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)	)	
	)	
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 TO RESPONDENT JOHN A. BIEWER COMPANY OF OHIO, INC.'S MEMORANDUM IN OPPOSITION TO COMPLAINANT'S MOTION FOR ACCERLERATED DECISION ON LIABILITY AND PENALTY

On December 12, 2008, Complainant filed in this matter a Motion for Accelerated Decision on Liability and Penalty ("Complainant's Motion"), with a memorandum supporting that motion ("Complainant's Memorandum"). In the memorandum, Complainant set out: (1) an exposition of the law applicable to accelerated decision under the Administrator's Rules, specifically, 40 C.F.R. §22.20; (2) twelve proposed findings of fact, citing evidentiary support; (3) argument on the issue of Respondent's liability; and, (4) argument supporting the penalty amount proposed, consisting of Complainant's analysis of the evidence of record in consideration of the statutory penalty criteria of Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), as interpreted in the Administrator's adopted RCRA civil penalty policy, issued

in June 2003. On Julyl 30, 2009, Respondent submitted its response to Complainant's Motion and Memorandum ("the Response"). Complainant herein replies to that response, as allowed by 40 C.F.R. § 22.16(b).

RESPONDENT'S LIABILITY

In Complainant's Motion, at 12-16, Complainant sets our twelve specific proposed "Findings of Fact," citing to specific evidence in the record included as attachments to Complainant's Motion. In its Response, Respondent makes no attempt to challenge any of the twelve proposed Findings of Fact. Consequently, under controlling law, Complainant is entitled to each of those twelve proposed findings of fact being entered.[1] See Complainant's Memorandum, at 16-21. As Respondent states that "it must concede that it is not in compliance with RCRA," the Response, at 2, perhaps it is simply conceding liability on Complainant's Motion. In any event, on the evidence support Complainant proposed Findings of Fact,

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[1]In its Response, at 2, Respondent includes one paragraph of five sentences under the sub-title "Factual Background." Complainant would note that though this paragraph purports to set forth a "factual background" related to Complainant's Motion, no a single citation is made in the paragraph to any evidence of record, submitted by either Respondents or Complainant. Facts asserted by a party to a motion for summary disposition "must be established through on the vehicles designed to ensure reliability and veracity -- depositions, answers to interrogatories, admissions and affidavits." Martz v. Union Labor Life Ins. Co., 757 F.2d 135, at 138 (7th Cir. 1985). "[U]nsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision American Corp., 754 F.2d 1212, at1216 (5th Cir. 1985). "The opposing party cannot defeat summary judgment by mere allegations but must bring 'sufficient evidence supporting the claimed factual dispute . . .to require a jury or judge to resolve the parties; differing versions of the truth at trial[,]'" and the "burden is on both parties to file necessary materials with the court to support their claims for and against summary judgment." General Office Products v. A.M. Capen's Sons, Inc., 780 F.2d 1077, at 1078 (1st Cir. 1986). Consequently, as none of the factual statements of Respondent under "Factual Background" in its Response are supported by citation to any evidence in the record, none of these statements can be considered on Complainant's Motion.

Complainant is entitled to judgment, as a matter of law, that Respondent is liable for the violation alleged in the Complaint and Compliance Order.

APPROPRIATE PENALTY AMOUNT

In a separate memorandum ("Complainant's Penalty Memorandum"), incorporated by reference into Complainant's Memorandum, see Complainant's Memorandum, at 22, Complainant sets out her 27 page analysis of the evidence of record in this matter, in consideration of the statutory penalty criteria of RCRA, in support of the Administrator's assessment of the $282,649 penalty amount proposed. Complainant's Penalty Memorandum is replete with an identification of facts relied upon by Complainant is her penalty analysis, with specific citations to evidence in the record, including statements made by Respondent in its Answer; findings made by the Administrator, and set out in the Federal Register, in promulgating rules regulating the wood treating industry; and attachments A through N to Complainant's Motion, most of which are documented communications between Respondent and the Ohio Environmental Protection Agency or Respondent's environmental consultant regarding the arsenic and chrome contamination at Respondent's facility, which is the subject matter of this proceeding.

In its Response, Respondent disputes the appropriateness of the penalty amount proposed, however, Respondent makes no attempt to challenge any of the analysis of Complainant in Complainant's Penalty Memorandum.[2] In fact, Respondent makes no challenge whatsoever to

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[2]In its Response, at 4, Respondent makes this statement: "Complainant does not even contend, much less establish, that there are no disputed facts pertaining to its proposed $282,649 penalty amount." With Complainant having identified the facts supporting the penalty amount she is proposing, the burden is on Respondent, not Complainant, to identify whether any such fact is being disputed by Repsondent.

