



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

REPLY TO THE ATTENTION OF:

January 29, 2009

Judge William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.
Mail Code 1900L
Washington, D.C. 20460-2001

RECEIVED
JAN 30 2009

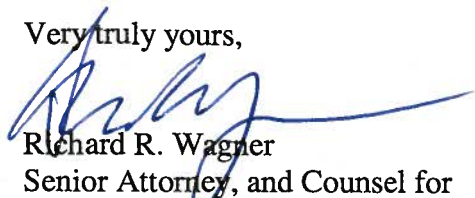
REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

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

Dear Judge Moran:

Enclosed, please find a copy of the Amended Complaint and Compliance Order (Amended Complaint), filed in this matter today, as directed in your order of January 23, 2009. I would note that, with the exception of the caption and paragraphs 8 and 9, the Amended Complaint, in all respects, is exactly the same as the Complaint and Compliance Order filed in the matter on May 5, 2008. This includes paragraph numbers, which are the same in both documents.

Very truly yours,


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

cc: Region 5 Hearing Clerk

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

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:

**John A Biewer Company of Toledo, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497**

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

)
) **DOCKET NO. RCRA-05-2008-0006**

RECEIVED
JAN 30 2009

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

AMENDED COMPLAINT AND COMPLIANCE ORDER

AMENDED COMPLAINT

Preliminary Statement

1. This is a civil administrative action instituted by the United States Environmental Protection Agency (U.S. EPA) Administrator (the Administrator) under Section 3008(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6928(a), and pursuant to Sections 22.01(a)(4), 22.13 and 22.37 of the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance or Compliance or Corrective Action Orders, and the

Revocation, Termination or Suspension of Permits” (“the Administrator’s Rules”), 64 Fed. Reg. 40137 (July 23, 1999), codified at 40 C.F.R. Part 22 (July 1, 2000).

2. By lawful delegation, Complainant, the Director, Land and Chemicals Division, Region 5, U.S. EPA, is authorized to issue this Complaint.

3. Pursuant to Sections 3001 - 3005 of RCRA, 42 U.S.C. § 6921-6925, the Administrator has promulgated regulations governing generators and transporters of hazardous waste, and governing facilities that treat, store and dispose of hazardous waste. At all times relevant to this Complaint, those regulations were codified at 40 C.F.R. Parts 260 through 279.

4. Pursuant to Section 3006(b) of RCRA, 42 U.S.C. § 6926(b), the Administrator granted the State of Ohio final authorization to administer a state hazardous waste program in lieu of the federal government’s RCRA program effective, June 30, 1989. 54 Fed. Reg. 27170 (June 28, 1989). The U.S. EPA granted Ohio final authorization to administer certain Hazardous and Solid Waste Amendments of 1984, and additional RCRA requirements, effective June 7, 1991, 56 Fed. Reg. 14203 (April 8, 1991) (corrected effective August 19, 1991 (56 Fed. Reg. 28088 (June 19, 1991); September 25, 1995, 60 Fed. Reg. 38502 (July 27, 1995); and December 23, 1996, 61 Fed. Reg. 54950 (October 23, 1996). The U.S. EPA-authorized Ohio regulations are codified at Ohio Administrative Code (OAC) Chapters 3745-49 through 69. See also 40 C.F.R. § 272.1800 *et seq.*

5. At all times relevant to this Complaint, Section 3006(d) of RCRA, 42 U.S.C. §6926(d), provided that any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under Subchapter III of RCRA, 42 U.S.C. §§6921-6939(e).

6. Pursuant to Section 3008(a)(3) of RCRA, 42 U.S.C. §6928(a)(3), the Administrator may assess a civil penalty of up to \$25,000 per day of noncompliance for each violation of a requirement of Subchapter III of RCRA (Sections 3001-3023, 42 U.S.C. §§6921-6939(e)).

7. U.S. EPA has provided notice of commencement of this action to the State of Ohio, as required by Section 3008(a)(2) of RCRA, 42 U.S.C. §6928(a)(2).

