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

PRE-HEARING EXCHANGE OF THE ADMINSITRATOR'S DELEGATED COMPLAINANT

The Administrator's Delegated Complainant (Complainant), by undersigned Counsel, hereby submits this Pre-Hearing Exchange in conformance with the Pre-Hearing Order of the Presiding Officer, entered June 27, 2008.

(1) LIST OF WITNESSES AND LIST OF EXHIBITS

At any hearing to be conducted in this matter, Complainant will call no witnesses. As will become apparent from a review of the Penalty Rationale included in this Pre-Hearing Exchange, all facts supporting a finding of Respondent's liability for the violations alleged in the Complaint and the appropriateness of the penalty amount proposed are established by admissions made by Respondent in documents which it has generated, and are admissible in evidence in this proceeding.

Complainant does intend to introduce into evidence at hearing the following documents:

(a) Letter from Mannik & Smith Group, Inc. (MSG) to Ohio Environmental Protection Agency (OEPA), dated November 23, 2004.

(b) Letter of Transmittal from MSG to OEPA, dated March 16, 2005.

(c) Letter of MSG to OEPA, date November 28, 2005.

(d) Letter of MSG to OEPA, dated December 22, 2005.

(e) Letter of OEPA to Brian Biewer, dated January 27, 2006.

(f) ATSDR Public Health Statement of Chromium.

(g) ATSDR Public Health Statement for Arsenic.

(h) ATSDR Toxicological Profile Information Sheet.

(i) ATSDR Toxicological Profile for Arsenic.

(j) ATSDR Toxilogical Profile for Chromium.

(k) Letter of OEPA to Brian Biewer, dated July 9, 2004.

(l) Letter of Brian Biewer to OEPA, dated August 6, 2004.

(m) Letter of OEPA to John A. Biewer Co. of Ohio, dated October 14, 1992.

(n) Letter of John A. Biewer Co. of Ohio to OEPA, dated November 17, 1992.

(o) Letter of OEPA to John A. Biewer Co. of Ohio, dated December 29, 1992.

(p) Material Safety Data Sheets for CCA Treating Solution, with cover letter of Brian Biewer, dated November 18, 2004.

As is apparent from a review of the Penalty Rationale, for the purpose of presenting its case, Complainant also cites various statutes, Federal Register Notices, regulations, and the Administrator's 2003 RCRA Civil Penalty Policy. As these documents are readily available, both in hard copy and electronically, to all involved in this matter, Complainant is not providing copies of these documents in this Pre-Hearing Exchange. However, on request, will provide a hard copy of any of these documents to anyone participating in this proceeding.

(2) STATEMENT OF PROPOSED PENALTY

See attached Penalty Rationale.

(3) APPLICABILITY OF THE PAPERWORK REDUCTION ACTION

Section 3512 of the Paperwork Reduction Act (PRA), 44 U.S.C. § 3512, does not apply to this matter. That provision states that:

> no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director [of the Office of Management and Budget, or fails to state that such request is not subject to this chapter.

Respondent is charged with violating Ohio Rules and Section 3008(a) of the Resource Conservation and Recovery Act, in that it failed to take actions required to remove any contaminated subsoils that may be present under and in the vicinity of its drip pad. Complaint and Compliance Order, Paragraph 28. Congress has defined the term "information collection request" to mean:

> a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information. . . .

Section 3502(11) of the PRA. Respondent's alleged violations are based upon its failure to take required actions, not upon any failure to collect or report information.

(4) RECOMMENDED LOCATION FOR HEARING

Complainant would recommend that any hearing to be conducted be held in Perrysburg, Ohio. As such hearing is to be a hearing open to the public, the hearing should be held in a place conveniently accessible to the residents of Perrysburg, as those are the people who will be most directly effected by whatever environmental threat may be presented by arsenic and chrome

contamination remaining at Respondent's Perrysburg drip pad. In contrast, if the hearing were to be held in Washington, D.C., St. Clair, Michigan, or Chicago, Illinois, public attendance by those most interested would be quite difficult as it would require extended travel.

Respectfully submitted,

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

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PENALTY RATIONALE

This Penalty Rationale is submitted as a component of the Pre-Hearing Exchange of the Administrator's Delegated Complainant. The penalty amounts proposed and rationale provided to support those amounts are based upon the evidence now known to Complainant, and are subject to being adjusted to the extent that the evidence admitted at any hearing conducted is at variance with what is now known.

I. THE VIOLATIONS.

The John A. Biewer Company of Toledo ("the Company") is charged with violating the Resource Conservation and Recovery Act of 1976 ("RCRA") at its Perrysburg, Ohio, facility in that, since closing its drip pad at the facility, it failed to take actions necessary to decontaminate all waste residues and containment system components at the drip pad. The Company's failure to take these actions is a violation of Section 3745-69-45 of the Ohio Administrative Code ("OAC"), Subchapter II of RCRA, and Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

II. LAW AND POLICY AFFECTING PENALTY AMOUNT DETERMINATION.

(a) Relevant Law, and the Policy of the Administrator

Congress invests the Administrator with exclusive authority to assess a civil penalty for violations of RCRA, and to determine the amount of penalty to assess ("[a]ny penalty assessed in the order shall not exceed $25,000 per day of noncompliance for each violation," and "[i]n assessing such a penalty, the Administrator shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements"). Section 3008(a)(3) of RCRA.

Federal reviewing courts have recognized that the determination of an appropriate amount of civil penalties for violations of a federal environmental statute is not "fact finding," but rather an exercise of discretion by the agency:

> The assessment of a penalty is particularly delegated to the administrative agency. Its choice of a sanction is not to be overturned unless 'it is unwarranted in law' or 'without justification in fact.' [Citations omitted.] The assessment [of a penalty] is not a factual finding but the exercise of a discretionary grant of power.