Complainant's gravity based penalty analysis, set out in Complainant's Penalty Memorandum, at 11-22. It fails to identify any fact relied upon by Complainant in determining the gravity based penalty amount which it disputes, nor does it make any attempt to persuade that Complainant's gravity based penalty amount is not support by an analysis of the evidence of record, and a considered application of the statutory penalty criteria as interpreted by the Administrator in her RCRA Civil Penalty Policy ("the Policy").

Respondent's sole challenge to the penalty amount proposed addresses a consideration of the "lack of willfulness" in Respondent's violating conduct, which the Administrator directs be addressed in determining an appropriate amount of penalty for her to assess. The Policy, at 36-37. In support of its challenge, Respondent states that

> it intends to present evidence at the hearing showing that there are a number of factors militating against Complainant's proposed penalty, including its financial inability, not unwillingness, to perform the drip pad closure plan. Its lack of funds stemmed from circumstances that were beyond JAB Ohio's control, manely the faiolure of JAB Ohio's wood treatment operations at the Facility. . . . Furthermore, the evidence at the hearing will show that JAB Ohio borrowed funds it would likely be unable to repary to retain MSG in the first place, evidenceing good faith on the part of JAB Ohio.

The Response, at 3-4 (emphasis added).

In urging a reduction in the penalty amount for an "inability" to comply with the RCRA requirement violated, on grounds that it was a "lack of funds" that caused it to be unable to follow through on the drip pad closure plan, have cited no evidence. Respondent's statement that it lacked funds to perform the tasks necessary to comply with RCRA. is nothing more than

an "unsupported allegation," a "conclusion," and as such cannot defeat a motion for accelerated decision. See fn. 1.

As noted in Complainant's Memorandum, at 6-8, Respondent has certain obligations under the law in responding to a motion for accelerated decision. A party "waives its right to an adjudicatory hearing where it fails to dispute the material facts" upon which an agency decision may be based. In Re Green Thumb Nusery, Inc., 6 E.A.D. 782, at 792 (March 6, 1997). A party opposing accelerated decision "must demonstrate that [a] dispute is 'genuine' by referencing probative evidence in the record, or by producing such evidence," Id., at 793. A party may not avoid accelerated decision "by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[,]" and "the mere possibility that a factual dispute may exist, without more, is not sufficient to overcome a convincing presentation by the moving party." Id., fn.24. As these are holdings of the Administrator in published decision of the Environmental Appeals Board, these holdings are controlling precedent in this matter. See Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993) ("controlling precedents" include "agency regulations [and] the agency's policies as laid down in its *published* decisions" (emphasis in original)).

As Respondents have cited no evidence in the record, or produced any evidence, to support its claim that "it lacked funds" to comply with the law and complete drip pan closure requirements at the JAB-Ohio facility, and that its lack of funds was due to "circumstances that were beyond JAB Ohio's control," Respondent has failed to meet its burden to support its

assertions.[3] Consequently, Respondents have failed to demonstrate that there is any "genuine issue of material fact" with regard to the proposed penalty amount, and, as their claim that JAB-Ohio was unable to afford to comply with the law and clean up the arsenic and chromium contamination at its drip pad is not supported by the evidence, there is no basis in fact for reducing the proposed penalty amount based on that claim. As that claim is the only challenge Respondents raise in opposition to the proposed penalty amount, Complainant has met its burden of persuasion and demonstrated that the proposed penalty amount is appropriate.[4]

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[3]Notwithstanding the Administrator's general "burden of proof" on facts necessary to support the penalty order proposed, on a matter put at issue by a respondent, if the information to prove the facts on which the matter will be determined is in the control of the respondent, the failure of the respondent to timely provide that information will result in a finding contrary to that asserted by respondent on the issue. See U.S. v. New York, New Haven & Hartford R.R., 355 U.S. 253, at 256 fn.5 (1957) ("based on considerations of fairness, [evidentiary law] does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."); In Re New Waterbury, Ltd., TSCA Appeal No. 93-2, at 16 (EAB 1994) ("where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, the Region may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules."); Newell Recycling, at 210 ("Surely Newell was in possession of such information if anyone was. Nothing in the record, moreover, intimates that information regarding Newell's ability to pay is readily available from a source other than Newell. [As Newell did not provide that information, the] Presiding Officer, therefore, correctly declined to mitigate the penalty on the basis of Newell's putative inability to pay it."). The failure of a party to produce evidence in his control to support positions that he has taken "not only strengthens the probative force of its absence but of itself is clothed with a certain probative force." International Union (UAW) v. NLRB, 459 F.2d 1329, at 1338 (D.C. Cir. 1972).