General Allegations

8. That Respondent John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, were each, at all times relevant to this Complaint, corporations incorporated under the laws of Michigan. Respondent John A. Biewer Company, Inc., or Respondent Biewer Lumber LLC, at all times relevant to the violations alleged in this Complaint, was the parent corporation of John A. Biewer Company of Toledo, Inc., and:

- (a) Respondent John A. Biewer Company, Inc. and/or Respondent Biewer Lumber LLC, managed or directed activities of Respondent John A. Biewer Company of Toledo Inc., relevant to the violations alleged in this Complaint, so as to be liable for those violations under United States v. Bestfoods, et al., 524 U.S. 51 (1998);
- (b) Respondent John A. Biewer Company, Inc. and/or Respondent Biewer Lumber LLC, controlled the activities of Respondent John A. Biewer Company of Toledo Inc., relevant to the violations alleged in this Complaint, under circumstances warranting a “piercing of the corporate” veil pursuant to the law of the State of Michigan, and a finding, thereunder, that the parent corporation is liable for those violations;
- (c) On September 29, 2008, Complainant filed a Motion to Amend Complaint and Compliance Order in this matter, seeking to add as respondents John A. Biewer Company, Inc., and Biewer Lumber LLC, serving both those parties, as well as John A. Biewer Company of Toledo, Inc., with a copy of the motion and a memorandum in support of that motion; and

- (d) On January 23, 2009, the Presiding Officer issued an order granting the motion: (1) finding, without determining any ultimate issue, that Complaint had put forth a sufficient basis to warrant the inclusion of those entities as named respondents for purposes of pleading; (2) directing that Complainant file an amended complaint adding as parties John A. Biewer Company, Inc., and Biewer Lumber LLC; and (3) directing that discovery will commence promptly to determine the relationship and common activities of all three Biewer entities.

9. That Respondent, John A. Biewer Company of Toledo, Inc., Respondent John A. Biewer Company, Inc., and Respondent Biewer Lumber LLC, are each a “person” as defined by Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), and OAC 3745-50-10.

10. That from approximately 1976 to June 2001, the Respondent conducted its business at, and in, buildings located at 13010 Eckel Junction Road, Perrysburg, Ohio.

11. That the place where the Respondent conducted its business was, and is, a “facility” as defined by OAC 3745-50-10.

12. That the Respondent was the “owner” or “operator” of that facility, as defined by OAC 3745-50-10.

13. That in conducting its business, Respondent pressure-treated wood with a chemical solution, that being chromated copper arsenate.

14. That in its production process, after Respondent pressure-treated wood with a chemical solution, 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.

15. That, as the wood underwent a preservative reaction on the drip pad, excess chemical solution on the wood either evaporated or fell off of the wood onto the drip pad as waste.

16. That in 1997 Respondent ceased its operation as described in Paragraphs 13 through 15.

17. That constituents of chromated copper arsenate include greater than 5% chromic acid (CAS #7738-94-5); arsenic acid (CAS #7778-39-4); and copper oxide (CAS #1317-38-0).

18. That the waste material generated by the Company, identified in Paragraph 15, was a "solid waste," as defined by Section 1004(27) of RCRA, and by OAC 3745-51-02.

19. That the material generated by the Company, identified in Paragraph 15, was waste listed as "hazardous," OAC 3745-51-31, and identified by U.S. EPA as hazardous waste No. F035. See 46 Fed. Reg. 4617 (January 16, 1981).

20. That waste material generated by the Company, identified in Paragraph 15, was a "hazardous waste," as defined by Section 1004(5) of RCRA, and by OAC 3745-51-03.

Alleged Violation: Failure to Meet Closure Requirements

21. Complainant incorporates Paragraphs 1 through 20 of this Complaint as though set forth in this paragraph.

22. That Ohio Rules 3745-69-40 through 3745-69-45 constitute the effective RCRA requirements governing drip pads in Ohio, in lieu of 40 CFR 265, Subpart W. See Paragraph 4.

23. That OAC 3745-69-45 provides that: "At closure, the owner or operator must 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."

24. That on November 23, 2004, Respondent had prepared on its behalf a Closure Activity Report (Report), identifying its plan to carry out closure activities, pursuant to the requirements of the OAC, at its drip pad.

25. That on June 7, 2005, and October 5, 2005, consistent with the Report, Respondent conducted decontamination procedures for closure at its drip pad, consisting of the removal of loose material by shoveling and/or dry vacuuming, followed by two cycles of pressure washing and wet vacuuming.

26. That analysis of samples of the rinseate resulting from the decontamination procedures, identified in Paragraph 25, revealed that the rinseate contained levels of arsenic and chromium significantly above remediation standards identified in the Report.

27. That since October 5, 2005, Respondent has failed to take further actions at its drip pad necessary to remove or decontaminate all waste residues, containment system components, contaminated subsoils, and structure and equipment contaminated with waste and leakage, and manage them as hazardous waste.