Panhandle Co-op Association v. E.P.A., 771 F.2d 1149, at 1152 (8th Cir. 1985). Citing prior U.S. Supreme Court decisions, the Tenth Circuit has held that "once the agency determines that a violation has been committed, the sanctions to be imposed are a matter of agency policy and discretion." Robinson v. U.S., 718 F.2d 336, at 339 (10th Cir. 1983). In a published decision, the Administrator has recognized the distinction between facts upon which a penalty amount determination is based and the actual calculation of the penalty amount. In Re Chautauqua Hardware Corporation, EPCRA Appeal No. 91-1 (June 24, 1991). While the "quantity" of a particular chemical may be a "factual issue" bearing on the appropriateness of a penalty, as may be the "ability of the company to continue in business," whether the policy should impose a separate penalty for each chemical not reported, or whether an appropriate penalty dollar amount was selected for each box of the policy matrix "is a legal or policy issue." Id., at 11.

As "the agency" here is "the Administrator,"[1] it is the "policy and discretion" of "the Administrator" that is to inform the determination of penalty amounts that he will assess for

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[1]"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 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, at 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 CAA, "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."

violations of RCRA.

While determining the amount of civil penalty for violations of RCRA is an exercise of discretion by the Administrator, that discretion is not open-ended, without limits. In Section 706 of the APA, Congress provides that, on judicial review, final decisionmaking of an agency, which includes final penalty orders of the Administrator, "shall" be held "unlawful and set aside" if its findings and conclusions are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[2] Consequently, given that he must act through his officers and staff, the Administrator informs his decisionmaking process through the rules he has promulgated, and the policies that he has adopted, interpreting statutory penalty criteria and establishing penalty calculation methodologies based upon those interpretations.[3]

In recognition of his obligation to assure that his final orders assessing a civil penalty for violations of the Federal environmental statutes, such as RCRA, are fair and consistent, and penalty amounts not arrived at in an "arbitrary and capricious" manner, the Administrator has exercised his

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[2]The Court of Appeals for the District of Columbia has held that:

> The function of the court is to assure that the agency has given reasoned consideration to all the material facts and issues. [Footnote omitted.] This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination. [Footnote omitted.]

Greater Boston Television Corporation v. FCC, 444 F.2d 841, at 851 (D.C. Cir. 1970). The Court emphasized that it has maintained a "rigorous insistence on the need for conjunction of articulated standards and reflective findings, in furtherance of even handed application of law, rather than impermissible whim, improper influence, or misplaced zeal." Id. at 852. The Court observed that "in the last analysis it is the agency's function, not the Examiner's, to make the findings of fact and select the ultimate decision, and where there is substantial evidence supporting each result it is the agency's choice that governs." Id. at 853.

[3] The United States Supreme Court has recognized that "[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress[,]" Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, at 843 (1984), and that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. Moreover, in reviewing final agency action, the Court has held that "[j]udicial deference to reasonable interpretations by an agency of a statute that it administers is a dominant, well settled principle of federal law." National Railroad Passenger Corporation, et al. v. Boston & Maine Corporation et al., 503 U.S. ___, 118 L.Ed.2d 52, at 65-66 (1992).

discretion as Chief Executive Officer of the Agency, and, through his delegated policy-making officers, adopted penalty policies incorporating his interpretation of the various statutory criteria, and setting forth penalty calculation methodologies to guide those who must determine appropriate penalty amounts for him to assess for violations of those statutes.[4]
In June 2003, the Administrator, through his Assistant Administrator for Solid Waste and Emergency Response, and his Assistant Administrator for Enforcement and Compliance Monitoring, issued the Administrator's revised "RCRA Penalty Policy" ("the Policy").[5] The

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[4]In 1984, for the purpose of assuring that the his penalty assessment process would result in assessed penalties which meet goals of "deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems," the Administrator, through his Assistant Administrator for Enforcement and Compliance Monitoring, directed that each division of the Agency issue media specific penalty policies, based upon Agency-wide principles announced on February 16, 1984. Policy on Civil Penalties (#GM-21), reissued on December 1, 1994, as PT1.1; and A Framework for Statute-Specific Approaches to Penalty Assessment (#GM-22), reissued on December 1, 1994, as PT1.2. It was further directed that:

> In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty action should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented.

#GM-21, at 1. The "consistent application of a penalty policy" was found important:

> because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

Id. at 4. It was also recognized that "[t]reating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment." #GM-22, at 27.

[5]The Assistant Administrator for Solid Waste and Emergency Response provides "Agencywide policy, guidance, and direction for the Agency's solid and hazardous wastes and emergency response programs," with "responsibility for implementing the Resource Conservation and Recovery Act," and, in addition, "serves as principal adviser to the Administrator" in matters pertaining to those programs. 40 CFR 1.47. The Assistant Administrator for Enforcement and Compliance Monitoring is the principal adviser to the Administrator "in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics and radiation." 40 CFR 1.35. This Assistant Administrator also "reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and

purpose of the Policy is to:

> ensure that RCRA civil penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained.

The Policy, at 5. In a final decision of the Administrator, issued by the Environmental Appeals Board, the Administrator noted that: "[t]he policy implements the requirement in RCRA that in assessing a civil penalty the Agency [sic: Administrator] take into account 'the seriousness of the violation, and any good faith efforts to comply with the applicable requirements.'" In Re Everwood Treatment Company, Inc., RCRA (3008) Appeal No. 95-1, at 7 (September 27, 1996).[6] "In determining an appropriate civil penalty, the Agency (sic) must take the seriousness of the violation into account, as well as any good faith efforts to comply with the applicable requirements[,]" which are the two statutory penalty criteria. Id., at 17. The Board went on to acknowledge that:

> [i]n so doing, this Board (and the Chief Judicial Officer ("CJO") before it) have looked to the Agency's (sic) RCRA Civil Penalty Policy as an analytical model for determining an appropriate penalty.

