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 106 483 522, 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	)	

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COMPLAINANT'S POST-HEARING BRIEF

An oral evidentiary hearing was held in this matter on February 23, 2010, in Toledo, Ohio, on order of the Presiding Officer, dated January 13, 2010. At the close of that hearing, the Presiding Officer directed that initial post-hearing briefs of the parties be filed on or before March 31, 2010. The Administrator's Delegated Complainant files this post-hearing brief in conformance with that direction.

COMPLAINANT'S POSITION REGARDING THE HEARING

In the Supplemental Pre-Hearing Exchange of the Administrator's Delegated Complainant (filed January 22, 2010), Complainant informed the Presiding Officer and Respondent that she would be "participating in the scheduled hearing under protest," for the purposes of preserving her appeal rights.

Complainant has filed a Motion for Accelerated Decision on Liability and Penalty ("Comp-AccDecMot-LiabPen"), pursuant to 40 C.F.R. § 22.20, with a Memorandum in Support of Comp-AccDecMot-LiabPen ("Comp-AccDecMot-LiabPen-Mem") and a Memorandum in Support of the Penalty Amount Proposed ("Comp-AccDecMot-LiabPen-PenMem"). Complainant's contention is that, in its Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty ("RespOpp-Comp-AccDecMot-LiabPen") -- consisting of four pages, without attachments -- Respondent fails to raise any genuine of material fact which, as a matter of law, would entitle Respondent to an oral evidentiary hearing under holdings of the Administrator's published decisions, issued by the Environmental Appeals Board ('the Board"). *See* Complainant's Reply to Respondents John A. Biewer Company of Toledo, Inc.'s, Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty ("CompReply-Comp-AccDecMot-LiabPen"). The Board has clearly held that:

> an oral hearing (as opposed to an opportunity to obtain a ruling from the Presiding Officer on the documentary record) is required only if the party requesting the hearing raises a genuine issue of material fact.

In Re Newell Recycling Company, Inc., 8 E.A.D. 598, 625 (1999).

In RespOpp-Comp-AccDecMot-LiabPen, Respondent admitted to committing the violations alleged in the Amended Administrative Complaint and Compliance Order ("AmdAdmCompCompOrd"), therefore, the Presiding Officer found Respondent liable. The Presiding Officer denied Comp-AccDecMot-LiabPen with regard to penalty. As a party may appeal "those issues raised during the course of the proceeding[,]" as a matter of right, 40 C.F.R.

§ 22.30(c), the Administrator's Delegated Complainant has determined to stand on the pleadings on Comp-AccDecMot-LiabPen and presented no evidence at the hearing.

COMPLAINANT'S PENALTY PRESENTATION

In Comp-AccDecMot-LiabPen-PenMem, Complainant provided a 27-page analysis explaining how the $282,649 penalty amount proposed was determined. In this analysis, Complainant addressed each penalty factor in the Administrator's RCRA Civil Penalty Policy (June 2003), considering specific evidence of record relevant to the penalty factor, and explaining the weight given to the evidence and penalty factor. Complainant first addressed what the Administrator identifies as the "gravity based" component, after which a "multi-day" component was considered, and added. Complainant then set out her analysis of the evidence in consideration of each of the "adjustment criteria," indicating why, or why not, the "gravity based" component was adjusted in consideration of the evidence relevant to those criteria.

In published decisions of the Administrator applying her rule governing accelerated decision motions, specifically 40 C.F.R. § 22.20, the Board has held that "a party waives its right to an adjudicatory hearing where it fails to dispute the material facts upon which the agency's decision rests[.]" In Re Green Thumb Nursery, Inc., 6 E.A.D. 782, 792 (March 6, 1997). Moreover, in opposing such a motion the contesting party must demonstrate that a factual issue is in dispute by "referencing probative evidence in the record, or by producing such evidence," Id., at 793, and "[s]ummary disposition may not be avoided by merely alleging that a factual dispute may exist, or that future proceedings may turn something up[.]" Id., fn.24.

