

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:

John Biewer of Toledo  
John Biewer of Ohio

Respondent

Docket No. RCRA-05-2008-0006  
RCRA-05-2008-0007

**ORIGINAL**

\* \* \* \* \*

Tuesday,  
February 23, 2010

114 James M. Ashley and  
Thomas W.L. Ashley  
United States Courthouse  
Room 224  
1716 Spielbusch Avenue  
Toledo, Ohio 43604

ADMINISTRATIVE LAW JUDGE:

William B. Moran

REPORTED BY:

Janice M. Grill, CVR

\* \* \* \* \*

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## APPEARANCES:

## PRESENT ON BEHALF OF THE AGENCY:

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## PRESENT ON BEHALF OF THE RESPONDENT:

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Grand Rapids, Michigan 49503

\* \* \* \* \*

TABLE OF CONTENTSWITNESSES ON BEHALF OF THE AGENCY:

	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
None				

WITNESSES ON BEHALF OF THE RESPONDENT:

Gary E. Olmstead	40	60	--	--
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EXHIBITS

	<u>FOR IDENTIFICATION</u>	<u>ADMITTED</u>
Respondent Exhibit No. 1	39	44
Respondent Exhibit No. 2	39	56
Respondent Exhibit No. 3	58	59

\* \* \* \* \*

1 Tuesday, February 23, 2010

2 P R O C E E D I N G S

3 THE ADMINISTRATIVE LAW JUDGE: Thank you.  
4 Please be seated. We're not on the record.

5 (Discussion off the record.)

6 THE ADMINISTRATIVE LAW JUDGE: Good morning.  
7 My name is Judge William B. Moran. I am the Federal  
8 Administrative Law Judge in this case.

9 This case consists of two cases actually. One  
10 is -- and forgive me if I get the docket numbers mixed  
11 up, but the record will show the correct order. One is  
12 John A. Biewer Company of Ohio. And then also, of  
13 course, there were at different stages two other  
14 Respondents named, one of which has been dropped by EPA.  
15 That other Respondent is John A. Biewer Company. And  
16 pursuant to discovery earlier on, Biewer Lumber was for a  
17 time added as a Respondent.

18 Anyway, so we've been denominating these two  
19 cases as Biewer Company of Ohio and Biewer Company of  
20 Toledo, Biewer Toledo.

21 And we have just by informal agreement  
22 designated Biewer Ohio as the lead case. The docket  
23 numbers are RCRA, which is R-C-R-A, 05-2008-0006 and  
24 0007. I think that's right.

25 MR. DONNELL: Yes.

1 THE ADMINISTRATIVE LAW JUDGE: Okay. Now,  
2 today being February 23, 2010. We're here in Toledo,  
3 Ohio. I'd like the parties' counsel to identify  
4 themselves, beginning with EPA.

5 MR. WAGNER: Your Honor, Richard, middle  
6 initial "R," last name, Wagner, the Senior Attorney with  
7 the Region 5, United States Environmental Protection  
8 Agency.

9 MR. OVIEDO: Your Honor, Luis Oviedo, L-U-I-S  
10 O-V-I-E-D-O, Associate Regional Counsel, U.S. EPA.

11 THE ADMINISTRATIVE LAW JUDGE: Thank you.

12 MR. DONNELL: Douglas Donnell with Mika,  
13 Meyers, Beckett and Jones for the Respondents.

14 THE ADMINISTRATIVE LAW JUDGE: Okay. Now, I'm  
15 going to begin with a statement about this case and about  
16 some of the issues. So, bear with me. Pay attention, if  
17 you can, and are willing to. And understand that these  
18 remarks are preliminary. In fact, these were thoughts  
19 that I wanted to express about this case, and I developed  
20 them on the plane trip up here, and last night, although  
21 they've been percolating for a while.

22 Let me begin. The purpose of today's hearing  
23 is to address the penalty phase of this matter. And  
24 there's noted there are two dockets involved here; Biewer  
25 Ohio and Biewer Toledo.

1           Let me observe at this point in time that for  
2 both dockets, there is a single alleged violation. And  
3 while there are some differences, they essentially  
4 involve the same alleged violation, which is that the  
5 Respondent in each respective case failed to meet certain  
6 closure requirements in connection with the respective  
7 facilities drip pad, that's D-R-I-P pad.

8           Now, also before me this morning are the  
9 Respondent's motion to amend its pre-hearing disclosure  
10 substituting in both your cases Mr. Gary Olmstead for  
11 Brian Biewer to testify about the same facts the  
12 Respondent outlined in its supplemental witness  
13 disclosure. And EPA has filed an objection to this  
14 motion.

15           Now, before I proceed with my remarks about  
16 this case, I also -- well, actually first of all, are  
17 there any other matters in addition to the Respondent's  
18 motion for entry of decision? I'm going to be coming to  
19 that in a moment. But are there any other matters that  
20 I've overlooked that I need to deal with in today's  
21 proceeding?

22           MR. WAGNER: No, Your Honor.

23           MR. DONNELL: No, Your Honor.

24           THE ADMINISTRATIVE LAW JUDGE: Okay. Now,  
25 thank you. I will not be ruling this morning or today on

1 the Respondent's motion for entry of decision. But I  
2 will tell you that it is my strong inclination to grant  
3 that motion. Why then, you folks may ask, why are we  
4 having today's proceedings? Well, I have a reason behind  
5 most everything I do. And sometimes it's a good one, and  
6 sometimes it's not. But I do have a reason.

