UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION FOR ENTRY OF DECISION AND MOTION FOR IMMEDIATE CONSIDERATION

On February 8, 2010, Complainant was served with copies of Respondent's Motion for Immediate Consideration ("Motion 1") and Respondent's Motion for Entry of Decision ("Motion 2").

In Motion 2, Respondent notes that Complainant stated, in her Supplemental Pre-Hearing Exchange ("SPHX"), that: "Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness." In its request for relief, Respondent states: "since Complainant has refused to introduce a prima facie case into evidence, this Court should rule that a penalty of zero dollars is appropriate." Motion 2 at 4.

Complainant stated her position on these issues in her SPHX when she noted that:

> In its five-page Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty ("Opposition"), with no exhibits attached, dated July 30, 2009, Respondent clearly failed to meet its burden to demonstrate that it is entitled to an oral evidentiary hearing, as required by the applicable rule of the Administrator, specifically, 40 C.F.R. § 22.20, and holdings of her published decisions, issued by the Environmental Appeals Board, interpreting and applying that rule. See In Re Green Thumb Nursery, Inc., 6 E.A.D. 782, 792 (1997), and In Re Newell Recycling Company, Inc., 8 E.A.D. 598, 625 (1999).

SPHX at 1-2. Complainant further declared that:

> It is the position of Complainant that Respondent has defaulted on Complainant's Motion for Accelerated Decision on Liability and Penalty on both issues, penalty as well as liability, and that Respondent is not entitled to an oral evidentiary hearing. Therefore, Complainant will be participating in the scheduled hearing under protest. In the interest of preserving her appeal rights, Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness.

Id, at 2.

In Motion 2, Respondent asserts that "Respondent, in its Motions for Accelerated Decision, provided more than ample evidence of Respondent's inability, rather than unwillingness to perform environmental investigation and work at its facility, even to the point of borrowing money it had little likelihood of being able to repay to do some of that work." Motion 2 at 4. Respondent also asserts that "in reviewing Complainant's proposed penalty calculation, Respondent has discovered what it believes are several errors in accurately applying EPA's own penalty policy." *Id.*

Respondent's assertions do not accurately reflect the record. A review of Respondent's Memorandum in Opposition to Complainant's Motion for Accelerated Decision on Liability and Penalty ("Respondent's Opposition") reveals that that document consists of less than five double-spaced pages, *with no attachments*. While Respondent's counsel makes the same statements

concerning Respondent's financial circumstances in Respondent's Opposition, 3-4, as it later makes in Motion 2, there is no citation in Respondent's Opposition to any *evidence* in the record. Respondent submitted no evidence to support the assertions of Respondent's counsel with Respondent's Opposition.

Respondent asserts that there might be several errors in Complainant's proposed penalty calculation. Yet, Respondent is not entitled to an oral evidentiary hearing simply because it challenges the amount of penalty proposed. The law is quite clear that a non-movant on a summary disposition motion must demonstrate that a factual dispute is genuine "by referencing probative evidence in the record, or by producing such evidence." In Re Green Thumb Nursery, Inc., 6 E.A.D. 782, 793 (1997). *See also* Newell Recycling Company, Inc., 8 E.A.D. 598, 625 (1999), citing Green Thumb Nursery, Inc. ("Newell's penalty arguments fail to raise a genuine issue of material fact and that, consequently, Newell was not entitled to an evidentiary hearing."). Moreover, "unsupported allegations or affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment." Galindo v. Precision American Corp., 754 F.2d 1212, 1216 (5th Cir. 1985).[1] Complainant is quite aware that the Presiding Officer denied her Motion for Accelerated Decision on Liability and Penalty. However, the law is clear that Respondent cannot defeat Complainant's Motion for

[1]Facts asserted by a party to a motion for summary disposition "must be established through one of the vehicles designed to ensure reliability and veracity -- depositions, answers to interrogatories, admissions and affidavits." Martz v. Union Labor Life Ins. Co., 757 F.2d 135, 138 (7th Cir. 1985). "The opposing party cannot defeat summary judgment by mere allegations but must bring 'sufficient evidence supporting the claimed factual dispute . . .to require a jury or judge to resolve the parties differing versions of the truth at trial[,]'" and the "burden is on both parties to file necessary materials with the court to support their claims for and against summary judgment." General Office Products v. A.M. Capen's Sons, Inc., 780 F.2d 1077, 1078 (1st Cir. 1986).