Id. As this policy is the Administrator's interpretation of a statute which Congress entrusts the Administrator with administering, Federal reviewing courts will give deference to the

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consistent enforcement and compliance monitoring program." Id. The predecessor to this Assistant Administrator, on February 16, 1984, issued the Administrator's agency wide "Policy on Civil Penalties," with an accompanying "Framework for Statute-Specific Approaches to Penalty Assessment," directing that each appropriate Assistant Administrator issue a statute-specific penalty policy for the statutes which for which they are responsible. The RCRA Penalty Policy (October 1990) was issued in response to the Assistant Administrator's directive of Febraury 16, 1984. See the Policy, at 6.

[6]The U.S. Environmental Protection Agency, or, simply, "Agency," is a Federal bureaucracy of approximately 15,000 officers and employees. "The Administrator" is the Agency's Chief Executive Officer. "Agency" and "the Administrator" are not one and the same. In Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Congress states that "the Administrator" is to "take into account" the statutory criteria, not "the Agency." Consequently, the Administrator's delegated complainant has used the designation "sic" in the cited passage. See Morgan v. United States, 298 U.S. 468, at 481 (1936) (there is "no basis for the contention that the authority conferred [on the Secretary] by section 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administrative sense[.]")

interpretation.[7]

Consequently, given the clear instructions from the Administrator on how he would have penalty amounts determined in his name, and the judicial review criteria which he must meet, his Delegated Complainant in this matter has analyzed the evidence in the record in consideration of the RCRA statutory penalty criteria, as interpreted in the Administrator's adopted RCRA Penalty Policy, and its calculation methodologies, to arrive at an appropriate amount of penalty to propose he assess for each violation alleged in the Administrative Complaint.

(b) The Structure of the Administrator's RCRA Penalty Policy

The general formula of the policy consists of:

(1) determining a gravity-based penalty for a particular violation, from a penalty assessment matrix, (2) adding a "multi-day" component, as appropriate, to account for a violations's duration, (3) adjusting the sum of the gravity-based and multi-day components, up or down, for case specific circumstances, and (4) adding to this amount the appropriate economic benefit gained through non-compliance.

RCRA Civil Penalty Policy, June 2003 ("the Policy"), at 1.

Gravity-Based Penalty

The initial gravity-based penalty amount, which is a measurement of the "seriousness of the violation," a statutory penalty criteria, Section 3008(a) of RCRA, is determined by reference to two factors identified on a matrix of the Policy:

(1) "Potential for Harm" (vertical axis); and
(2) "Extent of Deviation from a Statutory or Regulatory Requirement" (horizontal axis).

The Policy, at 18 - 19. The "potential for harm" factor is made up of two sub-factors not shown on the matrix: the risk of exposure of humans or the environment to hazardous waste and the adverse effect of noncompliance on the RCRA program. Id. at 12 - 16. The matrix provides three levels

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[7]The U.S. Supreme Court has recognized a "fundamental principle" that "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" Butz v. Grover Livestock Commission Co., 411 U.S. 182, at 185-186 (1973). On judicial review, federal courts have recognized this deference in upholding penalty amounts assessed by the Administrator which were determined by the application of her adopted penalty policies. Newell Recycling Company v. U.S. EPA, No. 99-60694 (5th Cir. 2000); Catalina Yachts, Inc. v. U.S. EPA, CV99-07357 (C.D.D.C. Calif. 2000); and Sultan Chemists, Inc. v. U.S. EPA, 281 F.3d 73 (3rd Cir. 2002)..

on which to register the "potential for harm" of a violation: major, moderate and minor. Id. at 18. The "extent of deviation from a statutory or regulatory requirement" factor accounts for the degree to which the violation renders inoperative the requirement violated. Id. at 16 -0 18. Again, the matrix provides three levels on which to register the "extent of deviation from the requirement" manifested by the violation: major, moderate and minor. Id. at 18.

Continuing Violations

Multiple violations and multi-day violations are addressed in the Policy. Id. at 20 - 27. The Policy recognizes that for violations occurring between January 30, 1997, and March 15, 2004,

> RCRA provides EPA with the authority to assess in administrative actions or seek in court civil penalties of up to $27,500 [footnote omitted] per day of non-compliance for each violation of a requirement of Subtitle C (or the regulations which implement that subtitle).

For such violations occurring after March 15, 2004, the Administrator may assess a civil penalty of up to $32,500 for each such violation. See 40 C.F.R. Part 19.

However, the Administrator recognizes that "multiple violations of the same statutory or regulatory requirement may begin to closely resemble multi-day violations in their number and similarity to each other." Id at 22 - 23. The Administrator continues:

> In these circumstances, enforcement personnel have discretion to treat each violation after the first in the series as multi-day violations (assessable at the rates provided in the multi-day matrix) if to do so would produce a more equitable penalty calculation. . . . In those cases, where multiple violations are being treated as multi-day violations, each occurrence should be treated as one day for purposes of calculating the multi-day component.

Id., at 23.

Economic Benefit

The Policy addresses any "economic benefit" realized by certain violators as a consequence of their violations. Id. at 28 - 33. The "economic benefit" must be considered to eliminate economic incentives for the regulated community to violate the act. An "economic benefit" component should be calculated and added to the gravity-based penalty component when a violation results in 'significant' economic benefit to the violator. Id. at 28. Two types of "economic benefit" are to be reviewed: first, the benefit to the violator of delaying costs he would have incurred had he been in timely compliance with the requirement; and second, the benefit the violator realized by avoiding costs he otherwise would have incurred had he been in timely compliance.