7 Now, the purpose is to the extent possible to  
8 wrap this up with finality at least in terms of my  
9 involvement with the case. It's been going on for quite  
10 some time because of a very lengthy discovery period and  
11 the Court's rather extensive orders associated with that  
12 and with the issues of derivative liability.

13 And so, it is my perspective that by taking  
14 testimony from the Respondent, the need for any potential  
15 remand can be reduced because of the way I will fashion  
16 my initial decision in this matter.

17 Now, it is noted that there are some factual  
18 differences between the two cases, but those differences  
19 have not produced different outcomes in the orders this  
20 Court has issued thus far.

21 Now, in the presentation of the Respondent's  
22 evidence today, as the parties have treated Biewer Ohio  
23 as the lead case, I would like the testimony to begin  
24 with the facts associated with the penalty in that matter  
25 first, and then Respondent's counsel can have

1 Mr. Olmstead -- it is Mr. Olmstead; right --

2 MR. GARY OLMSTEAD: (No audible response.)

3 THE ADMINISTRATIVE LAW JUDGE: -- distinguish  
4 any facts for the Biewer Toledo matter in his testimony.  
5 And we can just wrap it all together into one transcript  
6 without starting in a second -- that would be very  
7 inefficient to start a second proceeding.

8 Now, I have to say that the penalty phase of  
9 this hearing is unlike anything that I have dealt with in  
10 nearly 13 years of presiding in EPA administrative  
11 litigation matters. And therefore, I agree with the  
12 Respondent's characterization that this proceeding has  
13 had its odd moments, but none more bizarre than EPA's  
14 counsel's filing of a supplemental pre-hearing exchange.

15 The word bizarre is a term that can also apply  
16 to other arguments that EPA has made in this proceeding.

17 Now, for this penalty phase, counsel or EPA,  
18 Mr. Wagner, has announced that it is participating in  
19 this hearing, quote, under protest, and that EPA, quote,  
20 will present no evidence at the hearing, and will not  
21 make available for cross-examination any Agency personnel  
22 or other witnesses, end of quote.

23 In the face of this Court's rulings to the  
24 contrary, EPA maintains that the Respondent has defaulted  
25 on EPA's motion for accelerated decision as to liability



1 and as to penalty.

2 Oddly, EPA announces that its decision to  
3 present no evidence and to make no witnesses available is  
4 done for the purpose of preserving her appeal rights.

5 The Court is of the view that this approach will  
6 have the effect of eliminating its appeals rights, at  
7 least substantively. As the Respondent has noted, this  
8 Court's December 23, 2009 decision clearly ruled that the  
9 Respondent was entitled to cross-examine EPA's penalty  
10 calculation witness.

11 Now, as an aside, I also want to note that I  
12 believe that if it is ever warranted, and that is not so  
13 clear, but if it is ever warranted, this is a case where  
14 attorney's fees to the Respondent are justifiable. The  
15 Court agrees with the Respondent's characterization that,  
16 quote, EPA's position as to the penalty phase is simply  
17 untenable under any reasonable reading of the  
18 Administrative Rules and this Court's prior order.

19 The Respondent has correctly noted that early  
20 on in this proceeding, that is way before December 23,  
21 2009, the Court stated in a conference call that the  
22 Respondent was entitled to confront and cross-examine  
23 EPA's penalty calculation witness or witnesses at a  
24 hearing.

25 The Court also agrees in the context of the

1 issue of whether attorney's fees are justifiable. The  
2 Court agrees that the Respondent and Respondent's parent  
3 company and Biewer Lumber Company, Biewer Lumber LLC,  
4 have been dragged through very expensive litigation  
5 ending with EPA essentially announcing that it simply  
6 refuses to follow the Court's rulings or the  
7 Administrative Rules.

8 So, the Court invites the Respondent to brief  
9 its contention that attorney's fees should be awarded  
10 pursuant to 40 CFR 22.4(c), Subsection 10, and/or under  
11 any other supportive theory because of EPA's posture in  
12 this penalty phase of the proceeding as well as because  
13 of the contentions advanced by EPA in its effort to seek  
14 derivative liability, which contentions were in this  
15 Court's view advanced without any relevant -- any  
16 relevant case law support, and in the Court's view were  
17 frivolous contentions.

18 All of this needlessly cost of Respondent money  
19 to defend those aspects of Mr. Wagner's contentions.

20 Although EPA has maintained that the  
21 Respondent's opposition to EPA's motion for accelerated  
22 decision on liability presented no attachments, this  
23 ignores a number of facts. First, the Respondent has  
24 clearly stated from the start that it has been unable to  
25 respond financially to the alleged violation in each of

1 these cases. And that because of that, they have been  
2 unable to take care of associated corrective actions.

3 And there must be noted there has been  
4 extensive discovery related to this. And EPA has  
5 implicitly clearly recognized that there is merit to the  
6 respective Respondent's financial dire straits as this  
7 obviously caused it to fan out and seek other Respondents  
8 to be added to this litigation.

9 Next, as noted earlier, the Court stated at the  
10 outset of this proceeding, as I mentioned, in a  
11 conference call that the Respondent has a right to a  
12 hearing on the penalty proposed by EPA so that it may  
13 inquire and challenge regarding EPA's application of its  
14 penalty policy to the alleged and now conceded violation.

