



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONS 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

April 6, 2009

Honorable William B. Moran
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

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U.S. ENVIRONMENTAL
PROTECTION AGENCY

Re: In Re John A. Biewer Company of Toledo, Inc.
No. RCRA-05-2008-0006

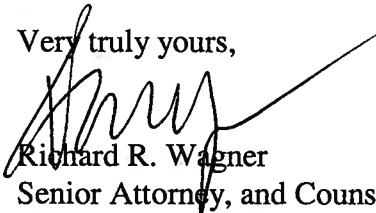
Dear Judge Moran:

I am having file today Complainant's Reply to Respondent's Response to Complainant's Motion for Discovery, along with a draft Discovery Order and a Certificate of Service.

I wanted to inform you that I will be out of my office beginning the afternoon of Tuesday, April 14, 2009, and not returning to my office until Friday, April 24, 2009. I will be traveling out of the country. Should your office need to contact anyone during that time about this matter, please contact Ms. Sandra Lee, my Section Chief, at (312) 886-6841.

Thank you very much.

Very truly yours,


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

cc: Region 5 Hearing Clerk

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

**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)
(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)
_____)

DOCKET NO. RCRA-05-2008-0006

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PROTECTION AGENCY

**COMPLAINANT’S REPLY TO RESPONDENTS’ RESPONSE TO
COMPLAINANT’S MOTION FOR DISCOVERY**

On February 26, 2009, the Administrator’s Delegated Complainant filed a Motion for Discovery (“the Motion”) in this matter. On March 26, 2009, Complainant was served with a copy of Respondents’ Response to EPA’s Discovery Requests (“the Response”). Pursuant to the Administrator’s Rules, specifically 40 C.F.R. § 22.16(b), Complainant submits this reply to Respondents’ response.

Two initial observations must be made regarding the Response. First, in the Response, Respondents do not contest any statement made by Complainant in her Memorandum in Support of Complainant’s Motion for Discovery (“the Memorandum”). Second, though the possibility that responsive records had been destroyed by Respondents under a records retention policy had

earlier been raised by Respondents, the Memorandum, at 3, their Response is silent as to any records sought in the discovery request having been so destroyed.

In the Response, Respondents answer each specific information request set out in the Motion. They have submitted certain information, and, as to other information sought, either objected to submitting that information, or asserted that they have not yet found responsive information. Complainant contends that the Response is inadequate to meet the legitimate needs of discovery in this matter, and cannot serve to allow Respondents to avoid the entry of an appropriate discovery order. After a comment on Respondents Biewer Lumber's discovery obligations, Complainant will address the objections of Respondents.

(a) Biewer Lumber's Obligation to Respond to Discovery

Initially, Complainant would note that Respondent Biewer Lumber objects to submitting its tax returns, Information Request 1, as well as all other information it has been asked to provide, as "Biewer Lumber did not exist until February 9, 2006," and it "objects to this Discovery Request to the extent it requests Biewer Lumber to produce documents created prior to its existence." Complainant addressed this claim of Respondents in the Memorandum.

The contention that Biewer Lumber did not exist prior to 2006 is simply not true. At the current Biewer Lumber web-site, Biewer Lumber identifies itself as a "third generation, family owned company" that has been serving its customers "for 45 years," states that it has been a "pioneer" in the treating industry and "remains a leader today," and that it has "three state-of-the-art treatment plants." Memorandum, at 4. Moreover, Complainant noted that, in earlier providing balance sheets and income statements for Respondent John A. Biewer Company of Toledo, Inc., going back to 1997 -- nine years prior to Biewer Lumber's supposed organization in

2006 -- those statements were provided by the Chief Financial Officer of Biewer Lumber. Id. Respondents are silent as to this information. Perhaps the “Biewer family” which has owned Biewer Lumber -- and the wood treatment plants since the days that it pioneered wood treatment on the way to becoming an industry leader today -- reorganized in some fashion in 2006. But reorganization cannot wipe a company’s slate clean.

Under these circumstances, Respondent Biewer Lumber’s objection to the Motion on grounds that it did not come into existence until 2006 cannot be sustained.