Adjustment Factors

Under the Policy, once the above factors are considered and a gravity-economic penalty amount for the violations determined, "adjustment" criteria are to be considered. The Policy, at 33 - 41. The additional adjustment criteria include:

(a) good faith efforts to comply/lack of good faith;
(b) degree of willfulness and/or negligence;
(c) history of noncompliance (upward adjustment only);
(d) ability to pay (downward adjustment only);
(e) environmental projects (downward adjustment only); and,
(f) other unique factors

III. FACTS SUPPORTING THE COMPANY'S RCRA VIOLATIONS.

Between 1983 and 1997 the Company conducted its business in, and around, buildings located at 13010 Eckel Junction Road, Perrysburg, Ohio. [Admitted, Answer, Para. 10] The Company's business was to pressure- treat wood with a chemical solution, that being chromated copper arsenate. [Admitted, Id., Para. 13] In its production process, after the Company pressure-treated the wood with the chromated copper arsenate, it transported the treated wood by rail to a drip pad in a building on its facility grounds, where the wood underwent a preservative reaction. [Admitted, Id., Para. 14] As the wood underwent the preservative reaction on the drip pad, excess chromated copper arsenate on the wood either evaporated or fell off of the wood onto the drip pad as waste.[8]

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[8]While in its Answer Respondent denies that any of the chemical solution was wasted, claiming that it "captured and reused" the solution, [Answer, Para. 15], its denial has no credibility in that, at the same time, it admits that chromated copper arsenate "was cleaned off the drip pad and shipped to a hazardous waste facility was 'solid waste.'" [Admitted, Id., Para. 18]. Moreover, the function of the Administrator's drip pad closure regulations is to assure that no hazardous waste contamination is left behind at closed drip pads. Respondent admits that "its material was listed by the Administrator as hazardous waste F035[.]" [Admitted, Id., Para. 19]. The regulation listing this substance is codified at 40 C.F.R. § 261.31. In response to a Notice of Violation issued to Respondent by the Ohio Environmental Protection Agency (OEPA), on July 9, 2004, Respondent informed OEPA that, on its behalf, Mannik & Smith Group (MSG), Maumee, Ohio, prepared "a plan which identifies the closure activities to be undertaken in regard to clean closing the drip pad[]" at its Perrysburg, Ohio, facility, providing a copy of the plan to OEPA. [Attachment A]. In the drip closure plan, under the heading of "List of Hazardous Wastes," Respondent noted that "[]the amount of CCA [wood treatment solution of arsenic, chromium and copper] which dripped from the treated lumber was never determined." [Attachment C, at 4.0]. The plan itself called for the pressure washing of the drip pad two separate times, with samples of the rinseate taken after each washing analyzed to determine whether concentrations of arsenic and chromium in the rinseate exceeded rinseate remediation standards. [Id., at 8.0]. Moreover, analysis conducted in June and October 2005 of rinseate

The drip pad is constructed of concrete, and measures 20 feet by 170 feet. [Attachment A, at 8.0] The Company ceased operating its drip pad in 1997.

Respondent failed to implement its drip closure plan by taking actions necessary to determine the level of hazardous waste contamination present at its drip pad and the surrounding area, and, if necessary, decontaminate or remove all waste residues and containment system components found there.[9] Respondent's failure to take this action is a violation of the OAC 3745-69-45, and,

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sampling conducted by MSG at Respondent's drip pad revealed that concentrations of arsenic and chromium in the rinseate were substantially in excess of the remediation standards to be met to decontaminate the drip pad. [Attachment D]. Arsenic concentrations were 48% above remediation standards, and chromium concentrations 20% above such standards. [Id.] Under the circumstances, the evidence clearly supports a finding that in the operation of Respondent's drip pad, chromated copper arsenic fell off of treated wood on to the drip pad as waste. In contrast, the only circumstance to support Respondent's assertion that it recovered all of the chemical solution that fell to its drip pad is its ignorance as to the level of any contamination that might be present at the drip pad, now closed, occasioned by its failure to powerwash, and analyze the resulting rinseate for arsenic and chromium contamination, as required by law.

[9]In its Answer, Para. 27, Respondent denies that it failed to take such actions, identifying steps that it did take. However, all action cited by Respondent consists of nothing more than identifying meetings and correspondence in which it participated. Respondent does not identify any actions it had taken, after the initial power washings, to implement and complete the remediation steps found necessary by its own consultant, MSG, to achieve acceptable closure of the drip pad, given the contamination found at Respondent's drip pad. Respondent's drip pad closure plan was submitted to OEPA on November 23, 2004. [Attachment A]. The plan was revised on March 16, 2005. [Attachment B]. After obtaining the results of the initial power washings at Respondent's drip pad in June and October 2005, MSG prepared a supplemental drip pad closure plan for Respondent, submitting it to Ohio EPA on December 23, 2005, finding further decontamination procedures to be necessary, including, but not limited to: the removal and disposal of fragmented concrete; brushing, scraping and dry vacuuming areas to dislodge residues in portions of the railroad track grooves and related areas; acid washing all railroad track grooves and adjacent areas; and continued pressure washing and wet vacuuming, with further rinseate analysis; and, on completion of the procedures, certification to Ohio EPA that the drip pad is "clean." [Attachment D]. Respondent has not carried out the supplemental decontamination procedures, nor has it asserted in its answer that it has. Moreover, Ohio EPA found the supplemental drip closure plan to be "incomplete and technically inadequate"; provided Respondent notice of its finding and detailed deficiency comments on the plan; and instructed Respondent to submit a revised closure plan. [Attachment E]. No revised plan was ever submitted by Respondent.

consequently, Section 3008(a) of RCRA..