15 And I want to drop a footnote here in a sense  
16 in that the challenge here is not to the underlying  
17 policy itself, and Respondent has not so contended, but  
18 rather it is to the application of the policy to the  
19 facts in this particular case.

20 I certainly agree with the Board when it has  
21 spoken to the issue about the impropriety of challenging  
22 the foundation of the policy itself.

23 So, to recap, the Court did earlier on state  
24 that the Respondent may inquire and challenge regarding  
25 EPA's application of its policy to the alleged and now

1       conceded violations.

2               Going back even earlier in these proceedings,  
3       it is noted that the Respondent in its answer to the  
4       original and to the amended EPA complaint requested its  
5       right to a hearing pursuant to 42 United States Code,  
6       Section 6928(B). It is noteworthy that even EPA in its  
7       amended complaint filed on January 30, 2009 informed the  
8       Respondent that, if requested, this is EPA informing the  
9       Respondent, that if requested, quote, the Administrator  
10      shall promptly conduct a public hearing, end of quote.

11              Further quoting from EPA's amended complaint,  
12      EPA informed the Respondent that, quote, all Respondents  
13      have the right to request a hearing to challenge the  
14      facts alleged in the complaint and the amount of the  
15      civil penalty to be assessed as proposed in the  
16      complaint. See the amended complaint at page eight for  
17      that quote.

18              Now, the Court, and by the way, I recognize  
19      that the term of art applied to me at least in these  
20      proceedings is Presiding Officer. Now, I shall tell you  
21      that I hear cases for any number of other agencies, and  
22      in all those instances, I'm still the Administrative Law  
23      Judge, sometimes referred to as the Administrative Law  
24      Judge, sometimes as the Presiding Official or in this  
25      case as the Presiding Officer. But it all means the same

1 thing.

2 Now, I want to speak further with respect to  
3 the Respondent's right to a hearing on the penalty  
4 proposed by EPA. And in this respect, I start with the  
5 RCRA statutory provision 42 United States Code 6928,  
6 which provides those name for alleged violations of RCRA  
7 may request a public hearing. Quote, upon such requests,  
8 the Administrator shall promptly conduct a public  
9 hearing, end of quote.

10 Where a violation established, the statute also  
11 directs that in assessing a penalty, the seriousness of  
12 the violation and any good faith efforts to comply are to  
13 be taken into account.

14 Next, I turned to 40 CFR Section 22.27, which  
15 is entitled, Initial Decision. Subsection B is the  
16 amount of civil penalty. It provides that if the Court  
17 determines that a violation has occurred, it shall then  
18 determine the amount of the recommended civil penalty  
19 based on the evidence in the record and in accordance  
20 with any penalty criteria set forth in the Act. Now,  
21 that Court is obligated to consider any civil penalty  
22 guidelines issued under the Act.

23 Here, it is worth noting that the penalty  
24 policies do not bind either the Administrative Law Judge  
25 or the Environmental Appeals Board. And for the benefit

1 of the court reporter, sometimes I will refer to the  
2 Environmental Appeals Board as "the Board," or the EAB  
3 for shorthand.

4 In any event, these policies do not bind the  
5 EAB or the Administrative Law Judge because the policies  
6 have not been subjected to the rule-making procedures of  
7 the Administrative Procedure Act, and therefore they lack  
8 the force of law.

9 See, for example, Employers Insurance of  
10 Wausau, an EAB decision in 1997.

11 Later, in this opening -- these opening  
12 remarks, I will refer again to the penalty policies lack  
13 of the force of law, but I will refer to it in the  
14 context of the rule of law.

15 Now, that Court is obligated and must also  
16 explain in detail in the initial decision how the penalty  
17 to be assessed corresponds to any penalty criteria set  
18 forth in the Act. If the Court decides to assess a  
19 penalty different an amount from the penalty proposed by  
20 the Complainant, then the Court must set forth the  
21 specific reasons for the increase or decrease.

22 And I would note that in my nearly 13 years, I  
23 have done all of those options. I have increased  
24 penalties. I have decreased them. I have adopted the  
25 proposed penalty presented by EPA.

1           Now, it is this Court's view that to accomplish  
2 its obligations under 22.27, there needs to be a hearing  
3 on the penalty proposed by the Complainant, that is  
4 unless the Respondent waives such right, and the Court  
5 does not itself elect to have a hearing on the penalty  
6 aspect.

7           To say the least, this case is unusual because  
8 except for this EPA counsel, and that is Mr. Wagner, EPA  
9 has recognized that a Respondent has a right to question  
10 the Agency about its proposed penalty, and to prevent --  
11 and to present its own view about an appropriate penalty,  
12 either by ascribing different values within a given  
13 penalty policy, or by advocating that the policy as  
14 applied to the facts in a particular case does not yield  
15 an appropriate penalty and consequently that the penalty  
16 should be derived from the application of the statutory  
17 criteria.

18           Let me stop for a second. Am I going too fast  
19 for you? No, okay.

20           Now, many decisions issued by the Environmental  
21 Appeals Board shed light on this issue. Now, from now,  
22 to save you all an exceptionally long presentation this  
23 morning, I'm going to cite some of these. But later,  
24 when I issue my initial decision, this discussion will be  
25 expanded. I should also note that if I make any

1 misstatements or errors in this, those are what will  
2 determine my final word on this when I issue my initial  
3 decision.