28. That in failing to take actions necessary to remove and decontaminate all hazardous waste material related to the operation of its drip pad, as alleged in Paragraphs 26 and 27, Respondent has failed to comply with OAC 3745-69-45, thereby violating Subchapter III of RCRA, subjecting the Company to the assessment of civil penalties, as provided for in Section 3008(a) of RCRA, 42 U.S.C. § 6928(a).

PROPOSED CIVIL PENALTY

By Section 3008(a) of RCRA, 42 U.S.C. § 6928(a), Congress has authorized the Administrator to assess a civil penalty of up to \$25,000 per day for each violation of Subtitle C of

RCRA, 42 U.S.C., Subchapter III. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and regulations promulgated thereunder, the Administrator may assess a civil penalty of up to \$27,500 per day for each such violation of RCRA occurring from January 31, 1997, to March 15, 2004, and a civil penalty of up to \$32,000 per day for each such violation of RCRA occurring after March 15, 2004. See 40 C.F.R. Part 19 (July 1, 2005).

Complainant has determined the amount of proposed civil penalty for violations alleged in this Complaint based upon an analysis of relevant evidence known to the Complainant, in consideration of Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3), by which Congress requires that the Administrator, in assessing a civil penalty, take into account “the seriousness of the violation and any good faith efforts to comply with applicable requirements.” The analysis incorporated the Administrator’s adopted policy, “RCRA Civil Penalty Policy” (June 23, 2003) (“the Policy”), interpreting the RCRA penalty criteria. A copy of the Policy is available upon request. The Policy of the Administrator provides a consistent method of applying the statutory penalty factors for violations of Subtitle C of RCRA, 42 U.S.C., Subchapter III.

The penalty amount determined appropriate for the violations alleged in this Complaint is \$287,441. See attached Penalty Summary Sheet.

PAYMENT OF PROPOSED CIVIL PENALTY

Respondent may pay the civil penalty amount proposed by certified or cashier’s check, payable to “Treasurer, the United States of America,” and remit to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A copy of the check shall be sent to:

Richard R. Wagner
Office of Regional Counsel (C-14J)
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

and

Michael Cunningham
Waste, Pesticides and Toxics Division (LR-8J)
U.S. Environmental Protection Agency
77 West Jackson Blvd.
Chicago, Illinois 60604-3590

Respondent must include a transmittal letter with its payment, identifying in the letter, and on the check, the case name and docket number.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

Congress has provided in Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), that, upon the request of the person or persons named in the proposed order, made within 30 days of being served with the proposed order, the Administrator shall promptly conduct a public hearing. Consequently, all respondents have the right to request a hearing to challenge the facts alleged in the Complaint and the amount of civil penalty to be assessed, as proposed in the Complaint.

Any pre-hearing matter and hearing that may occur will be governed in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq., and the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and

the Revocation or Suspension of Permits,” 40 C.F.R. Part 22 (July 1, 2000) (“the Administrator’s Rules”). A copy of the Administrator’s Rules accompanies this Complaint.

If a respondent wishes to avoid being found in default, respondent must file a written answer to the Complaint with the Regional Hearing Clerk (E-13J), U.S. Environmental Protection Agency, Region 5, 77 West Boulevard, Chicago, Illinois 60604-3590, within thirty (30) days of your receipt service of this Complaint. 40 C.F.R. § 22.15(a). In counting the 30-day time period, the actual date of receipt is not included. Saturdays, Sundays, and federal legal holidays are included in the computation. If the 30-day period expires on a Saturday, Sunday or federal legal holiday, the time period is extended to include the next day which is not a Saturday, Sunday or federal legal holiday. 40 C.F.R. § 22.7(a).

A respondent’s Answer must clearly and directly admit, deny or explain each of the factual allegations contained in the Complaint with respect to which respondent has any knowledge, or, where respondent has no knowledge of a particular factual allegation, so state. 40 C.F.R. § 22.15(b). The Answer must also state:

- 1. The circumstances or arguments that respondent alleges constitute the grounds of defense;**
- 2. The facts that respondent disputes;**
- 3. The basis on which respondent disputes the proposed relief, that being the amount of penalty, proposed; and**
- 4. Whether respondent requests a hearing.**

40 C.F.R. §22.15(b).

A respondent’s failure to admit, deny or explain any material factual allegations in the Complaint will constitute an admission of the allegation. 40 C.F.R. §22.15(d).

Respondent should further note that the Administrator's Rules provide that any hearing that shall be held will be a "hearing upon the issues raised by the complaint and answer." 40 C.F.R. §22.15(c).