IV. APPLICATION OF LAW AND POLICY TO THE COMPANY'S DRIP PLAN CLOSURE VIOLATIONS.

(a) Gravity Based Penalty Amount

(1) Potential for Harm

(A) *Risk of Exposure*

In proposing RCRA rules to govern the operation of drip pads in the wood preserving industry, the Administrator found that "[w]astes from the preservation of wood with inorganic formulations or arsenic and/or chromium typically contain high concentrations of these toxic metals, as well as lead." 53 Fed. Reg. 53282, 53284 (December 30, 1988). He further found that "[p]ast mismanagement of these wastes has led to off-site contamination of ground water, surface, water, and soils[,]" and recognized the "known toxicity and/or carcinogenicity of these metals[.]" Id. The Administrator noted:

> Arsenic is a proven carcinogen (Class A), has caused skin and lung cancer in humans. . . . Chromium compounds are acute systemic toxicants, mainly affecting the skin and mucous membranes. Lead is an accumulative poison; it can cause a number of human physiological effects including kidney damage and reproductive disorders.

Id., 53305.[10]

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[10]The Department of Health and Human Services, Agency for Toxic Substances & Disease Registry ("ATSDR"), has issued Public Health Statements for chromium and arsenic, which document the potential for harm to the environment and public health caused by the release of elevated levels of these substances. [Attachments F and G]. These statements are based upon the Toxicological Profiles for each substance, prepared by the ATSDR. Id. Section 104(i)(2)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 104(i)(2)(A), as amended by the Superfund Amendments and Reauthorization Act, requires that the Administrator and ATSDR:

> prepare a list, in order of priority, of substances that are most commonly found at facilities on the National Priorities List (NPL) and which are determined to pose the most significant potential threat to human health due to their known or suspected toxicity and potential for human exposure at these NPL sites.

"By Congressional mandate," the ATSDR "produces 'toxicological profiles' for hazardous substances found at" National Priority List sites. [Attachment H]. The "profiles" are developed in two stages: first, there is publication of a "draft" in the Federal Register, inviting public

Regarding the **"probability of exposure,"** the Administrator provides that "[t]he risk of exposure presented by a given violation depends on both the likelihood that human or other environmental receptors may be exposed to hazardous waste and/or hazardous constituents" and "the degree of such potential exposure." The Policy, at 13. Where actual management of waste is involved, "a penalty should reflect the probability that the violation could have resulted in, or has resulted in a release of hazardous waste or constituents, or hazardous conditions posing a threat of exposure to hazardous waste or waste constituents." Id. "The determination of the likelihood of a release should be based on whether the integrity and/or stability of the waste management unit or waste management practice is likely to have been compromised." Id.

In Respondent's circumstances, it ceased operation at Perrysburg in 1997. Prior to that, and subsequent to the date that the Administrator's RCRA regulations governing drip pads became effective, June 6, 1991, Respondent's operation of its drip pad was not permitted under RCRA, nor did it have interim status, nor has it ever demonstrated that it met conditions necessary so as to be exempt from the RCRA permitting requirement.

Over the last eleven years, Respondent has not completed closure of the drip pad at its Perrysburg facility consistent with RCRA requirements. While it has made some effort in developing a closure plan and undertaken some decontamination activities at the drip pad, its response to its legal obligations has been entirely deficient. As noted, in January 2006 OEPA issued to Respondent a notice of deficiency, informing the Respondent that its closure plan was incomplete and technically inadequate. [Attachment E.] Laboratory test results of samples of drip pad rinseate taken from the Respondent's Perrysburg facility in 2005 revealed elevated levels of chromium and arsenic. [Attachment C]. Moreover, it appears that drains are present on the drip pad at that facility -- MSG notes that "drain trench areas surfaces" which must be scrubbed and pressure washed. [Attachment D, at 4.0(3).]

On closure of the drip pad at the Perrysburg facility, in 1997, Respondent was required to "remove or decontaminate all waste residues, contaminated containment system components (pad, liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leakage, and mange them as hazardous waste." OAC 3745-69-45. Rather than meet those requirements, as of January 2006 Respondent still did not have knowledge of the full extent of the contamination at the site, notwithstanding sampling which revealed elevated levels of chromium and arsenic in the rinseate, and the possibility that there might be ancillary piping or tank components associated with drains on the pad. Under the circumstances, the integrity of the "waste management unit," i.e. the drip pad, clearly has been compromised. Respondent's ability to detect and prevent releases can

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comment, and second, on consideration of the comments received, a "profile" is finalized and published. [Attachments I and J]. The "profile" for each substance "succinctly characterizes the toxicologic and adverse health effects information for the hazardous substance described"; each "profile" is peer reviewed; and "key literature that describes a hazardous substance's toxicologic properties" is reviewed. Id. Each profile includes "a Public Health Statement that summarizes in nontechnical language, a substance's relevant properties." Id.

hardly be adequate when it has not apprised itself of where its drains lead to, or the extent of the piping and tank components that may have been associated with the drip pad.

Moreover, analyzing the circumstances which existed during Respondent's operation of its drip pad is relevant to the "probability of exposure" created by the Respondent's violations. To prevent the tracking of hazardous waste from treated wood drip pads, the Administrator proposed a standard in his rules which required that

> generators must have equipment (e.g., forklifts, tram cars, etc.) that is dedicated for use on each drip pad and that does not leave the pad. Personnel working on drip pads should decontaminate any clothing or shoes before they are taken off a drip pad site.