4           Anyway, I will start as a representative  
5 example with In the Matter of Sandoz, that's S-A-N-D-O-Z.  
6 That's a February 1987 Board decision, and I believe that  
7 it is representative of the usual Agency stance on  
8 penalty determinations.

9           Now, in that case, the parties stipulated to  
10 limit the hearing to the appropriateness of the proposed  
11 penalty. And note that EPA did not take the position  
12 that a Respondent is not entitled to contest the proposed  
13 penalty in the setting of a hearing.

14           Sandoz, like this case, was a RCRA matter. And  
15 the Board noted that the statute requires that any  
16 penalty assessment is to take into account the  
17 seriousness of the violation and any good-faith effort to  
18 comply with the applicable requirements. The Board  
19 stated that the Presiding Officer has properly assessed a  
20 penalty if he or she takes into account the seriousness  
21 of the violation and any good faith efforts to comply,  
22 and if he or she considers at least the civil penalty  
23 guidelines which have been issued under the Act.

24           The Board emphasized in Sandoz that the EPA's  
25 proposed penalty is not binding on the Presiding Officer.



1 Rather, the proposal is a recommendation, which the Court  
2 may accept or reject.

3 Now, it is this Court's position that a court  
4 can not intelligently make such a consideration in most  
5 cases without the benefit of questioning EPA's basis for  
6 its particular conclusions. Typically, the Respondent,  
7 as the party with a vested interest in making sure that  
8 the Agency has properly applied its policy, will be the  
9 one conducting that inquiry.

10 My personal experience over all of these years  
11 has been that such inquiries often yield valuable  
12 information, which is of assistance in determining an  
13 appropriate penalty. If the Court is to meet its  
14 obligation of articulating with reasonable clarity the  
15 reasons for its penalty determination, it must, as the  
16 Board has stated, explain how the facts of a particular  
17 case fit or do not fit the policy.

18 The Board also stated in Sandoz that pursuant  
19 to 40 CFR 22.24, EPA -- EPA has the burden of going  
20 forward with and of proving that the proposed penalties,  
21 civil penalty is appropriate.

22 Again, with the exception of EPA's counsel  
23 today here, and I'm not including when I say that  
24 Mr. Oviedo, but Mr. Wagner's position -- just one second  
25 here -- is that if the Court is to meet its obligation of

1 articulating with reasonable clarity the reasons for its  
2 pending determination, it has to, as the Board has  
3 stated, explain how the facts of a particular case fit or  
4 do not fit the policy.

5 Now, as I mentioned too, I got off track there  
6 for a second, with the exception of Mr. Wagner, the  
7 Court's experience has been that EPA accepts this burden.  
8 As the Board described, EPA's burden of going forward  
9 with the evidence, they described it as a procedural  
10 device for the orderly presentation of evidence.

11 And in Sandoz, in fact, the Board found that  
12 the Respondent came forward with credible evidence of its  
13 actual cost of compliance and that EPA failed to persuade  
14 the Court that its penalty calculation was appropriate to  
15 the facts of the case.

16 Now, just a moment ago I alluded to that the  
17 usual posture taken by the Agency, at least in this  
18 Court's experience, is that the Agency accepts this  
19 responsibility.

20 The Board's decision in Great Lakes Division of  
21 National Steel Corporation, a June 1994 decision by EAB,  
22 is another example which is representative of this. And  
23 that case, which was an EPCRA, that's E-P-C-R-A, case,  
24 the Board noted the Agency's burden of going forward to  
25 prove -- of going forward to prove that the proposed

1 civil penalty is appropriate. And the Board noted in  
2 National Steel that the Agency did this in the customary  
3 manner. They did it through a witness.

4 In that case, the Agency called the Region's  
5 Enforcement Specialist, who testified on the Region's  
6 penalty calculations. And also, along with that  
7 testimony, the penalty policy itself was admitted as an  
8 exhibit.

9 Another example of this is M.A. Bruder and  
10 Sons. That's a July 2002 Decision, also a RCRA, R-C-R-A  
11 matter. The Board found there that the Region's  
12 application of the penalty policy was erroneous. As in  
13 this case, Bruder admitted liability, but it disputed the  
14 Agency's proposed penalty.

15 Again, following the customary approach, the  
16 Region put on its own penalty witness who testified as to  
17 how the Agency arrived at its proposed penalty upon  
18 application of the policy. And the Board noted again  
19 that the Presiding Officer's determination of the  
20 recommended penalty, quote, must be based on the evidence  
21 of record. And by having that evidence of the  
22 particulars as to how the Agency applied its policy to  
23 the facts in the case, the Board was able to determine  
24 that the Agency's analysis was flawed, and revealed that  
25 it failed to take into account the particular

1 circumstances of the case.

2 The Board found there, armed as it was with the  
3 facts underlying the Agency's penalty analysis, that the  
4 Agency's incorrect framing of the penalty analysis  
5 produced a penalty that was unreasonable. Absent a  
6 hearing, the Board would never have been able to make  
7 such an analysis.

8 Now, the Board's decision in Johnson Pacific,  
9 that's a February 1995 decision, is still another example  
10 of the usual practice. Although, as I alluded to, I'll  
11 be mentioning others in my decision.