[4]There is also pending in this matter a Motion for Accelerated Decision on Derivative Liability, seeking to have John A. Biewer Company, Inc. ("JAB-Co"), and/or Biewer Lumber LLC held liable for the violation of JAB-Ohio. As, in response to Complainant's Motion for Accelerated Decision on Liability and Penalty, neither JAB-Co nor Biewer Lumber LLC have claimed a lack of funds to complete the required clean up of arsenic and chromium contamination at the JAB-Ohio facility, neither has raised any challenge to the penalty amount proposed by Complainant.

Based upon the evidence cited in support of the Motion and the legal argument provided by Complainant, and the response of Respondents, Complainant is entitled to a finding, under 22 C.F.R. § 22.20, that there is no material issue of fact requiring a hearing on the issue of JAB-Ohio's liability for the violation alleged in the Complaint and Compliance Order, and that the proposed penalty of $282,649 is appropriate. Moreover, to the extent that JAB-Co and Biewer Lumber LLC may be found liable for this violation, as to those two respondents the penalty amount proposed is appropriate.

Respectfully submitted,

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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Respondents	)	
	)	

COMPLAINANT'S RESPONSE TO RESPONDENTS' BRIEF IN OPPOSITION TO COMPLAINANT'S MOTION TO STRIKE, IN PART, RESPONDENTS' PRE-HEARING EXCHANGE

In her Memorandum in Support of Complainant's Motion to Strike, in Part, Respondent's Pre-Hearing Exchange ("Complainant's Memorandum"), filed December 12, 2008, Complainant argued as follows:

(I) That in the Resource Conservation and Recovery Act ("RCRA"), Congress has invested the Administrator with exclusive authority under to assess civil penalties, and, under the Administrative Procedure Act ("APA"), the Administrator has promulgated rules by which she assesses such penalties. These rules, and none other, control this proceeding to assess civil penalties against Respondents for the RCRA violation it is alleged to have committed. Complainant's Memorandum, at 1-5.

(II) That a search of the Administrator's Rules, promulgated at 40 C.F.R. Part 22 reveal that no "right" to cross-examine an agency penalty witness is recognized. To the contrary, at 40 C.F.R. § 22.20 the Administrator specifically provides for

the assessment of a civil penalty without any oral evidentiary hearing whatsoever, if there is "no genuine issue of material fact." Id., at 5-8.

(III) That the Administrator, in fact, has issued final orders under 40 C.F.R. § 22.20, without conducting any oral evidentiary hearing, assessing civil penalties against Respondents for as much as $1.345 million, which have been upheld on judicial review. That given her prior decisions assessing civil penalties without an evidentiary hearing, to recognize Respondents in this particular case to have an absolute "right" to cross-examine an agency penalty witness at a hearing is an "arbitrary and capricious" decision, unlawful under Section 706 of the APA. Id., at 8-13.

In their response, while persisting in asserting an absolute right to cross-examine an agency penalty witness, Respondents make no attempt to address the impact of 40 C.F.R. § 22.20, by which the Administrator specifically provides for the assessment of a civil penalty without any cross-examination of an agency penalty witness, when there is no genuine issue of material fact. And Respondents fail to address Complainant's citation to the law demonstrating that the determination of an appropriate amount of civil penalty for violations is an issue of law for argument, and not a factual issue requiring the credibility of a witness' testimony. Id., at 11-13. Respondents fail to address the impact on their asserted right of the long-standing principle of American civil law that a party has a right to an oral evidentiary hearing only to the extent that there are contested issues of fact to be determined. Id., at 6-8. Nor do Respondents articulate any rationale as to why they should be found to have an absolute right to cross-examine an agency penalty witness, when the Administrator has assessed civil penalties against Newell Recycling Company, Inc., and Green Thumb Nusery, Inc., and Spitzer Great Lakes Ltd., Inc., and Roger Antikiewicz, and Federal Cartridge Company, without any of these parties cross-

examining an agency penalty witness.[1] Id., at 9-10. One cannot assert or determine "rights" of parties in the Administrator's civil penalty assessment process without being informed by the statutes and rules which govern that process.