53 Fed. Reg., 53309. As Respondent was without a permit or interim status, specifically applying this standard to the operation of its drip pad -- nor did it ever make any demonstration that it met the conditions for exemption from permitting requirements -- it is uncertain whether Respondent ever met this standard. Not being able to document that this standard had been met leads to a fair inference that, in the operation of its drip pad, there was a greater likelihood that hazardous waste was tracked off of, or otherwise escaped, the drip pad than there would have been were it known that Respondent met the standard.[11] This greater likelihood of hazardous waste having escaped the

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[11]Providing added weight to support this conclusion is the fact that, in the past, chromic and arsenic solution waste was mishandled by other John A. Biewer Companies involved in the same wood processing activities as Respondent. Regarding a Washington Courthouse facility, operated by John A. Biewer of Ohio, Inc. -- this Biewer company lists the same corporate headquarters address as Respondent, with the same Brian Biewer representing both companies in communications with OEPA -- in October 1992, OEPA documented the Biewer's failure at that facility to do a hazardous waste determination on drippage from its treated wood; its failure to mark containers of hazardous waste as hazardous waste, and with the date the hazardous waste was initially accumulated in the containers; its failure to label drip pad sweepings with the words "hazardous waste"; and, its failure to conduct adequate inspections and test its emergency equipment every week. [Attachment M]. Though in December 1992 OEPA determined that Respondent adequately demonstrated abatement of all these violations, [Attachments N and O], the deficiencies noted by OEPA constitute evidence that the Biewers' management of hazardous waste was not always in conformance with requirements meant to provide for care and accountability in the handling of hazardous waste. As to the Michigan facility, John A. Biewer Company, Inc.'s -- this is a third company -- mishandling of hazardous waste resulted in groundwater contamination. Attorney General of the State of Michigan,et al. v. John A. Biewer Co., Inc., 140 Mich.App. 1, 363 N.W.2d 712 (1985). The Biewer's inadequate management of hazardous waste at drip pads at these facilities makes it more likely that hazardous waste was similarly handled by the Biewers at Respondent's drip pad, and that contamination remains at and near the drip pad. This circumstance, in turn, increases the need for adequate closure measures to be taken at that drip pad to determined the presence of any hazardous waste, and to

drip pad during Respondent's wood processing operation heightened the need for Respondent to take appropriate management measures, at closure, to assure that any hazardous waste that may have been tracked during the operation of its drip pad would be detected and removed in the closure process.

It is apparent that Respondent has exercised little management control over its drip pad, but, rather, simply walked away after generating an inadequate drip pad closure plan, and discovering from initial power washing that there was hazardous waste contamination left behind when it closed its facility operations. It has allowed the drip pad to continue to remain in existence without searching for the extent of contamination and completing necessary closure requirements. In doing so, Respondent has created a great risk that the environment and human health would be exposed to the arsenic and chromium contamination it left behind at its drip pad eleven years ago. The Administrator provides that

> [a] larger penalty is presumptively appropriate where the violation significantly impairs the ability of the hazardous waste management system to prevent and detect releases of hazardous waste and constituents.

The Policy, at 13. Here, Respondent has done nothing at all at its drip pad to detect the extent of hazardous waste at and around its drip pad, and to contain and remove it. Consequently, the **"probability of exposure"** regarding Respondent's violations is registered as **substantial.**

In evaluating the **"potential seriousness of contamination,"** the Policy provides that the "quantity and toxicity of wastes (potentially) released" is to be considered, as well as the "likelihood or fact of transport by way of environmental media (e.g., air and groundwater)" and the "existence, size, and proximity of receptor populations (e.g., local resident, fish, and wildlife, including threatened or endangered species) and sensitive environmental media (e.g., surface wastes and aquifers)." The Policy 13-14.

The constituents of chromated copper arsenate, the solution used by Respondent in its wood treating process, include chromic acid (CAS #7738-94-5); arsenic acid (CAS #7778-39-4) and copper oxide (CAS #1317-38-0). [Admitted, Answer, Para. 17]. The dangers presented to the environment and human health by exposure to these substances has already been addressed. See above, at 10. Because Respondent never determined the amount of chemical solution which dripped from the treated lumber at Respondent's drip pad, the quantity of toxic waste involved in Respondent's violations cannot be determined. However, it is most likely that the *quantity* of toxic waste involved is not great, but, rather, consists of residual amounts of waste that may have clung to the soil, or to piping or tank components. At the same time, as the drip pad was not protected against atomospheric conditions for a number of years, escape of these toxic substances would more likely occur into the soil under the drip pad, and migration away from the area. Due to

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remove it, so as to protect human health and the environment vestiges of Respondent's drip pad operations.

Respondent's failure to gather information it is required by law to gather, it cannot be said with certainty that these substances have been released into the environment, however, under the Policy "emphasis is placed on the potential for harm posed by a violation rather than on whether harm actually occurred." Id. at 14.

Maps reveal that in the vicinity of Respondent's Perrysburg facility there are creeks which run by the facility, with the Maumee River running to the north of the facility. [Attachment A.] Railroad tracks run along the Northwest boundary of the facility, and directly adjacent to the far side of those railroad tracks is a residential subdivision. Id.

Although the consequences of exposure to the hazardous waste involved could be serious, given the limited amount of the waste, the fact that the receptor population here does not appear to be necessarily large and the drip pad is enclosed in a building, limiting the avenues for the toxic constituents of Respondent's chromated copper arsenate to enter the environment, the **"potential seriousness"** of contamination would appear to be **minor**.

(B) ***Harm to the RCRA Regulatory Program***

The Administrator has recognized that "[t]he objectives of RCRA are to promote the protection of human health and the environment and to conserve valuable material and energy resources[,]" and that Sections 2002(a), 3001, 3002, 3003, 3004 and 3005 of the Solid Wasted Disposal Act, as amended by RCRA, "fosters these objectives by "providing for the identification of hazardous wastes, the establishment of a 'cradle to grave' hazardous waste tracking system, and the development of standards and permit requirements for the treatment, storage, and disposal of hazardous waste." 45 Fed. Reg. 12724, 12724-12725 (February 26, 1980). "[A]ll regulatory requirements are fundamental to the continued integrity of the RCRA program[,]" and violations of such requirements may have serious implications and merit substantial penalties where the violation undermines the statutory or regulatory purposes or procedures for implementing the RCRA program." The Policy, at 14.

