorized to hear and rule upon matters under Article III of the U.S. Constitution, as Respondent argues.

Respondent's Claim for Attorney's Fees is Premature and Unwarranted

The Administrator provides that "[w]ithin 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer[.]" 40 C.F.R. § 2.30(a). As a "party," Complainant's "rights of appeal" in this matter encompass "those issues raised during the course of the proceeding and by the initial decision[.]" 40 C.F.R. § 22.30(c). Consistent with Section 557(b) of the APA, by rule, the Administrator provides that, on review, 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, and shall set forth in the final order the reasons for its actions." 40 C.F.R. § 22.30(f). Board review of this matter will incorporate a review of the Presiding Officer's denial of Complainant's Motion for Accelerated Decision on Derivative

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"inherent power" to award attorney's fees, and Complainant is herein submitting a "reply" brief, the EAJA is not at issue and further discussion of the EAJA not warranted.

Liability, as well as a review of his denial of Complainant's request for a determination of penalty in an accelerated decision. As the Presiding Officers' ruling on neither issue involves an evaluation of witness testimony, the Board "is in no way bound by the decision of" the Presiding Officer, and has authority to enter its own findings and conclusions with regard to both issues. See above, at 10-11. As this review has not yet occurred, Respondent's request for the Presiding Officer award it attorney's fees in the initial decision he will issue is certainly untimely, and may very well prove to be superfluous.

Moreover, Respondent JAB-Ohio has not prevailed on liability. Initially, in June 2008, answering an allegation of the Administrative Complaint and Compliance Order ("ACCO") that it violated RCRA by failing to decontaminate the drip pad at its closed wood-treating facility of toxic arsenic and chromium contamination, Respondent "neither admitted nor denied" committing the alleged violation "for lack of information." Answer to Complaint and Compliance Order, 10. After 14 months of litigation, Respondent admitted that it committed those violations. Respondent John A. Biewer Company of Ohio, Inc.'s Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, 2. The Presiding Officer found Respondent liable for those violations. Order on Complainant's Motion for Accelerated Decision on Liability and Penalty, 5.

As to the costs of litigating the issue of appropriate penalty for Respondent's violation, it was not on Complainant's account that Respondent incurred litigation and travel costs for a penalty hearing. On January 22, 2010, well before the February 23, 2010, scheduled hearing in Toledo, Complainant informed the Presiding Officer and Respondent 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 of the Administrator's Delegated Complainant, 2. In response, on February 8, 2010, Respondent filed Respondent's Motion for Immediate Consideration, and Respondent's Motion for Entry of Decision, requesting that the hearing be cancelled and an immediate order entered finding that a penalty amount of $0 be found appropriate, based upon Complainant's decision to present no evidence at the hearing. Consequently, though differing widely on the appropriate amount of penalty, neither Complainant nor Respondent thought it necessary to conduct a hearing, requiring additional litigation costs and travel expenses on the part of all concerned. Had the Presiding Officer ruled upon Respondent's Motion for Immediate Decision, filed two weeks prior to the hearing date, Respondent JAB-Ohio would not have incurred litigation and attorney's fees associated with the hearing.

Governing Law Does Not Authorize the Presiding Officer to Award Attorney's Fees Under the Federal Rules of Civil Procedure

As Respondent's claim for attorney's fees is made under the Federal Rules of Civil Procedure and the Presiding Officer's alleged "inherent power" to "control the conduct of the parties appearing before [him], including the inherent power to punish those who abuse the judicial process," Resp's Brief, 10, citing Chambers, it is necessary to review the statutes which govern the Administrator's civil penalty assessment process, both the APA and RCRA.

Respondent's attempt to attribute to an ALJ the authority of a federal district court judge is wrongheaded and simply not supported by governing law. Writing for the United States Supreme Court, Justice Brennan has stated:

> . . . We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the

> rules of procedure, trial, and review which have evolved from the history and experience of courts.' FCC v. Pottsville Broadcasting Co. 309 US 134, 143, 84 L Ed 656, 60 S Ct 437 (1940).