The only law cited by Respondents in response to Complainant's Memorandum is 40 C.F.R. § 22.24(a) and (b), and 40 C.F.R. § 22.22(c). However, Rule 22.24 (a) does no more than place upon Complainant the "burden" of proving that any violation alleged occurred, and the burden of persuasion that the penalty amount sought is appropriate. Rule 22.24(b) provides that each matter of controversy is to be decided upon a preponderance of the evidence. There is no language in either of these provisions which can provide support for the proposition that a respondent has a right to an oral evidentiary hearing to cross-examine an agency penalty witness, and Respondent has provided no analysis of the language in an attempt to demonstrate that the language does provide such support. Rule 22.22(c) allows a presiding officer to admit into the record "written testimony" in lieu of oral testimony, and, if any such written testimony is so admitted, the opposing party has a right to cross-examine the author of the written testimony. This rule does not require anyone to call any particular witness to testify, nor does it require any party to introduce anything at all into evidence. Consequently, Rule 22.22(c) cannot support Respondents' claim of a "right" to cross-examine an agency penalty witness.

The process by which the Administrator has determined that she would assess civil penalties for violations of the federal environmental statutes is a legal process, and actions taken

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[1]Complainant would note that, in an initial decision issued by the Chief Administrative Law Judge on July 2, 2009, she identified three additional cases in which civil penalties were determined on accelerated decision, without the cross-examination of an agency penalty witness. In the Matter of Wisconsin Plating Works of Racine, Inc., No. CAA-05-2008-0037, at 8 (Initial Decision, July 2, 2009).

during the course of any particular proceeding for the purpose of her assessing such penalties are controlled by the law and precedent applicable to that process, which includes, in this case, RCRA, and the APA, the Administrator's Rules, and agency policy set out in the Administrator's published decisions. See Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993). Respondents do not cite any provision of law or precedent applicable to this proceeding to support their claimed "right" to cross-examine an agency penalty witness. As a matter of law, there simply is no such right.

In this case Respondents are alleged to have committed one violation of RCRA. With her Motion for Accelerated Decision on Liability and Penalty ("the Motion"), Complainant has presented a 27 page argument in which she has analyzed the facts of this case in consideration of the RCRA statutory criteria, as interpreted in the Administrator's civil penalty policy, to support the penalty amount proposed in the Complainant and Compliance Order, and the Motion.[2] Respondents may not agree with Complainant's analysis, and, in that event, argue against Complainant's proposed penalty amount in response to the Motion -- just as it would argue against the proposed penalty amount in a post-hearing brief, were the evidence controverted -- asserting that Complainant's analysis is defective and that a penalty amount other than that proposed by Complainant is more appropriate. In his or her initial decision, in determining the appropriate penalty amount, the Presiding Officer may accept either argument, in whole or in

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[2]In the Administrator's published decision, issued by the Environmental Appeals Board -- cited in Complainant's Memorandum, at 6-7 -- the Administrator's RCRA penalty policy was found to "implement[] the requirement in RCRA that in assessing a civil penalty the Agency [Administrator] taken into account 'the seriousness of the violation, and any good faith efforts to comply with the applicable requirements." In the Matter of Everwood Treatment Company, Inc., 6 E.A.D. 589. At 594 (1996).

part, as persuasive, or may find a different penalty amount appropriate, provided he or she make that determination in conformance with the Administrator's Rules, specifically 40 C.F.R. § 22.27(b). Requiring Complainant to present a witness to read -- or otherwise attempt to recite by memory -- Complainant's penalty argument from the witness stand, and then be "cross-examined" on the argument is simply not necessary now, nor has it ever been, see above, at 2, to provide Respondents an opportunity to challenge the amount of penalty Complainant proposes for their alleged violation.

As a matter of law, Complainant's Motion Respondent to Strike, in Part, Respondent's Pre-Hearing Exchange, must be granted, as Respondent's claimed right to cross-examine an agency penalty witness simply does not exist, and to find that such a right does exist is contrary to the Administrator's Rules and published decisions, as well as RCRA and the APA, as demonstrated in Complainant's Memorandum.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Complainant's Reply to Respondent John A Biewer Company of Ohio, Inc.'s, Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty, and Complainant's Response to Respondent' Brief in Opposition to Complainant's Motion fo Strike, in Part, Respondents' 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:

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August 12, 2009

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