A review of RespOpp-Comp-AccDecMot-LiabPen reveals that Respondent made no challenge whatsoever to the "gravity based" penalty amount identified as appropriate in Comp-

AccDecMot-LiabPen. Moreover, Respondent made no challenge to Complainant's calculation therein of the "multi-day" component, or to Complainant's analysis of the evidence with regard to any "adjustment criteria" except for the "degree of willfulness" of Respondent's violations, and Respondent's "good faith efforts to comply" with its RCRA obligation to remove arsenic and chromium contamination remaining at its closed drip pad. RespOpp-Comp-AccDecMot-LiabPen, 2-4. With regard to those two penalty factors, Respondent asserted that "its financial inability, not unwillingness, to perform the drip pad closure plan" resulted in its violations; its lack of funds "stemmed from circumstances that were beyond JAB Ohio's control; and that it "borrowed funds it would likely be unable to repay to retain [an environmental consultant] in the first place." Id., 3-4. However, Respondent cited no evidence in the record to support the assertions that it was making, nor did it submit any such evidence with RespOpp-Comp-AccDecMot-LiabPen. Instead, Respondent merely stated that it "intends to present evidence at the hearing" to prove its assertions, and that "the evidence at the hearing will show" that it ran out of funds and was unable to complete the drip pad closure requirements of RCRA. Id.[1]

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[1]In Comp-AccDecMot-LiabPen-Mem, 12-16, Complainant set out specific uncontested facts supporting a finding that Respondent was liable for the violation alleged in the AmdAdmCompCompOrd. In support of the amount of penalty proposed, Complainant cited not only those findings of fact, Comp-AccDecMot-LiabPen-PenMem, 10-11, but also additional findings earlier made by the Administrator in promulgating RCRA rules governing wood-treating facilities and drip pads. Id., 11-19. The Administrator's Rules provide that: "when an accelerated decision . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted." 40 C.F.R. § 22.20()b)(2). While the Order on EPA's Motion for Accelerated Decision on Liability and Penalty does not identify what "material facts" cited by Complainant to support the penalty amount proposed "exist without substantial controversy and what material facts remain controverted," a fair reading of the language of RespOpp-Comp-AccDecMot-LiabPen reveals that, with reference to Comp-AccDecMot-LiabPen-PenMem, Respondent raises nothing more than an objection to Complainant's consideration of "willfulness of the violation" and "good faith efforts to comply" penalty factors.

Given its failure to meet its obligations under the Administrator's Rule, and Green Thumb Nursery, Inc., as a matter of law, Respondent was not entitled to a hearing to challenge the penalty amount proposed, the hearing was superfluous, and, the penalty amount ought to be determined "on the documentary record" relevant to Comp-AccDecMot-LiabPen. *See* Newell Recycling Company, 8 E.A.D., at 625. However, since a hearing was, conducted, Complainant will address the evidence presented by Respondent at the hearing.

RESPONDENT'S EVIDENCE AT HEARING

At the hearing, Respondent addressed no more than two penalty issues: (1) "willfulness of the violation" it committed, and (2) its alleged "good faith efforts to comply" with the RCRA requirement it violated. The evidence presented by Respondent at hearing lacks both credibility and probative value, and, consequently, cannot support any finding of fact.

Respondents' evidence at hearing consisted of one witness' testimony and 3 exhibits. Over Complainant's objections, Respondent called Gary Olmstead to testify. Transcript, 40. Mr. Olmstead: (1) identified Exhibits 1 and 2 as "balance sheets and income statements" of JAB-Ohio and JAB-Toledo, respectively, Transcript, 41; (2) acknowledged that he was "familiar with" what was contained in the exhibits, Id., 43; and (3) stated, as a conclusion, that he believed that the exhibits accurately reflected the financial condition of each particular company during the time periods identified in the exhibits. Id. He offered his opinion, acknowledging that "based upon these financial documents" Respondent was not able "financially to perform environmental cleanup and investigation at the site." Id., 47-48. On cross-examination, Mr.

Respondent challenges no fact cited by Complainant in support of the penalty amount proposed, nor does it identify any affirmative evidence of its own, and no more can be read into RespOpp-Comp-AccDecMot-LiabPen than is already there.

Olmstead acknowledged that the financial documents he testified with at hearing were not audited, and that audited financial documents did, in fact, exist. Id., at 60-61. He also admitted that he had no knowledge of the specific financial data in the line items of the income statements and balance sheets he reviewed at hearing, and would not know the dollar amount of any particular line item without looking at those documents before him. Id., 61-62.