As a fundamental purpose of RCRA is to establish a "'cradle to grave' hazardous waste tracking system," drip pads used in the wood preserving industry, when removed from use, must be closed consistent with the closure requirements of the RCRA regulations. If that is not done, there will not be an accounting for all hazardous waste resulting from the operation of the drip pad, whether on the pad itself, in the soil around and under the pad, or in any pattern of migration away from the pad. As Respondent continues to fail to account for all hazardous waste that it may have generated during the operation of its drip pad, it has allowed that hazardous waste to escape "cradle to grave" tracking, as intended by RCRA. Consequently, the degree of **"harm to the RCRA regulatory program"** presented by its violation must be registered as **substantial.**

(2) Extent of Deviation

"The 'extent of deviation' from RCRA and its regulatory requirements relates to the degree to which the violation renders inoperative the requirement violated." The Policy, at 16. While the Policy specifically addresses a party's failure to have a closure plan, noting that there may be a

range of "extent" levels on which to register the violating conduct, based upon whether the party has no plan, a plan with minor deficiencies, or a plan with major deficiencies, the violation alleged against Respondent is that it "failed to take actions necessary to decontaminate all remaining waste residues and containment system components at its drip pad." Complaint, Para. 27. As Respondent's Perrysburg facility closed in 1997, long ago Respondent should have complied with the law, searching for, and, if found, decontaminating the drip pad and surrounding area of all remaining arsenic and chromium waste residues.

However, this is not a situation where Respondent simply walked away, abandoning it and whatever hazardous waste it accumulated at the facility. On the closure of the facility, the Company did remove all treated lumber, as well as any chromated copper arsenate solution that it had on site. Its violation is that it did nothing beyond the initial power washing to the implement the decontamination process at the drip pad as instructed in its drip pad closure plan.

Under the circumstances, Respondent's violation was neither a low level deviation nor a substantial deviation from the applicable requirement. Rather, Respondent significantly deviated from some closure requirements, while implementing others. It did not complete the required work. Consequently, an **"extent " level of <u>moderate</u>** is assigned to the Company's violation.

(3) Total Gravity Based Penalty

In selecting an appropriate penalty amount from a cell in the gravity based matrix, there is discretion to consider: the seriousness of the violation in relation to other violations which would fall within the same cell; efforts at remediation or the degree of cooperation evidenced by the facility, to the extent that they are not considered elsewhere in the penalty amount calculation; the size and sophistication of the violator; the number of days of violation; and other relevant matters.

On considering the factual basis of these particular violations of Respondent, no adjustment is made with regard to any of these factors, as none of the factors legitimately affect the "seriousness of the violation." For example, the potential for harm from exposure and harm to the RCRA regulatory program presented by this particular violation -- failing to take actions necessary to decontaminate all waste residues and containment system components at its drip pad -- does not vary based upon the size and sophistication of the violator. Certainly, given that the gist of the violation is that Respondent has not remediated its drip pad site as required by law, and continued to fail to carry out this task even after being served with OEPA's Notice of Deficiency regarding Respondent's closure plan, no downward adjustment is warranted in consideration of Respondent's

"efforts at remediation" or "cooperation." Likewise regarding the number of days of violation: by law the drip pad should have been decontaminated and closure realized 10 years ago.

Under the Policy, **Multi-Day Penalties** are mandatory for the second through the 180th day of a continuing violation designated major-major or major-moderate, subject to being waived in "highly unusual cases" with prior U.S. EPA Headquarter's consultation; multi-day penalties are discretionary for those violations otherwise characterized on the matrix. Id., at 25.

While a multi-day penalty component for Respondent's violations is "discretionary" under the Administrator's policy, given the facts and circumstances of its violating conduct, a multi-day is appropriate. Here, the number of days that Respondent's violating conduct continued can be documented. Id., at 23. Moreover, each day the potential contamination in and around Respondent's drip pad existed, the opportunity for migration of that contamination was enhanced. Consequently, a multi-day component from the Penalty Policy's Multi-Day Matrix of Minimum Daily Penalties is found appropriate for days 2-181 of Respondent's violating conduct. It should be noted that all days of violation accounted for in this penalty determination occurred after OEPA served Respondent with its July 9, 2004, notice that Respondent was in violation of RCRA, as it had not decontaminated all waste residue, subsoils, etc., and manage them as hazardous waste, [Attachment K], and after Respondent submitted its August 6, 2004, response to that notice. [Attachment L].

Under the circumstances set out, the **Total Gravity Penalty Amount Calculation** which follows is appropriate:

Failure to Complete Drip Pad Closure Requirements (OAC 3745-69-45; 40 CFR 265.445).

Risk of Exposure	Moderate	(high range)
Probability of Exposure	Substantial	
Potential Seriousness of Contamination	Minor	
Harm to Regulatory Program	Substantial	
Extent of Deviation	Moderate	(mid range)

A Moderate-Moderate reading in the Penalty Assessment Matrix, Policy, at 18, between the mid range and high range, appropriate to Respondent's violation on day 1 would be $8,768. This high range value in the Moderate-Moderate box for "Potential for Harm" is appropriate as an average among two penalty components being "substantial" and one being "minor."

A Moderate-Moderate reading in the Multi-Day Matrix of Minimum Daily Penalties, Policy, at 26, between the mid range and high range appropriate to Respondent's violation for days 2 through

180 would be $1,367. This high range value in the Moderate-Moderate box for "Potential for Harm" likewise is appropriate, for the reasons stated above.