(b) Objections to Specific Requests

1. John A. Biewer Company, Inc., has provided the information requested. Biewer Lumber objects to submitting their complete tax returns including all schedules and attachments for January 1, 1997, through the present. Complainant has already demonstrated that Biewer Lumber has been in existence during all times relevant to the allegations of the Complaint. See above, at 2. In the order adding Biewer Lumber and John A. Biewer Company, Inc., as respondents, the Presiding Officer held that Complainant “is entitled to learn through discovery of the nature of the relationship” of the three companies, as well as “the movement of funds in and among these entities.” Order on Motion to Amend Complaint and Compliance Order, at 4. The information sought in this discovery request is expected to reveal line item entries which could shed light on what happened to the transfer of assets of John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., after they closed. Moreover, review of the information requested could reveal payments being made to, or on behalf of, those companies after they ceased operations and had limited rental income, with on-

going expenses for taxes and insurance on their property, the services of the environmental consultant, and its initial decontamination activities at their drip pad.

Under the law, to determine whether each Respondent has been an independent company, it is necessary to review not only the “papers for incorporation” but also to examine whether each Respondent “functioned” as an independent corporation in fact. To make that determination it is necessary to review information that such corporations would be expected to have, such as financial documentation (financial statements, tax returns, or underlying transactional data) to determine whether the company was self-standing and independent, corporate maps showing the relationship of Respondents; a history of the ownership of Respondents since 1997; a history of Respondents’ respective officers and Board of Directors; and copies of records of Board of Directors’ and shareholders’ meetings and resolutions. Consequently, the information sought in this request is not only warranted under the law and circumstances already known, it is necessary to assure integrity in any finding made on the issue of “piercing the corporate veil.”

2. Biewer Lumber objects to submitting their complete year-end financial statements, including the auditor’s letter, balance sheet, income statement, statement of cash flows and notes, for January 1, 1997, through the present. In the Order adding Biewer Lumber and John A. Biewer Company, Inc., as respondents, the Presiding Officer held that Complainant “is entitled to learn through discovery of the nature of the relationship” of the three companies, as well as “the movement of funds in and among these entities.” *Id.* The information sought in this discovery request is expected to reveal line item entries which could shed light on what happened to the transferred assets of John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., after they closed. Moreover, review of the information requested could

reveal payments made to, or on behalf of, those companies, after they ceased operations and had limited rental income, with on-going expenses for taxes and insurance on their property, the services of an environmental consultant, and the initial decontamination activities at its drip pad.

Under the law, to determine whether each Respondent has been an independent company, it is necessary to review not only the “papers for incorporation” but also to examine whether each Respondent “functioned” as an independent corporation in fact. To make that determination it is necessary to review information that such corporations would be expected to have, such as financial documentation (financial statements, tax returns, or underlying transactional data) to determine whether the company was self-standing and independent, corporate maps showing the relationship of Respondents; a history of the ownership of Respondents since 1997; a history of Respondents’ respective officers and Board of Directors; and copies of records of Board of Directors’ and shareholders’ meetings and resolutions. Consequently, the information sought in this request is not only warranted under the law and circumstances already known, it is necessary to assure integrity in any finding made on the issue of “piercing the corporate veil.”

3. Respondents have answered this particular information request.

4. Respondents object to submitting ownership and corporate management information, and history, because Biewer Lumber did not exist until two years after the violations are alleged to have occurred, and the information sought “is neither relevant to the issues at hand nor reasonably calculated to lead to the discovery of admissible evidence.” In response to each unit of information requested, Respondents also state, by rote, that “to the extent that these documents exist and are in the possession of [Respondents], they have already been produced to the EPA.” The information requested here has not been provided by Respondents.