Accelerated Decision on Liability and Penalty without referencing probative evidence in the record or producing such evidence in response to that motion. On its face, Respondent's Opposition cites no evidence to support its counsel's assertions.[2]

Finally, Complainant has noted in its SPHX, that Respondent identified in its one-page witness disclosure/pre-hearing exchange, Brian Biewer, its Secretary/Treasurer, as it sole witness. Although Respondent identified the *subject matter* of his testimony, it has never provided any *substantive statement* identifying what it is that Mr. Biewer is going to say, as required by the Administrator's Rules, 40 C.F.R. § 22.19. Complainant is quite aware that, on October 7, 2008, the Presiding Officer denied her motion to strike Respondent's witness disclosure, in which Complainant argued that Respondent's submission did not comply with requirements of the Administrator's Rules. The Presiding Officer found that Respondent's witness disclosure did meet the requirements of those rules. Nonetheless, Respondent's one-page witness disclosure/pre-hearing exchange is what it is: on its face, it clearly does not identify what it is that Mr. Biewer is expected to say from the witness stand.

In summation, not only did Respondent fail to disclose the substance of Mr. Biewer's testimony in its pre-hearing exchange, in Respondent's Opposition, Respondent also failed to identify any genuine issue of material fact regarding penalty; failed to cite any evidence in

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[2] Only the Administrator is authorized by Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a), to assess a civil penalty for violations of RCRA, and to determine the amount of penalty to be assessed. The Administrator has provided a process by which she carries out her penalty assessment authority under the federal environmental statutes, including RCRA. 40 C.F.R. § 22.1. In that process the Administrator authorizes the Presiding Officer to "[c]onduct administrative hearings under these Consolidated Rules of Practice . . . " published at 40 C.F.R. Part 22, and to issue only an "initial decision," 40 C.F.R. § 22.27. The Administrator provides for agency review of "those issues raised during the course of the proceeding and by the initial decision" of a Presiding Officer. 40 C.F.R. § 22.30.

support of its attorney's assertions challenging the proposed penalty amount with regard to the penalty factors of "willingness of violation" and "good faith efforts to comply,"; and failed to make any other argument contesting the $282,649 proposed penalty amount. It is simply not possible for parties to professionally and competently prepare for hearing when opposing parties fail to identify evidence and issues of fact during the pre-hearing process, consistent with the rules put in place for the very purpose of assuring an informed hearing presentation by the parties. Moreover, without an informed hearing presentation by the parties, sound decisionmaking is not possible.

On the record of this case, as a matter of law, Respondent defaulted in its pre-hearing obligations under the Administrator's Rules. As a consequence, Respondent is not entitled to an oral evidentiary hearing. On this record, a $282,649 penalty amount is appropriate for Respondent's violation.[3]

Consequently, rulings of a presiding officer are not final rulings.

[3] It is noted that Respondent has requested that the Presiding Officer award it legal fees, citing no more than a catch-all provision of the Administrator's Rules which authorizes Presiding Officers to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by the Consolidate Rules of Practice." 40 C.F.R. § 22.4(c)(10). At this point in the proceeding, no request of Respondent -- even one properly made with citation to legal authority, which Respondent's request is not -- can be granted by the Presiding Officer. First, the proceedings have not concluded, and will encompass a review by the Environmental Appeals Board, which can be expected to make the final decision in this matter. Second, it has yet to be determined whether Respondent will prevail.

Respectfully submitted,

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

Luis Oviedo
Associate Regional Counsel and Co-Counsel

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

CERTIFICATE OF SERVICE

I hereby certify that today I filed the original of a **Complainant's Response to Respondents' Motion for Entry of Decision and Motion for Immediate Consideration** in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service. I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

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February 12, 2010

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