12 Involved there was a FIFRA case. That's F-I-F-  
13 R-A if I already didn't have a case involving FIFRA. The  
14 Board stated there that equity is clearly a permissible  
15 consideration in assessing penalties under the statute  
16 and that the Region was clearly wrong in arguing  
17 otherwise.

18 As the Board stated in that case, quote,  
19 although fairness, equity and other matters as justice  
20 may require are not specifically mentioned in the penalty  
21 provisions of FIFRA, they are nonetheless fundamental  
22 elements of the regulatory scheme. Continuing with the  
23 quote, the Board asked rhetorically why else would the  
24 statute require the Agency to hold a hearing before  
25 imposing a penalty except to ensure that the proceedings

1 and the penalty itself are fair.

2 I note that FIFRA does not specifically list  
3 equity among its statutory criteria, nor does RCRA. But  
4 the Board found such a consideration inherent within the  
5 statutory criteria under either the gravity of the  
6 violation or the Respondent's ability to continue in  
7 business or perhaps under the third factor, that is the  
8 company size in that case.

9 The point is that if equity can be considered  
10 under FIFRA, it certainly can be considered under RCRA,  
11 which expressly takes into account a Respondent's good  
12 faith efforts to comply.

13 Interestingly, I noted that the Agency argued  
14 that the Judge lacked adequate evidence to categorize the  
15 business as he did, and he did not set forth specific  
16 reasons for his penalty assessment, which was a reduction  
17 in the amount proposed by the Agency. And the Board  
18 added that the Presiding Officer's obligation is to  
19 provide a reasonable explanation for the assessment that  
20 is proposed, that is recommended by that Court. And to  
21 this Court, that requires a hearing.

22 Indeed, in Johnson Pacific, Johnson Pacific,  
23 the Board spoke in terms of the Presiding Officer, quote,  
24 having sufficient evidence to reclassify the size of the  
25 business differently from EPA's classification.

1           The practical purpose of holding a hearing on  
2 the penalty aspect was also evident as the Court  
3 testimony from the Respondent's witness, who was a  
4 certified public accountant. And the Court found that  
5 that witness's testimony was reliable and the Board noted  
6 that it was unrebutted -- unrebutted by EPA.

7           Now, as the Court feels to be the situation  
8 which is occurring in this case, the Board in Johnson  
9 Pacific, that's Pacific as in ocean, spoke of the, quote,  
10 Complainant's zeal to exact an additional sum, which the  
11 Board describes as misguided.

12           This zeal, in this Court's view, occurred here  
13 when without EPA's -- without case authority, EPA's  
14 counsel tried to hold additional Respondents liable on  
15 grounds that one would expect to be presented from a non-  
16 lawyer, and I have previously expressed that in my order  
17 dealing with the issue of derivative liability.

18           And I am thinking of examples such as arguing  
19 that referring to a generic website or by attempting to  
20 blur the Biewer family as if they were identical to and  
21 undistinguished from -- indistinguishable from corporate  
22 entities. These were examples, in the Court's view, of  
23 frivolous arguments which should not have been made.  
24 That misguided zeal, in this Court's view, has now reared  
25 its head in the context of seeking to deny the Respondent

1 its day in court to challenge the Agency's proposed  
2 penalty.

3 Now, this Court's view of the -- let me just go  
4 off the record for a second here.

5 (Discussion off the record.)

6 THE ADMINISTRATIVE LAW JUDGE: Okay. We're  
7 back on the record. Yes. Okay.

8 Now, this Court's view of the fundamental right  
9 to a hearing on the penalty issue, it's noted is shared  
10 by other Administrative Law Judges, and is noted it is  
11 shared implicitly by the Board.

12 For example, in DIC Americas, Inc., that's a  
13 TSCA decision, which is T-S-C-A, issued by the Board in  
14 September 1995, the presiding Judge held a penalty  
15 hearing which lasted two days. The Board noted that to  
16 deviate from the civil penalty guidelines, the Court is  
17 obligated to provide specific reasons for doing so.

18 Again, without an evidentiary hearing in which a  
19 Respondent has the opportunity to delve into the process  
20 applied by the Agency to the case being litigated, and  
21 the opportunity to present its own evidence on the  
22 appropriate penalty, it's difficult to see how the Court  
23 can identify such specific reasons for its recommended  
24 penalty as the Board requires.

25 Emphasizing the importance of providing a

1 Respondent with its day in court to challenge and to  
2 present evidence, the Judge in that DIC America case  
3 noted, quote, not every case comes out just the way the  
4 Government asks when the matter is before me for a  
5 decision. Continuing to speak, the Judge in that case  
6 said, I am willing to listen to any reasonable assertions  
7 with respect to why in the interest of justice  
8 particularly the penalty ought to be reduced, which is  
9 why I denied the motion for summary judgment as to the  
10 penalty in this case.

11 The Board also noted in DIC Americas that a  
12 Respondent must be given a real opportunity to present a  
13 defense to EPA's penalty assessment, and that it is  
14 important that this right be real and not a charade.

15 Now, in seriousness, and this whole proceeding  
16 is serious, but I tried to make a humorous remark about  
17 the length of my remarks. But in seriousness about that,  
18 I expect to still have perhaps as long as 30 minutes more  
19 to continue. So, if you people need a break now for a  
20 minute, I'd be glad to offer that or we can push through.  
21 I'll go off the record and ask counsel about that.

22 (Discussion off the record.)