That Biewer Lumber pre-existed the violations has already been established. That the information sought is relevant is obvious: “[I]t is not enough to simply have the requisite papers for incorporation drawn up and filed. The entity must then function as a corporation in fact.” In Re Safe & Sure Products, Inc., et al., No. I.F. & R. 04-907003, at 24 (1998). Circumstances to be considered in determining the appropriateness of “piercing the corporate veil” is whether there has been a “disregard of legal formalities and the failure to maintain an arms-length relationship among related entities,” and whether there has been a “failure to maintain, or the absence of, adequate corporate records or minutes.” *Id.*, at 22.

Companies do not take action -- or fail to take action -- people do. Whether a company is liable for an action taken by a particular person is determined by the relationship of the person to the company, and the relationship is determined by the role and responsibilities of the person in the company structure. As explained at the Biewer Lumber website, the Biewer family¹ has set up all of the Respondents, as well as other “Biewer” companies, in one common enterprise: the production and sale of treated lumber products. Under the cited law, to determine whether each Respondent has been an independent company, it is necessary to review not only the “papers for incorporation” but also to examine whether each Respondent “functioned” as an independent corporation in fact. To make that determination here it is necessary to review information that

¹At the Biewer Lumber web-site, the public is informed that “Biewer Lumber™ is a third generation family owned company[,]” which operates a number of “facilities” which include “three pressure-treated lumber and distribution facilities.” When Complainant uses the term “Biewer family” it means the “Biewer family” identified at the Biewer Lumber web-site which owns the “company” Biewer Lumber, and the facilities identified. The Memorandum, Attachment C. Moreover, the common enterprise and interests of all “John A. Biewer” and “Biewer” companies appearing as Respondents in this proceeding is manifested by the fact that the same attorney is representing them all.

such corporations would be expected to have, such as corporate maps showing the relationship of Respondents; a history of the ownership of Respondents since 1997; a history of Respondents' respective officers and Board of Directors; and copies of records of Board of Director's meetings.

Consequently, the information sought in this request is not only warranted under the law and circumstances already known, it is necessary to assure integrity in any finding made on the issue of "piercing the corporate veil." To make that determination it is necessary to review information that such corporations would be expected to have, such as financial documentation (financial statements, tax returns, or underlying transactional data) to determine whether the company was self-standing and independent, corporate maps showing the relationship of Respondents; a history of the ownership of Respondents since 1997; a history of Respondents' respective officers and Board of Directors; and copies of records of Board of Directors' and shareholders' meetings and resolutions. Consequently, the information sought in this request is not only warranted under the law and circumstances already known, it is necessary to assure integrity in any finding made on the issue of "piercing the corporate veil."

Finally, the information requested must exist as a matter of corporate formality. A documentation of corporate owners and officers, and of actions of the Board of Directors, is necessary for the management of a corporation, and an assessment of the performance of the corporation. If Respondents actually are each "independent" companies they must have this documentation.

5. While Respondents have submitted a list of transactions, it has provided them only for 2006-2009, and nothing further. They have not provided a description of the specific nature of the transactions, the related parties' names, the date of the transaction, and the dollar

amount of the transactions. Respondents object to submitting this information for inter-company transactions of the John A. Biewer Company of Toledo, Inc., for the period of January 1, 1997, to the present, and for John A. Biewer Company of Ohio, Inc., for the period of January 1, 2001, to the present..

Respondents object to this request as “being unreasonable, oppressive and unduly burdensome.” Respondents do not object to the production of the information requested on grounds of relevancy. Several comments must be made. First, for whatever reasons, it was the Biewer family itself which intentionally chose to set up in a complicated structure its production and sale operation, with numerous “John A. Biewer” companies participating in the highly regulated industry of wood-treating, and with the two companies before the Administrator -- according to the Biewers -- without funds to meet their legal obligation to pay for the decontamination of the hazardous waste their operations have left behind.² To the extent Respondents face a “burden” in making an accounting of any transfer of funds among the various “Biewer” companies, it is a burden the Biewer family has brought upon itself. Second, if all of these “Biewer” companies were, and are, independent, as Respondents claim, there should simply not be that many related party transactions for John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., as it has not been in the business of operating its facility since 1997 and 2001 respectively.