Matthews v. Eldridge, 424 U.S. 319, at 348-49, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976).[2]

The Administrator has clearly acknowledged that her assessment of civil penalties for violations of the Resource Conservation and Recovery Act ("RCRA") is governed by the APA.[3]

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[2]The "wise admonishment" of Justice Frankfurter included the following:

> The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. [footnote omitted] . . . These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. . . . Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Federal Communications Commission v. Pottsville Broadcasting Company, 309 U.S. 134, 142-44 (1940). Two years after Matthews, Justice Rehnquist, writing for the Court, stated:

> But 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.'" FCC v. Schreiber, 381 US, at 290, 14 L Ed 2d 383, 85 S Ct 1459, quoting from FCC v. Pottsville Broadcasting Co. 309 US at 143, 84 L Ed 656, 60 S Ct 437. Indeed, our cases could hardly be more explicit in this regard.

Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519, 543-544 (1978). In subsequent years, the Court has continued to cite Pottsville Broadcasting Company for the proposition that "it is well settled that there are wide differences between administrative agencies and the courts[.]" Sims v. Commissioner of Social Security, 530 U.S. 103, 110 (2000). See also, Shepard v. National Labor Relations Board, et al., 459 U.S. 344, 351 (1983) ("The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws.").

[3]The Administrator has promulgated rules, which have been codified at 40 CFR Part 22. These rules "govern all administrative adjudicatory proceedings for . . . [t]he assessment of any

Interpreting the APA, the U.S. Supreme Court has held that Congress intended to make ALJs "semi-independent subordinate hearing officers," and that an ALJ "is a creature of Congressional enactment." Ramspeck v. Federal Trial Examiners Conference, 345 U.S. 128, at 132-133 (1952).[4] In Section 556(c) of the APA, Congress provides that an ALJ may be appointed to conduct any hearing that is necessary, and, in conducting any such hearing, the actions of the ALJ are "[s]ubject to the published rules of the agency and within its powers[.]"[5] This has been

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civil penalty" under various federal environmental statutes in which Congress has invested the Administrator with authority to assess civil penalties for violations. 40 CFR 22.1. The Administrator has recognized that these rules have been promulgated:

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

63 Fed. Reg. 9464, 9464 (February 25, 1998). In 40 C.F.R. § 22.1(a)(4), the Administrator provides that her rules are specifically applicable to her penalty assessment process under the Solid Waste Disposal Act, in which appear the RCRA amendments.

[4]In 1978 amendments to the APA, Congress provided that hearing examiners shall be known as "administrative law judges." 95 P.L. 251; 92 Stat. 183 (March 27, 1978). Consequently, the terms "hearing officer" and "trial examiner" and "ALJ" all refer to the same governmental officer. Notwithstanding the name change, no amendment was made to Sections 556 and 557 of the APA, 5 U.S.C. §§ 556 and 557, effecting the authority of this particular governmental officer. For a review of the historical development of this officer, see K. Davis, Administrative Law Treatise, 2nd Ed., § 17.11 (1980). By rule, the Administrator identifies this particular federal officer a "Presiding Officer." 40 C.F.R. § 22.3.

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

interpreted to mean that, on matters of law and policy, an ALJ is subordinate to the agency in which he serves.[6]

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

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

In Section 557(b) of the APA, Congress has authorized an ALJ only to "initially decide" a matter, and "on appeal from or review of the initial decision the agency has all the powers which it would have in making the initial decision," with exceptions not relevant to this discussion. The Supreme Court has recognized the plenary scope of agency review in holding that, where Congress places decisionmaking authority in a "Board," the "responsibility for decision" placed on the Board:

> is wholly inconsistent with the notion that it has power to reverse an examiner's findings only when they are 'clearly erroneous.' Such a limitation would make so drastic a departure from prior administrative practice that explicitness would be required.