23 THE ADMINISTRATIVE LAW JUDGE: All right. Then  
24 we'll go back on the record.

25 Now, as I stated earlier in my opening remarks,



1 it is the Court's view that the position of EPA's counsel  
2 in this case is the most bizarre aspect of this case thus  
3 far. Now, some insight into counsel's perspective is  
4 available.

5 First, I should in an effort of full disclosure  
6 tell you that some five or eight years ago, I spoke at  
7 the invitation of the Office of Enforcement for EPA to  
8 attorneys from region -- it's five, isn't it, Mr. Wagner?

9 MR. WAGNER: Yes, Your Honor.

10 THE ADMINISTRATIVE LAW JUDGE: Okay. And I  
11 spoke to them about the perspective of hearing cases from  
12 the Administrative Law Judge position.

13 And at that time, I was somewhat surprised, I  
14 wonder if Mr. Wagner will remember this, but he stood up  
15 and expressed that it was his view that there was no  
16 right to a hearing necessarily, and that included no  
17 right necessarily to a right to a hearing on the penalty.

18 Now, since then, EPA counsel has taken his  
19 perspective further, and this has been expressed in an  
20 article, I don't know if counsel for Respondent is aware  
21 of this, the article is entitled "Administrative  
22 Decision-making by Judges in the United States  
23 Environmental Protection Agency Administrative Civil  
24 Penalty Assessment Process: whatever happened to the  
25 law?" This was written by Mr. Richard R. Wagner. I

1 assume it's the same Mr. Wagner that's in this courtroom.

2 MR. WAGNER: Yes, Your Honor --

3 THE ADMINISTRATIVE LAW JUDGE: Okay.

4 MR. WAGNER: -- correct for that.

5 THE ADMINISTRATIVE LAW JUDGE: And it was  
6 published in the Journal of the National Association of  
7 the Administrative Law Judiciary in the spring 2008  
8 edition. Counsel for Respondent aware of that?

9 MR. DONNELL: No, I wasn't, Your Honor.

10 THE ADMINISTRATIVE LAW JUDGE: Okay. Well, the  
11 cite for that is in Westlaw 20 JNAALJ 80.

12 MR. WAGNER: Excuse me, Your Honor, could I say  
13 just a word about that? That was a reprint of the  
14 article that originally appeared at the College of  
15 William and Mary Law and Environmental Policy Journal.  
16 And the reprint, the cite you just gave, all of the  
17 margins and much of the punctuation is off because they  
18 used a different system other than WordPerfect. So, if  
19 you're looking for the article, I'd suggest the College  
20 of a William and Mary edition.

21 THE ADMINISTRATIVE LAW JUDGE: Okay. I did not  
22 find the errors that you -- and I wouldn't care about  
23 that anyway. I hope I'm deeper than that than to say  
24 well, this is not what's really because look at the  
25 margins, you know. But thank you for mentioning it,

1 Mr. Wagner. I have the text of this in front of me here,  
2 which I'm going to be referring to, and I didn't  
3 recognize those issues.

4 Now, I have alluded to the fact that when I  
5 issue my initial decision in this matter that some of the  
6 cases I've cited by the EAB will be referred to, but  
7 there will be others.

8 And in the same spirit, the comments I'm making  
9 about this article, which is reflective of Mr. Wagner's  
10 position on this matter, they will be expanded in my  
11 initial decision as well.

12 Now, I must say that I was somewhat relieved to  
13 find that my position in this matter is not a lonely one.  
14 As Mr. Wagner in his article takes on critically the  
15 decisions of the EAB, the Administrator, the Chief  
16 Administrative Law Judge for EPA and others, I should  
17 acknowledge though in fairness that what I would describe  
18 as an understatement writ large, Mr. Wagner does state  
19 that the views expressed are his and not necessarily that  
20 of the Administrator, Agency, or the United States, see  
21 Footnote 1.

22 The article starts off, it's hard to imagine a  
23 higher plane to start off in the article, but -- and I'm  
24 not going to be reciting all of the article obviously.  
25 But it starts off in the highest possible plane at all

1 because Mr. Wagner starts citing the United States  
2 Constitution and the provision that says, "We, the people  
3 of the United States," and then goes to note that  
4 Congress has the power to make all laws, and that  
5 pursuant to this authority, and I'm paraphrasing,  
6 Congress has the authority through statutes to regulate  
7 human activity harmful to the environment, and with these  
8 statutes, Congress has invested in the Administrator the  
9 authority to assess civil penalties for their violation.

10 So, in the context of revealing Mr. Wagner's  
11 perspective, which by the way, I do not think this is a  
12 merely academic exercise. I think what has happened in  
13 this case is that contrary to the Agency's position, it  
14 is my perspective that Mr. Wagner has taken it on to  
15 himself to implement his particular views in the context  
16 of this litigation.

17 And I do view that as arguably analogous to the  
18 rogue agent, the agent that has, in the master and  
19 servant terminology, gone outside of the scope of  
20 responsibilities.

21 Now, as a window to Mr. Wagner's perspective, I  
22 note that on page five, referring to an agriculture case,  
23 he cites that where Congress has entrusted in an  
24 Administrative Agency with the responsibility of  
25 selecting the means of achieving the statutory policy,

1 then the fashioning of an appropriate and reasonable  
2 remedy is for the Secretary of Agriculture, not the  
3 Court.