A copy of the Answer, and any subsequent documents filed by Respondent in this enforcement action should be sent to Richard R. Wagner, Senior Attorney, Office of Regional Counsel (C-14J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604-3590. Mr. Wagner may be telephoned at (312) 886-7947.

Notwithstanding any request a respondent may make for a hearing, if a respondent fails to file an answer within thirty (30) days of the respondent's receipt of this Complaint, the Regional Administrator or Presiding Officer may issue a Default Order. 40 C.F.R. § 22.15(a); 40 C.F.R. § 22.17. Issuance of a Default Order will constitute a binding admission by the respondent of all facts alleged in the Complaint and a waiver of the respondent's right to a hearing on those factual allegations. Any civil penalty determined appropriate in the Default Order shall then become due and payable, without further proceedings, on becoming a final order under 40 C.F.R. § 22.27(c). In addition, the default penalty is subject to the provisions relating to the imposition of interest, penalty and handling charges set forth in the Federal Claims Collection Act of 1966, 31 U.S.C. § 3717. Interest will accrue on the default penalty at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717. U.S. EPA will impose a late payment handling charge of \$15.00 after thirty (30) days, with an additional charge of \$15.00 for each subsequent 30-day period over which an unpaid balance remains. In addition, U.S. EPA will apply a six (6) percent per annum penalty on any principal amount not paid within ninety (90) days of the date that the default Order is signed by the Regional Administrator or Presiding Officer.

COMPLIANCE ORDER

Based on the foregoing, Respondent is hereby ordered -- pursuant to authority in 3008(a) of RCRA, 42 U.S.C. § 6928(a), and § 22.37(b) of the Consolidated Rules -- to comply with all applicable requirements of the Ohio Rules.

Respondent shall notify U.S. EPA in writing upon achieving compliance with this Order within 15 calendar days after the date it achieves compliance. If Respondent has not taken or completed any requirement of this Order, Respondent shall notify U.S. EPA of the failure, its reasons for the failure, and the proposed date for compliance within 10 calendar days after the due date set forth in this Order.

Respondent shall submit all reports, submissions, and notifications required by this Order to the United States Environmental Protection Agency, Region 5, RCRA Branch, Attention: Michael Cunningham (LR-8J), 77 West Jackson Boulevard, Chicago, Illinois 60604-3590.

Pursuant to Section 3008(b) of RCRA, 42 U.S.C. § 6928(b), and the Administrator's Rules, specifically 40 CFR 22.37, this order shall automatically become a final order unless, no later than thirty days after the order is served, the Respondent requests a hearing pursuant to § 22.15.

SETTLEMENT CONFERENCE

A Respondent may request an informal conference to discuss the facts of this case and to arrive at a settlement. To request a settlement conference in this matter, the request should be submitted to Michael Cunningham, RCRA Branch (LR-8J), United States Environmental Protection Agency, Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604-3590, or telephone him at (312) 886-4464.

A request for an informal settlement conference does not extend the 30-day period allowed for filing a written Answer and Request for Hearing. A respondent may pursue an informal conference notwithstanding the filing of an Answer and Request for Hearing.

U.S. EPA encourages all parties for whom a civil penalty is proposed to pursue the possibilities of settlement through an informal conference. U.S. EPA, however, will not reduce the penalty simply because the parties hold a conference. The parties will embody any settlement that they may reach as a result of the conference in a written Consent Agreement and Final Order issued by the Regional Administrator, U.S. EPA, Region 5.

Dated this 29th day of January, 2009.



Margaret M. Guerriero
Director
Land and Chemicals Division

Complaint Docket No. RCRA-05-2008-0006

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

RECEIVED
JAN 30 2009

CERTIFICATE OF SERVICE

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY,

I hereby certify that today I filed the original and one copy of the **Amended Complaint and Compliance Order** in the office of the Regional Hearing Clerk (E-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604-3590, with this Certificate of Service.

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

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

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

I further certify that on this day I caused true and correct copies of the filed documents to be sent by certified mail, return receipt requested, to:


John A. Biewer Company, Inc.
812 S. Riverside St.
St. Clair, Michigan 48079
Registered Agent: Richard Biewer

No. 7001 0320 0005 8922 3448

Biewer Lumber LLC
812 S. Riverside St.
St. Clair, Michigan 48079
Registered Agent: Timothy Biewer

No. 7001 0320 0005 8922 3455

January 30, 2009



Donald E. Ayres (C-14J)
Paralegal Specialist
77 W. Jackson Blvd.
Chicago, IL 60604
(312) 353-6719