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 492 (1971).[7] In a published decision of the

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[7]The Attorney General of the United States has explained that, under Section 557(b) of the APA, an "initial decision" is "advisory" in nature, and that "[i]n making its decision, whether following an initial or recommended decision, the agency is in no way bound by the decision of its subordinate officer; it retains complete freedom of decision -- as though it had heard the evidence itself." Attorney General's Manual on the Administrative Procedure Act, at 83 (1947). Federal courts have held likewise. "Section 8(a) of the Administrative Procedure Act, 5 U.S.C. § 557(b), clearly authorizes the agency to 'make any findings or conclusions which in its judgment are proper on the record,' notwithstanding a different determination by the Examiner [ALJ]." Fink v. Securities and Exchange Commission, 417 F.2d 1058, at 1059 (2nd Cir. 1969). "[T]he fact that the Board reached different factual conclusions than the administrative law judge is not as diabolic as respondent suggests[,]" the issue is "whether the Board's decision is based on substantial evidence." U.S. Soil Conditioning v. N.L.R.B., 606 F.2d 940, at 942 (10th Cir. 1979). In has been recognized that Universal Camera makes clear that "the ultimate responsibility for findings of fact rests with the [NLRB] by statute, as we believe it rests with the Secretary of Health and Human Services here, and for the same reasons." Mullen v. Bowen, 800 F.2d, at 542. "[A]s the Supreme Court made clear in Universal Camera, the agency is free to substitute its judgment for that of the ALJ[,]" and "the ALJ's determinations are not entitled to any special deference from the agency except insofar as the ALJ's findings are based on witness credibility determinations." Mattes v. United States, 721 F.2d 1125, at 1129 (7th Cir. 1983). "Under administrative law principles, an agency or board is free either to adopt or reject an ALJ's findings and conclusions of law. . . . The agency or board retains the power to rule on disputed facts and the ALJ's determinations of such facts are not given the weight of the findings of fact by a district court." Starrett v. Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986).

Administrator, her Chief Judicial Officer ("CJO") held that:

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

In Re Martin Electronics, Inc., 2 EAD 381, 395 (CJO 1987). In making that holding, the CJO cited Professor K.C. Davis' summary of the state of the case law on the relationship between an ALJ and an agency:

> The final distillation (of present case law) is that the primary factfinder is the agency, not the ALJ; that the agency retains 'the power of ruling on facts . . . In the first instance'"; that the agency still has 'all the powers which it would have in making the initial, decision'; that the ALJ is a subordinate whose findings do not have the weight of the findings of a district judge; that the relation between the ALJ and agency is not the same as or even closely similar to the relation between agency and reviewing court; and that the ALJ's findings are nevertheless to be taken into account by the reviewing court and given special weight when they depend upon demeanor of witnesses. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 17:16, at 330 (2nd ed. 1980).

Id.

In RCRA, Congress has invested in the Administrator exclusive authority to assess penalties for its violation, and exclusive authority to determine the amount of any penalty to be assessed. Section 3008 of RCRA, 42 U.S.C. § 6928. Congress provides that when "the Administrator" determines that a violation has occurred, "the Administrator may issue an order assessing a civil penalty" or "requiring compliance," 42 U.S.C. § 6928(a)(1), and that "[i]n assessing such a penalty, the Administrator shall take into account the seriousness of the violations and any good faith efforts to comply with applicable requirements." 42 U.S.C.

§ 6928(a)(3). Clearly, Congress has not invested in ALJs authority to assess a penalty for violations of RCRA, or to determine the amount of penalty to assess.

It is clear from the language of Section 3008 of RCRA, and Sections 556(c) and 557(b) of the APA, as interpreted by the federal courts and the Administrator herself in Martin Electronics, see above, at 11-15, that the Presiding Officer is without authority to award attorney's fees based upon any "inherent powers" a federal district court judge may have under the Federal Rules of Civil Procedure, as advocated by Respondent in its post-hearing brief. In Section 3008 of RCRA, Congress makes no grant of authority to an ALJ, and, in Sections 556(c) and 557(b) of the APA, Congress grants an ALJ authority only to issue initial decisions, subject to the rules, published decisions and policies of the agency, reserving in the agency plenary authority, on review of an initial decision, to enter its own independent findings and conclusions as if the agency was originally hearing the matter.

Whatever potential right or remedy Respondent may have at some future point in this proceeding, it is clear that at this stage of the proceedings its claim for an award of attorney's fees is premature and unwarranted, and it has not asserted in its post-hearing brief a legally

recognized basis for an award of attorney's fees. Consequently, Respondent's request for attorney's fees in its post-hearing brief must be denied.

Respectfully submitted,

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

Luis Oviedo
Associate Regional Counsel

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of **Complainant's Reply Brief** 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:

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