Three observations must be made regarding Mr. Olmstead's testimony. First, Respondent did not call Mr. Olmstead as an expert witness. In Respondent's Motion to Amend Prehearing Disclosure ("Resp MAPD"), filed two business days before the hearing, on February 19, 2010, when it first identified Mr. Olmstead as its witness for hearing, Respondent identified him by no more than name and stated that he "is also familiar with the matters set forth in Respondent's Supplemental Witness Disclosure." Respondent did not identify Mr. Olmstead as a financial analyst, a certified public accountant, or any other type of expert on interpreting financial data, and Respondent provided no curriculum vitae for Mr. Olmstead. At hearing, Mr. Olmstead identified himself as the "Chief Financial Officer for John A. Biewer Company, Inc.," and stated that "I prepare financial statements for their subsidiaries, including John A. Biewer Company of Toledo and John A. Biewer Company of Ohio." Transcript, 40. While he acknowledges that "I feel that I am" competent to testify regarding the financial condition of the companies, Id., 43, he provided no testimony or other evidence revealing that he has any "knowledge, skill, experience, training, or education" in financial analysis, or that he is a certified public account.[2] Mr.

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[2]Rule 702 of the Federal Rules of Evidence ("FRE") provides that, when a witness is called by a party to provide the trier of fact with "scientific, technical, or other specialized knowledge," that witness must be "qualified as an expert by knowledge, skill, experience, training, or education[.]" While the FRE are not binding on the Administrator's civil penalty assessment process, the Board has held that it "would look to the Federal Rules of Civil

Olmstead's testimony simply cannot be credited as coming from a person with any particular expertise in interpreting financial data. From the record of his testimony, he is equally as likely to have held his position by virtue of being a brother-in-law of a company director as he is to have held his position by virtue of his skill, training and education. Consequently, any opinion given by Mr. Olmstead regarding the financial condition of Respondents and their ability to finance the removal of arsenic and chromium from their facilities, as required by the law, cannot be accepted as that of an expert interpreting financial data.

Second, the exhibits which Mr. Olmstead consulted and relied upon in his testimony lack probative value, are not credible evidence, and cannot support any finding of fact. As noted, Mr. Olmstead acknowledged that the exhibits he used at hearing in presenting his testimony were not audited financial statements of JAB-Toledo, Id., at 60, and, moreover, he acknowledged that, in fact, audited financial statements of JAB-Toledo were available. Id., 61. While he interjected that the numbers in the exhibits he had at hearing "are consistent with the numbers that were in" the audited reports, Id., that statement is worthless as evidence as he failed to testify where and when he actually made the comparison between the audited and unaudited reports; no audited financial reports were introduced into evidence at the hearing with which he could make the

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Procedure ("FRCP") and related case law as an aid in interpreting the Agency's rules." In Re Asbestos Specialists, Inc., 4 E.A.D. 819, at 827 (1993). "[I]n some cases, the experience of federal courts in applying a federal rule can offer an instructive example." Id., fn.20. Likewise, the FRE may be "look[ed] to" as an "aid" in determining whether the testimony of Mr. Olmstead was "reliable " and had "probative value," 40 C.F.R. § 22.22(a)(1), and whether Respondent met its "burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief," 40 C.F.R. § 22.24(a), so as to allow a determination that, "upon a preponderance of the evidence," its financial resources did not enable it to pay for removing the arsenic and chromium contamination at its drip pad. 40 C.F.R. § 22.24(b).

comparative analysis; and he had testified that he had no independent knowledge of any of the dollar amounts on any page of the exhibits. Id., 61-62.[3]

The Board has held that "unverified tax returns, unsupplemented by audited financial statements, did not provide the type of detailed analysis necessary to substantiate an inability to pay claim," and that "unverified financial statements submitted by respondent in RCRA case did not satisfy its burden of showing inability to pay." Carroll Oil Company, 10 E.A.D. 635, 665 (2002). And the Board held that such proof was likewise inadequate to support a finding that a respondent lacks the "financial ability to comply" with a statute's closure regulations. Id., 671.

Third, given that the records marked as exhibits at hearing were something other than the existing audited balance sheets and income statements of Respondents, there is: (1) no evidence describing when and for what purpose the records in Respondent's hearing exhibits were prepared; (2) no evidence that Respondent made, and kept, the records in the regular course of business; (3) and no explanation by the witness why, if audited balance sheets and income statements are available, he was using unaudited balance sheets and income statements to describe Respondents' financial circumstances in his testimony. The absence of this evidence is