²Brian Biewer is listed as a witness who “may also testify regarding the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to fully perform actions requested by Ohio EPA and/or U.S. EPA[.]” Respondent’s Supplemental Witness Disclosure, at 1. The same representation is made by Brian Biewer with regards to John A. Biewer Company of Ohio, Inc. Respondent’s Supplemental Witness Disclosure, at 1

The information sought in this request can be expected to shed light on inter-company transactions as they appear in each company's financial statement. See Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order (Toledo), at 9, fn.4; and Memorandum in Support of Complainant's Motion to Amend Complaint and Compliance Order (Ohio), at 17, fn.13. It can also shed light on the source of funds made available to support each company, as each was without production income, and only John A. Biewer Company of Toledo, Inc., had income, which was no more than limited rental income. With regard to these companies, this information is directly relevant to their "absence of corporate assets and undercapitalization," to their "commingling of funds and other assets or affairs and the diversion of corporate funds or assets to noncorporate uses," to the "nature of the corporation's ownership and control," and to "other shareholder acts or conduct ignoring, controlling or manipulating the corporate form." Safe & Sure Products, at 22.

6. Respondents appear to have answered this particular information request.

7. Respondents have not submitted information regarding the parties associated with "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the balance sheets of John A. Biewer Company of Toledo, Inc. Nor have they provided the date of the transactions, and the services that were provided and received in association with these transactions, or a list of year end balances for these accounts for each related party for the years ending 1997 to present. Respondents object to submitting this information for inter-party transactions of the John A. Biewer Company of Toledo, Inc., for the period of January 1, 1997, to the present.

Respondents object to this request as “being unreasonable, oppressive and unduly burdensome.” Respondents do not object to the production of the information requested on grounds of relevancy. As above, several comments must be made here. First, for whatever reasons, it was the Biewer family itself which intentionally chose to set up in a complicated structure its production and sales operation, with numerous “John A. Biewer” companies participating in the highly regulated industry of wood-treating, and with the two companies before the Administrator allegedly without funds to meet their legal obligation to pay for the decontamination of the hazardous waste their operations have left behind.³ To the extent Respondents face a “burden” in making an accounting of any transfer of funds among the various “Biewer” companies, it is a burden the Biewer family has brought upon itself. Second, if all of these “Biewer” companies were, and are, independent, as Respondents claim, there should simply not be that many related party transactions for John A. Biewer Company of Toledo, Inc., as it has not been in the business of operating their facilities since 1997.

The information sought in this request can be expected to shed light on inter-company transactions as they appear in each company’s financial statement. See Memorandum in Support of Complainant’s Motion to Amend Complaint and Compliance Order (Toledo), at 9, fn.4; and Memorandum in Support of Complainant’s Motion to Amend Complaint and Compliance Order (Ohio), at 17, fn.13. It can also shed light on where the funds were coming from to support this company, as it was without production income, and had no more than limited rental income.

³Brian Biewer is listed as a witness who “may also testify regarding the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to fully perform actions requested by Ohio EPA and/or U.S. EPA[.]” Respondent’s Supplemental Witness Disclosure, at 1. The same representation is made by Brian Biewer with regards to John A. Biewer Company of Ohio, Inc. Respondent’s Supplemental Witness Disclosure, at 1

This information is directly relevant to that company's "absence of corporate assets and undercapitalization," to its "commingling of funds and other assets or affairs and the diversion of corporate funds or assets to noncorporate uses," to the "nature of the corporation's ownership and control," and to "other shareholder acts or conduct ignoring, controlling or manipulating the corporate form." Safe & Sure Products, at 22.

8. Respondents have not submitted information regarding the parties associated with "Accounts Receivable Intercompany" and "Accounts Payable Intercompany" entries appearing on the balance sheets of John A. Biewer Company of Ohio, Inc. Nor have they provided the date of the transactions, and the services that were provided and received in association with these transactions, or a list of year end balances for these accounts for each related party for the years ending 2001 to present. Respondents object to submitting this information for inter-party transactions of the John A. Biewer Company of Ohio, Inc., for the period of January 1, 2001, to the present.