4           However, while Mr. Wagner's objections to the  
5 way civil penalties are handled in administrative  
6 proceedings are many, even he acknowledges that the  
7 penalty determination process must, quote, be based on  
8 the evidence in the case. See the article at page seven.

9           Further, he acknowledges at the same page that  
10 the penalty determination process requires, quote,  
11 consideration of other factors as justice may require  
12 specific to the case.

13           Now, I've just alluded to the fact that, as I  
14 flip to my next tab here, that Mr. Wagner's objections to  
15 how others have handled the penalty process are many.  
16 Among these a central objection is with EAB's deference  
17 to ALJ, that would be Administrative Law Judge, penalty  
18 determinations.

19           As Mr. Wagner puts it, quote, from its  
20 decision-making -- this is at page eight -- from its  
21 decision-making, it would appear that the Board has  
22 failed to heed the admonishment of Justice Frankfurter  
23 and indeed has read the laws of Congress through the  
24 distorting lens of inapplicable legal doctrine. The  
25 Board rules as if the Administrative Law Judge was an

1 independent trial judge. Moreover, and again this is  
2 paraphrasing, the article will speak for itself, but I do  
3 not believe any of the quotes that I'm presenting here in  
4 the paraphrased form distort what was said. Mr. Wagner  
5 goes on, moreover, as a consequence of deferring  
6 decision-making to each of the several ALJ's, the Board  
7 has issued final decisions on behalf of the Administrator  
8 that are arbitrary and capricious.

9 He goes on to state that the Board is required  
10 to exercise its own judgment when considering appeals and  
11 not to defer to the judgment of whichever one of the  
12 several ALJ's offered the initial decision.

13 well, I would like to note here that I don't  
14 believe that's what the Board does at all. I believe the  
15 Board would take exception to that description as well.

16 But perhaps the most revealing window to the  
17 thoughts of Mr. Wagner is shown by the following passage  
18 from his article. He states that, quote, the assessment  
19 of a penalty is not a factual finding, but the exercise  
20 of a discretionary grant of power. He goes on to state  
21 that the penalty amount determination is not an issue of  
22 fact. It is not a determination to be established by  
23 witness's testimony, and deference to an ALJ's penalty  
24 amount determination cannot be warranted on the grounds  
25 that he alone had an opportunity to observe witness

1       demeanor.

2               My view of the remark that the assessment of a  
3 penalty is not a factual finding of the exercise of a  
4 discretionary grant of power is that that is a false  
5 choice because it is both factual finding and the  
6 exercise of discretionary power and more.

7               Mr. Wagner also goes on at the same page, page  
8 nine of his article, to say that, quote, one ALJ cannot  
9 match the Agency's collective training, historical  
10 experience and expertise in evaluating environmental  
11 risks and environmental harm.

12              He adds that moreover, these penalty policies  
13 do not require that a specific penalty amount be  
14 determined appropriate for any particular violation of  
15 any particular violator.

16              Now, as I alluded to a few moments ago, I want  
17 to take special note that I have no personal issue with  
18 Mr. Wagner. He seems like a nice person. I think he's  
19 wrong. And nor does the Court take issue with his right  
20 to express his views. I wholeheartedly support that. I  
21 heartily support that right.

22              Rather, the problem is from this Court's  
23 perspective is that, as I mentioned, Mr. Wagner has  
24 effectively tried to implement his views in this  
25 litigation. And in so doing, he has run afoul of the

1 statute, the Board's decisions, and the Administrator's  
2 choices.

3 In some respects, if one were to assume that  
4 the Administrator, the Administrative Law Judges, the  
5 Board were all in error, it reminds me of a New Yorker  
6 cartoon of decades ago where a mother is watching her son  
7 in a parade and she sees everyone walking in the parade,  
8 and she says to her friend, oh look, everybody is out of  
9 step except for my Richard.

10 I'm about to wrap this up. I want to note  
11 that, and I mentioned that Mr. Wagner is also critical of  
12 the Administrator and his duties or her duties as is the  
13 case right now. For example, speaking to the  
14 Administrator's fulfillment of her Administrative  
15 Procedure Act responsibilities, Mr. Wagner expresses that  
16 the Administrator cannot fulfill, I'm interjecting her  
17 because we have a female Administrator at this time, the  
18 Administrator cannot fulfill her APA responsibilities  
19 when the Board holds that it is clear and subsumed within  
20 the ALJ's authority to assess a penalty different than  
21 one calculated under Agency guidance is the notion that  
22 Agency guidance does not limit the Agency's -- the ALJ's  
23 authority to assess a penalty that is otherwise in accord  
24 with the statutory factors.

25 And I noted that Mr. Wagner has also taken the



1 Chief Administrative Law Judge to task for her  
2 perspective on this, stating at page 11 of his article  
3 that the Chief Administrative Law Judge without  
4 recognizing Section 556(C) of the APA or making any  
5 distinction between factual issues and issues of law and  
6 policy stated that ALJ's were institutionally insulated  
7 from any bias in favor of EPA's positions.

8 Mr. Wagner took issue with the Chief ALJ's  
9 statement that the litigation -- EPA litigation team  
10 proposes the amount of the penalty, and the  
11 Administrative Law Judge on the other hand independently  
12 determines the amount of the penalty.