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[3]Regarding Respondent's failure to produce audited financial records, also see U.S. v. New York, New Haven & Hartford R.R., 355 U.S. 253, at 256 fn.5 (1957) ("based on considerations of fairness, [evidentiary law] does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."). Moreover, the failure of a party to produce evidence in his control to support positions that he has taken "not only strengthens the probative force of its absence but of itself is clothed with a certain probative force." International Union (UAW) v. NLRB, 459 F.2d 1329, at 1338 (D.C. Cir. 1972). Here facts to prove that Respondent had no financial ability to pay for the decontamination of its drip pad, as required by RCRA, are "peculiarly with the knowledge of" Respondent, and, as Respondent has chosen not to tender into evidence its audited financial statements, Respondent's choice has a "certain probative force," and that force precludes any finding that, notwithstanding its failure to submit audited records, Respondent's un-audited financial records can suffice as probative and credible evidence.

further support for a finding that the exhibits Mr. Olmstead relied upon in his testimony are severely wanting in credibility and probative value, as is any opinion of his based upon those exhibits.

To summarize: (1) within two business days prior to hearing, Respondent first informed Complainant that Mr. Olmstead was to be Respondent's sole hearing witness; (2) Respondent did not qualify Mr. Olmstead as having any expertise in financial analysis, but called him as a lay witness; (3) Mr.Olmstead testified that the only knowledge he had of the financial assets and liabilities of JAB-Ohio came from what he read in the documents before him at hearing; and (3), rather than Respondent using at hearing audited financial reports and income statements which were available, the documents before Mr. Olmstead consisted of unaudited financial reports and income statements, with no evidence submitted establishing when and for what use these unaudited documents were prepared. Under the circumstances, Respondent's Exhibits 1 and 2 -- the unaudited financial reports and income statements -- the only financial records entered into evidence at the hearing, cannot be accepted as credible and probative evidence. Moreover, Mr. Olmstead's lay opinion that Respondent was not able financially to perform environmental cleanup and investigation at its drip pad, based upon those unaudited financial reports and income statements, Id., 47-48, cannot be accepted as probative and credible.

Respondent did attempt to use additional financial records during the course of Mr. Olmstead's testimony. Respondent described these records as "financial forms" which appeared as "Exhibit N," an attachment to "EPA's motion for accelerated decision on derivative liability." Transcript, 49. See also, Id., 57. These "financial forms" were not included in any of Respondent's three pre-hearing exchanges; Complainant objected to the use at hearing of any

documents not included in Respondent's pre-hearing exchange, Id., 48; and counsel for Respondent stated that "it is at least not my intent to introduce these [financial forms] as exhibits." Id. The financial forms, "Exhibit N," were not admitted into evidence. Moreover, the Presiding Officer had earlier provided notice to the parties that, under the Administrator's Rules, "at hearing an original and one copy of each exhibit shall be filed with the undersigned Presiding Judge for the record (an exhibit notebook binder is appreciated) and a copy furnished to each party." Notice of Hearing, filed January 15, 2010. Respondent provided no copy of the financial forms to Complainant at hearing, and, consequently, Complainant was denied their use during Respondent's examination of Mr. Olmstead. As these "financial forms" were not introduced into evidence at the hearing, they cannot be considered on any issue in this matter.[4]

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[4]At the close of Mr. Olmstead's testimony, the Presiding Officer invited the parties to submit as a component of their post-hearing briefs any arguments for, and against, admitting these "financial forms" into evidence. Transcript, 62. Complainant again objects to their admission into evidence. First, they were not identified in Respondent's pre-hearing exchange as evidence that it would use at hearing. Second, at hearing, Respondent's counsel stated that it was "not my intent to introduce these [financial forms] as exhibits," Transcript, 48; Respondent did not move to enter these "financial forms" into evidence; and the "financial forms" were not in the record at the time of Complainant's opportunity for cross-examination and/or rebuttal. The Administrator's Rules clearly provide that:

> If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

40 C.F.R. §22.22(a)(1). At hearing, Respondent made no attempt to establish that it had "good cause" for failing to identify the "financial forms" in its pre-hearing exchange. Under the circumstances, with the hearing having closed several weeks ago and Complainant's opportunity for cross-examination and rebuttal passed, it is patently unfair to allow Respondent, for the first time in its post-hearing brief, to attempt to introduce these "financial forms" into evidence. In a

CONCLUSION

The evidence presented by Respondent at the hearing conducted in this matter lacks any credibility and it has little probative value. Respondent presented one witness, attempting to demonstrate that, after it closed its wood-treating facility in 2001, it was without the financial resources to pay the costs of decontaminating its drip pad, removing arsenic and chromium contamination its operations had left behind. Rather than produce as a witness a financial expert to analyze Respondent's audited balance sheets, income statements and tax records, Respondent