Respondents object to this request as "being unreasonable, oppressive and unduly burdensome." Respondents do not object to the production of this information on grounds of relevancy. Several comments must be made. First, for whatever reasons, it was the Biewer family itself which intentionally chose to set up in a complicated structure its production and sale operation, with numerous "John A. Biewer" companies participating in the highly regulated industry of wood-treating, and with the two companies before the Administrator allegedly without funds to meet their legal obligation to pay for the decontamination of the hazardous

waste their operations have left behind.⁴ To the extent Respondents face a “burden” in making an accounting of any transfer of funds among the various “Biewer” companies, it is a burden the Biewer family has brought upon itself. Second, if all of these “Biewer” companies were, and are, independent, as Respondents claim, there should simply not be that many related party transactions for John A. Biewer Company of Ohio, Inc., as it has not been in the business of operating its facility since 2001.

The information sought in this request can be expected to shed light on inter-company transactions as they appear in each company’s financial statement. See Memorandum in Support of Complainant’s Motion to Amend Complaint and Compliance Order (Toledo), at 9, fn.4; and Memorandum in Support of Complainant’s Motion to Amend Complaint and Compliance Order (Ohio), at 17, fn.13. It can also shed light on the funds to support the company, as it was without any income. With regard to this company, this information is directly relevant to its “absence of corporate assets and undercapitalization,” to its “commingling of funds and other assets or affairs and the diversion of corporate funds or assets to noncorporate uses,” to the “nature of the corporation’s ownership and control,” and to “other shareholder acts or conduct ignoring, controlling or manipulating the corporate from” Safe & Sure Products, at 22.

9. Respondents have not objected to this information request, and acknowledged that its response has not been completed.

⁴Brian Biewer is listed as a witness who “may also testify regarding the lack of adequate income or assets of John A. Biewer Company of Toledo, Inc. to fully perform actions requested by Ohio EPA and/or U.S. EPA[.]” Respondent’s Supplemental Witness Disclosure, at 1. The same representation is made by Brian Biewer with regards to John A. Biewer Company of Ohio, Inc. Respondent’s Supplemental Witness Disclosure, at 1

10. Respondents have not objected to this information request, and acknowledged that its response has not been completed.

11. Respondents appear to have answered this particular information request.

12. Respondents have not provided Complainant with any estimates of the current market value for each parcel of land, improvements, and equipment owned the John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., and do not identify any submission which they purport did convey this information to Complainant.

13. While Respondents have provided the general ledgers from March 4, 1997 -- Respondents have not provided the general ledgers form January 1, 1997, as requested -- they have not provided the chart of accounts for John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc. A chart of accounts is necessary to understand the ledgers, and should be in existence. Respondents make no claim that this a chart of accounts has been destroyed or is otherwise unavailable.

14. Respondents object to providing payment documents associated with services rendered by The Mannik & Smith Group, an environmental contractor that prepared drip pad closure plans for the facilities of both John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc. Respondents assert that "to the extent the requested documents exist, they have been attached as Attachment F." As Attachment F includes no invoices, proof of bank transfers or other payment documents relevant to payments made to Mannik & Smith Group by anyone for the services rendered by Mannik & Smith Group for these two facilities, Complainant asks that any discovery order issued direct that Respondents either provide the information requested, or explain the reason why they are unable to provide the information.

This is necessary as the failure to maintain adequate corporate records and minutes, and a failure of a corporation to produce financial information, may be considered evidence in favor of a finding that the corporate veil should be pierced. Safe & Sure Products, at 23-24. Consequently, a formal recitation in the record of the reasons for Respondents being unable to produce the information identified in this request is necessary.