$8,768 + $244,693 ($1,367 x 179) = $253,461

(b) Adjustment FactorsGravity Based Penalty Amount

(1) Good Faith Efforts to Comply

As a matter of policy, the Administrator provides for a presumption that there should be no downward adjustment to an otherwise appropriate penalty amount "for respondent's efforts to comply or otherwise correct violations after the Agency's detection of violations . . . since the amount set in the gravity-based penalty component matrix assumes good faith efforts by a respondent to comply after EPA['s] discovery of a violation." Penalty Policy, at 35-36. The Administrator further provides, specifically, that: "no downward adjustment should be made because respondent lacked knowledge concerning either applicable requirements or violations committed by respondent." Id.

Having gone ten years without completing decontamination and closure of its Perrysburg drip pad, and surrounding area, notwithstanding specific notices from OEPA to do so, no downward adjustment is warranted in the any penalty amount to be assessed against Respondent for violations alleged in the Complaint.

(2) Degree of Willfulness/Negligence

The Administrator's policy provides that a penalty amount found appropriate for RCRA violations "may be adjusted upward for willfulness and/or negligence." The Policy, at 36. An upward adjustment of 10% in the penalty amount proposed for Respondent's violation has been made considering this penalty criteria. There is no question that Respondent was well aware of its legal obligations on the closing of its drip pad. As early as July 2004, OEPA provided specific notice to Respondent of the requirements of the law concerning the closure of drip pads and the removal of any hazardous waste left behind from the operation of the its Perrysburg drip pad. [Attachment K]. A month later, Respondent acknowledged that notice. [Attachment L]. In addition, there is no evidence to support a finding that Respondent ever had anything other than complete control of the events out of which the violations arose.[12] Consequently, an upward adjustment is warranted in

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[12]As Respondent had failed to alleged that it did not have an ability to pay the proposed penalty of $250,000 in its Answer, on June 26, 2008, the Administrator's Delegated Complainant filed a Motion for Partial Accelerated Decision asking the Presiding Officer to enter a finding that Respondent waived any claim that it is unable to pay the penalty amount proposed. Respondent did not object to the proposed finding being entered. Consequently, at least up to the amount of approximately $250,000, there is no evidence in the record in this matter that

Respondent's penalty for its degree of willfulness and/or negligence, as there is no apparent reason that it could not comply with the law.

(3) History of Noncompliance

The Policy provides only for an upward adjustment to the gravity based penalty in consideration of this factor, if there is evidence that a respondent has a history of noncompliance. As the Agency is unaware of any reasonably recent prior history of RCRA noncompliance by Respondent, it has not increased the gravity based penalty amount in consideration of this penalty factor. Penalty Policy, at 37 -38.

(4) Ability to Pay

The Administrator issued a published decision on the application of this factor in the determination of penalty amounts he would assess for violations of the Federal environmental statutes. When authorized staff are preparing and issuing an administrative complaint for civil penalties on the Administrator's authority, they can "presume" that a respondent has an ability to pay the amount of civil penalty proposed until the respondent's ability to pay "is put in issue by a respondent." In Re New Waterbury, 5 E.A.D. 529, at 15 (1994). Moreover, in RCRA penalty actions, as "ability to pay" is not a designated penalty criteria which Congress, in the statute, requires that the Administrator consider in determining a penalty amount, the Company itself has the burden of presentation and persuasion on the issue. In Re Carroll Oil Company, 10 EAD 635, 662-668 (2002).

As Respondent in its Answer contested the penalty amount proposed, but did not raise therein a claim regarding its "ability to pay" the penalty amount, on June 26, 2008, the Administrator's Delegated Complainant filed a Motion for Partial Accelerated Decision asking that a finding be entered that Respondent had waived any claim that it is unable to pay the penalty amount proposed. On July 22, 2008, Respondent filed a response stating that it did not object to the motion, and, on August 6, 2008, the motion was granted.

Consequently, no adjustment has been made to the gravity based penalty in consideration of this penalty factor at this time. The Policy, at 38-40.

(5) Environmental Projects and Other Unique Factors

No adjustment has been made in the penalty amount proposed in consideration of these criteria, as there is no evidence before the Administrator relevant to the criteria. The Policy 39-41.

Respondent could not afford to pay for the tasks necessary to complete closure requirements of the law.

(6) Economic Benefit

In a Closure Activity Study, prepared on Respondent's behalf by the Mannik & Smith Group, Inc., environmental consultants, the consultants identified $15,775 as the total estimated costs of closure of the Perrysburg drip pad. Using the BEN Program, enforcement staff has determined that the Company has realized an economic benefit of $ 8,634 as a result of not having timely

carried out its closure obligations at the drip. That amount is added to the Gravity Based/Multi-Day penalty amount.

V. TOTAL PENALTY FOR THE VIOLATIONS

The total penalty amount proposed for violations alleged in the Administrative Complaint is **$287,441.** This incorporates the Gravity Based Penalty Amount of $8,768; the multi-day component of $244,693; a 10% upward adjustment for "willfulness/negligence"($25,346); and an economic benefit component of $8,634.

To put this penalty amount in perspective, note should be made that the Administrator is authorized by Congress to assess up to "$25,000 per day of noncompliance for each violation of a requirement" of RCRA. For 180 days of violation, the maximum penalty amount would be $4,500,000. As all violations occurred after March 15, 2004, adjusted for inflation, the penalty amount for the Company's violations would be $5,760,000. Consequently, the penalty amount proposed for the Company's violations is approximately 4% of the maximum penalty, adjusted for inflation, authorized by Congress.

Richard R. Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant
Region 5
August 15, 2008

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of the **Pre-Hearing Exchange** in the office of the Regional Hearing Clerk (E-13J), 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

I further certify that I then caused true and correct copies of the filed documents to be sent to the following, by mail:

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August 25, 2008

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