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published decision of the Administrator, the Board has held that "by compelling the parties to provide [all evidence to be used at hearing and other related information] in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the [Presiding Officer] an opportunity for informed preparation for hearing." In Re JHNY, Inc., 12 E.A.D. 372, 382 (2005). It is impossible for any party to prepare for a hearing when the party is not provided notice of what will be presented as evidence by the opposing party. Moreover, where a party before an agency failed to raise a matter at hearing before an ALJ, and did not raise it until its post-hearing brief, a federal appellate court upheld an agency's decision to deny consideration of the matter. Trident Seafoods, Inc. v. National Labor Relations Board, 101 F.3d 111, at 116 (D.C. Cir. 1996). The Court said this:

> When one party utterly fails to raise a significant issue before the ALJ, the record developed with regard to that issue will usually be inadequate to support a substantive finding in its favor and, generally speaking, neither the ALJ nor the Board should consider such an issue.

Id. Likewise, as Respondent here has failed to move to introduce financial records into evidence during the course of the hearing, should it do so now, in its post-hearing brief, "the record developed with regard to" those financial documents will "be inadequate to support a substantive finding" in its favor, as Complainant will have been denied the opportunity to prepare to address those documents at hearing, to cross-examine on those financial records, and to present rebuttal evidence.

presented a lay witness to state a conclusion: that based upon his review of nothing more than unaudited income statements and balance sheets, Respondent has been financially unable to perform the environmental clean-up required at its facility's drip pad since it closed-down it operations in 2001.

At the same time, the record in this matter reveals that Respondent has explicitly waived its right to claim that it has an "inability to pay" the $282,649 penalty amount proposed. Consequently, given the waiver, it must be inferred that Respondent has access to resources to pay that amount of penalty. And Respondent has tendered no evidence whatsoever regarding an estimate of the costs of decontaminating the drip pad, or what it thinks the decontamination work is likely to cost. If Respondent has had $282,649 available to pay the penalty amount proposed in this matter, and there is a complete lack of evidence with regard to any estimate of the costs Respondent believes it would incur in removing the arsenic and chromium contamination from the drip pad at its closed facility, how can a finding be entered upholding Respondent's claim that it has been financially unable to pay the costs of removing arsenic and chromium contamination from its drip pad, as required by law? Clearly the evidence does not support such a finding. In RespOpp-AccDecMot-LiabPen, Respondent did not cite any evidence to support its claimed financial distress, and, at hearing, Respondent failed to produce any credible and probative evidence to support its claim.

Under the circumstances, based upon the analysis of evidence and law presented in the pleadings on Comp-AccDecMot-LiabPen, Complainant asks that an Initial Decision be issued, directing as follows:

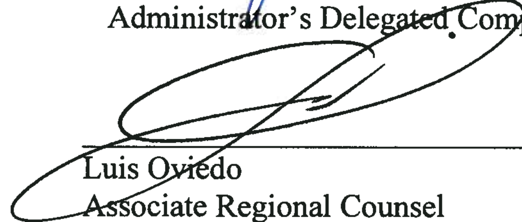
(1) That Respondent JAB-Toledo comply with the Compliance Order, issued as a component of the AmdAdmCompCompOrd, on January 30, 2009. Respondent JAB-Toledo shall comply with all applicable requirements of the Ohio Administrative Code, Chapters 3745-49 through 69, including, specifically, 3745-69-45, which requires that JAB-Toledo 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 manage them as hazardous waste;

(2) That Respondent JAB-Toledo achieve compliance, as set forth in (2), within 90 days of this order being issued;

(3) That in the manner provided for in the AmdAdmCompCompOrd, 7-8, within 60 days of the entry of the Initial Decision, Respondent JAB-Toledo pay the sum of $287,441 for the violations identified in the AmdAdmCompCompOrd.

Respectfully submitted,

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



Luis Oviedo
Associate Regional Counsel

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of **Complainant's Post-Hearing Brief** in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
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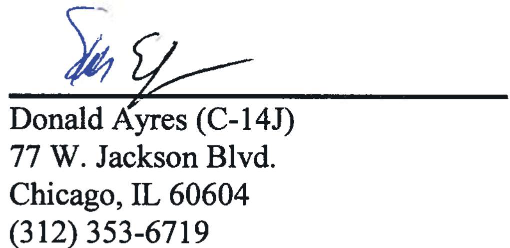

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