15. Respondents object to providing documents in their possession discussing the closure and closure costs at the wood-treating facilities of John A. Biewer Company of Toledo., Inc., and John A. Biewer Company of Ohio, Inc., and the extent of contamination and decontamination activities required to remove the contamination at each facility. They also purport to have provided this information in Attachment F of the Response, “to the extent the requested documents exist.” However, while the drip pad closure plans for each facility have been provided to Complainant, which include costs related to the plans themselves, a review of Attachment F reveals that Respondents have provided no information regarding the costs to properly close the facilities in conformance with the law, as proposed in the plans.⁵

⁵Included in Attachment F of the Response are two letters. One, dated October 4, 2004, is from The Mannik & Smith Group, Inc., to “Mr. Brian R. Biewer, Eckle Junction Road, Inc., c/o Biewer Lumber, 300 Oak Street, St. Clair, Michigan 48079.” The second is dated May 16, 2005, from The Mannik & Smith Group, Inc., to “Mr. Brian R. Biewer, Biewer Lumber, 300 Oak Street, St. Clair, Michigan 48079.” The first identifies “project fee costs” of \$5,300 for John A. Biewer Company of Ohio, Inc. The second identifies “project fee costs” of \$5,775 for John A. Biewer Company of Toledo, Inc. In addition, the drip closure plan of John A. Biewer Company of Ohio, Inc., identifies “Estimated Closure Costs” of \$19,800. Complainant’s Pre-Hearing Exchange, Attachment C, page 3 of the Mannik & Smith Report. It is not at all clear that all hazardous waste can be removed from the drip pads, and drip pad areas, of these two companies for these amounts of money. It would seem rather doubtful that the Biewer family would incur governmental enforcement actions and litigation costs, rather than pay the amounts of money identified to remove hazardous waste from the drip pad areas of these two companies. This inference is especially warranted as each company explicitly waived any claim that they each

In its Pre-Hearing Exchange the only witness Respondents identify is Brian Biewer, and it states that he may testify that John A. Biewer Company of Toledo , Inc., and John A. Biewer Company of Ohio, Inc., cannot afford to pay for the closure. See above, fn. 1. To make this assertion, the Biewer family must have some cost estimate on which to base the assertion. If Respondents do not have this cost information, they cannot make that assertion in good faith. This information is relevant, as it will disclose who it was that was paying the environmental contractor for services rendered to these two companies and any discovery order issued should include a requirement that Respondents produce the information identified in this request, or explain their inability to submit this information.

16. Respondents assert that they have already provided information requested, relating to officer and employees of John A. Biewer Company of Toledo, Inc., retained after it shut-down, in 1997, and John A. Biewer Company of Ohio, Inc., retained after it shut-down. This is not true, and Respondents do not identify any transmission of that information in the Response. Had that information already been provided, Complainant would not be going through the trouble of asking for it again. Complainant requests that any discovery order entered direct Respondents to comply with this information request, or to explain their inability to submit this information..

17. Respondents assert that they have already provided information requested, which is information relating to individuals acting on behalf of the John A. Biewer Company of Toledo, Inc., after it shut-down, in 1997, and the John A. Biewer Company of Ohio, Inc., after it

were unable to pay a penalty amount of approximately \$280,000. Response to Motion for Partial Accelerated Decision, dated July 22, 2008, filed in each action.

shut-down in 2001. That is not true, and, in the Response, Respondents do not identify any transmission of that information. Had that information already been provided, Complainant would not be going through the trouble of asking for it again. While Complainant is in possession of documents from which it would appear that Brian Biewer was the person acting on behalf of John A. Biewer Company of Toledo, Inc., no information has been provided to Complainant as to Brian Biewer's his corporate affiliations, position(s) and nature of compensation for his work, nor has anyone else been identified as acting on behalf of this company, nor has Brian Biewer been identified as the sole representative of that company. Consequently, Complainant requests that any discovery order entered order Respondents to comply with this information request, or to explain their inability to submit this information.

18. Respondents raise no specific objection to this request and assert that they are collecting this information to produce to Complainant.

19. Respondents raise no specific objection to this request and assert that they are collecting this information to produce to Complainant.

20. Respondents have identified the Chief Financial Officer of Biewer Lumber, Gary Olmstead, as the person preparing financial statements for John A. Biewer Company of Toledo, Inc., and John A. Biewer Company of Ohio, Inc., but have not provided all information requested. Information requested includes documentation regarding payment for services in the preparation of the financial statements of these companies.