13 As I said, I'll be saying much more about this  
14 when I issue my initial decision. But in the Court's  
15 response to Mr. Wagner's rhetorical question in his  
16 article, "whatever happened to the law," it's the Court's  
17 reaction to this that the law is operative and it's  
18 intact. And what is at work here is the statute itself  
19 with its provision of the right to a hearing. And also  
20 what is at work here and the answer to the question,  
21 "whatever happened to law," is the broader concept of due  
22 process.

23 All right. Now, that concludes my opening  
24 remarks.

25 MR. WAGNER: Excuse me, Your Honor. Might I

1 make just a two-minute statement?

2 THE ADMINISTRATIVE LAW JUDGE: No.

3 MR. WAGNER: Okay.

4 THE ADMINISTRATIVE LAW JUDGE: Regarding what I  
5 just said?

6 MR. WAGNER: Yes, Your Honor.

7 THE ADMINISTRATIVE LAW JUDGE: No. You can  
8 save that for your brief.

9 All right. Now, let me see if I've overlooked  
10 anything here. Oh, well, I have to deal next with the  
11 question of the motion to amend the pre-hearing  
12 disclosure substituting Mr. Gary Olmstead for Brian  
13 Biewer.

14 And I -- are there any additional arguments  
15 that the parties want to make on this before I rule on  
16 it?

17 MR. WAGNER: No, Your Honor.

18 MR. DONNELL: Only, Your Honor, that that  
19 motion actually becomes a moot one if ultimately the  
20 Court grants my motion for a decision in the -- or I  
21 should say in the absence of any proofs by the EPA.  
22 Obviously, we wouldn't need to put on any witnesses based  
23 upon that motion. But that's my only addition.

24 well, I should say one other thing, Your Honor,  
25 to clarify. In the motion, I indicated that I didn't

1 learn until very recently after the deadline for amending  
2 the pre-hearing disclosures that Mr. Brian Biewer wasn't  
3 at the company anymore. He had to leave -- there was  
4 somewhat of a falling out and he doesn't want to testify.  
5 I wasn't inclined to make him testify.

6 And so, that -- and we would restrict  
7 Mr. Olmstead's testimony, as indicated in the motion, to  
8 exactly that which Mr. Biewer was going testify to.

9 THE ADMINISTRATIVE LAW JUDGE: Okay. Thank  
10 you, counsel. And I've considered both the motion to  
11 amend the pre-hearing disclosure and EPA's response and  
12 objection to that, and my ruling is that Mr. Olmstead may  
13 testify.

14 I would note that the representations just made  
15 by counsel for the Respondent as an officer of the court.  
16 I would also note that testimony will be the exact  
17 subjects that Mr. Biewer was going to testify about. And  
18 I would further note that, and please correct me if I'm  
19 wrong, but I don't think you're going to be able to do  
20 that, that Mr. Olmstead's name has appeared throughout  
21 the various documents in this case at various times. And  
22 so, this is not some strange interloper who has first  
23 made his appearance on the scene. So, that is my ruling  
24 as to that.

25 Are we now ready to begin with testimony?

1 MR. DONNELL: We are, Your Honor.

2 MR. WAGNER: Excuse me, Your Honor, there's the  
3 outstanding motion for entry of decision, motion for  
4 immediate consideration.

5 THE ADMINISTRATIVE LAW JUDGE: I said I'm not  
6 going to rule on that today.

7 MR. WAGNER: Okay.

8 THE ADMINISTRATIVE LAW JUDGE: And I explained  
9 why. The point here is for efficiency purposes. You'll  
10 see when I craft my decision that I know what I'm doing.  
11 And so, I'm going to defer on that. And if I do rule in  
12 favor of the Respondent on that motion, the decision will  
13 still have other aspects that will involve -- you'll see  
14 just trying to tantalize the parties on that. Okay.  
15 That's my ruling.

16 MR. DONNELL: Thank you, Your Honor. And so,  
17 there's no need for me to renew that motion.

18 If I could ask for a five-minute recess, Your  
19 Honor. The reason being that I thought I had brought  
20 multiple copies of the one document that I was going to  
21 present the witness. I only find one, and I would like  
22 you and opposing counsel as well as the witness to have  
23 them. If I could indulge the court services in finding a  
24 copy machine so that I can make multiple copies of this  
25 document.

1 THE ADMINISTRATIVE LAW JUDGE: And I'll help  
2 you out with that. I believe I've met the Court's law  
3 clerks and I think -- that doesn't look like it's a lot  
4 of pages to copies though; right.

5 MR. DONNELL: No.

6 THE ADMINISTRATIVE LAW JUDGE: You need two  
7 sets?

8 MR. DONNELL: Well, I was going to have one for  
9 the witness, one for the Court, one for counsel and one  
10 for me. So, I actually need to three sets. I had four  
11 with my, and I only --

12 THE ADMINISTRATIVE LAW JUDGE: Okay. You need  
13 three complete sets in addition to the one you're holding  
14 in your hand?

15 MR. DONNELL: Correct, Your Honor.

16 THE ADMINISTRATIVE LAW JUDGE: Okay. So, we'll  
17 take --

18 MR. WAGNER: would the court reporter need a  
19 set?

20 MR. DONNELL: Well, the court reporter will  
21 keep the originals, the one that's filed. So, three sets  
22 is fine.

23 THE ADMINISTRATIVE LAW JUDGE: Okay. So, we're  
24 going to take a five or ten-minute recess while I have  
25 that done. Bring it up here, counsel, and I'll bring it