In the order adding Biewer Lumber and John A. Biewer Company, Inc., as respondents, the Presiding Officer held that Complainant "is entitled to learn through discovery of the nature of the relationship" of the three companies, as well as "the movement of funds in and among

these entities.” Id. The information sought in this discovery request is relevant to whether among Respondents there has been a “disregard of legal formalities and the failure to maintain an arms-length relationship among related entities,” as well as whether there has been a “failure to maintain, or the absence of, adequate corporate records.” Safe & Sure Products, Inc., at 22.

21. Respondents raise no specific objection to this request and assert that they are collecting this information to produce to Complainant.

22. Respondents appear to have answered this particular information request.

(c) SPECIFIC RELIEF SOUGHT BY COMPLAINANT

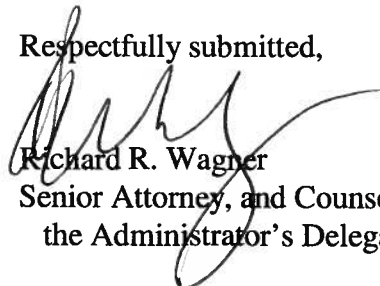
Complainant requests that an order be entered by the Presiding Officer as set forth in Complainant’s Motion for Discovery.

In consideration of the manner in which Respondents have responded to Complainant’s Motion for Discovery, Complainant requests the discovery order also direct that:

Should Respondents assert that they have already produced for Complainant any information sought in the discovery order, Respondents shall specifically identify the submission in which the subject information was included, and identify the document(s) in which the information is included.

A draft Discovery Order accompanies this Reply.

Respectfully submitted,



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

**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)
(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)
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Respondents)
_____)

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DISCOVERY ORDER

Having considered Complainant's Motion for Discovery ("the Motion"), filed February 26, 2009, Respondents' Response to EPA's Discovery Request ("the Response"), and Complainant's Reply to Respondents' Response to Complainant's Motion for Discovery, filed April 6, 2009, I hereby enter this Discovery Order.

On or before _____, 2009:

- (1) Respondents shall submit to Complainant the information identified in the Additional Information Request, attached to the Motion.
- (2) Respondents shall specify their reason(s) for being unable to submit any specific item of information identified in the Additional Information Request.
- (3) In the event Respondents assert that specific information relevant to any request in the Additional Information Request has been destroyed pursuant to a record

retention policy, with regard to the information subject to the assertion, Respondents shall produce for Complainant the following:

- (a) a copy of the records retention policy relied upon in destroying the information, including any transmission memorandum, or other message provided to personnel affected by the records retention policy;
- (b) an identification of the following:
 - (i) the physical location, by specific company, building address and room, where the information was stored at the time the decision was made to destroy the information, and the custodial officer or employee responsible for the information;
 - (ii) the name of all officers or employees participating in the decision to destroy the information and destruction of the information, and the specific company which employed any such officer or employee; and,
 - (iii) the specific date and time the information was destroyed, and the physical location at which it was destroyed, by specific company, building, address and room;
- (c) a copy of any and all documents generated by any Respondent related to the destruction of the information, and the decision to destroy that information; and
- (d) with regard to any specific information relevant to any request in the Additional Information Request which Respondents assert they have destroyed under their records retention policy, provide the name(s) of the accounting firm(s) used to prepare the information. With regard to any name(s) or firm(s) identified in response to this paragraph, provide a copy of the records retention policy of that individual(s) or firm(s).

- (4) Should Respondents assert that they have already produced for Complainant any information sought in this discovery order, Respondents shall specifically identify the submission in which the subject information was included, and identify the document(s) in which the information is included.

William B. Moran
United States Administrative Law Judge

Dater: _____
Washington, D.C.

In Re John A. Biewer Company of Toledo, Inc.
No. RCRA-05-2008-0006

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CERTIFICATE OF SERVICE

**REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY**


I hereby certify that today I filed the original of the **Complainant's Reply to Respondents' Response to Complainant's Motion for Discovery** and a **draft Discovery Order** 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
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

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

April 6, 2009



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