UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
John A. Biewer Company of Toledo, Inc.	)	
	)	**Docket No. RCRA-05-2008-0006**
	)	
Respondent	)	

ORDER ON EPA'S MOTION TO AMEND COMPLAINT AND COMPLIANCE ORDER AND NOTICE OF HEARING POSTPONEMENT

In this action under the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a), EPA[1] charges that the Respondent failed to comply with several requirements in connection with the closure of its drip pad and the hazardous waste associated with it. Here, EPA's Motion seeks to add alleged parent corporations Biewer Lumber, LLC and John A. Biewer Company, as respondents in this proceeding. For ease of reference, these entities will be referred to as the existing Respondent, "Biewer-Toledo;" John A. Biewer Inc. as "JAB;" and Biewer Lumber, LLC, as "Biewer Lumber." EPA contends that, as the RCRA statute extends to any person who violates its requirements, a parent corporation can be liable if it is found that it committed or participated in a violation or if the 'corporate veil' between the parent and subsidiary can be pierced. Motion at 6.[2] For the reasons which follow, the Court grants EPA's Motion to add JAB

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[1]Initially it was Ohio EPA ("OEPA") that began this inquiry. Later, the U.S. EPA took the reins. For simplification, the generic reference "EPA" is used. The more important point is that the U.S. EPA is now the Complainant in this proceeding.

[2]References to EPA's Motion are to the Memorandum in Support of it. The Court advised the parties during a conference call that it would permit the Respondent to file its own reply to any *new* matters raised by EPA in its reply to the Respondent's Response to the EPA motion. Despite the limitation placed on the Respondent's reply, that it was confined to any new facts alleged or arguments raised by EPA in its reply, EPA complains that this is unfair, as it carries the burden in the motion. The Court rejected EPA's protestation. In the first place, as noted, the Respondent's reply was limited to new matters. By definition, Respondent would not have had the opportunity to answer such new contentions. Given the complex issues presented and the fact that EPA seeks a civil penalty of more than $287,000, allowing a respondent the

and Biewer Lumber as Respondents and EPA is afforded the opportunity to conduct discovery in order to learn of the relationship and activities taken by and between the three entities.

EPA contends that, at this point, it is unable to discern whether JAB or Biewer Lumber is the parent corporation of Biewer Toledo. It states that it is uncertain about the relation between Biewer Toledo and these other entities, noting that, while there are multiple Dun & Bradstreet entries for Biewer companies, there is no separate listing for JAB. Regarding Biewer Toledo itself, EPA observes that although its name was changed to Eckle Junction, Inc[3]., in June 1998, counsel for Respondent continued to respond as Biewer Toledo, not Eckle.[4] EPA's expressed concern is that it needs to establish "the party actually responsible for the operation of the closed Perrysburg, Ohio wood treating facility during the time the violation identified in the Complaint [] occurred [at some time between] 2004-2005." Motion at 10.

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opportunity to reply to new issues is fair. Beyond that, the decision to allow further responses is inherently within the discretion of the trial judge. Unhappy with the ruling, EPA then filed a Motion to Strike Respondent's Sur-Reply. That motion will be mentioned *infra*, but only briefly, as it does not warrant more than a passing reference. Also raised during the same conference call and echoed in its Opposition to EPA's Motion, was Respondent's request for oral argument on the issues in the Motion. As the Court also explained in the conference call, allowing oral argument is rarely granted in these administrative proceedings and no compelling reason had been advanced to explain why the written submissions were an inadequate means of expression for the parties' positions. Further, allowing both sides the opportunity to reply to contentions, as the Court has done here, is another reason why oral argument is deemed unnecessary.

[3]The Eckle Junction name was derived from the name of the road where Respondent Biewer Toledo conducted its business in Perrysburg, Ohio.

[4]EPA has a penchant for injecting side comments which do not bear on the issue in its own motion. For example, it expresses displeasure that, while Respondent, Biewer Toledo, waived an inability to pay the proposed penalty defense, but then added that there may be testimony "regarding the lack of adequate income or assets of [Biewer Toledo] to fully perform action requested by EPA and/or U.S. EPA." EPA Motion at 8. In addition to not being germane to the motion, such testimony speaks to a distinct topic – the ability to carry out the actions EPA seeks. That is not the same as relinquishing an inability to pay a proposed penalty. Yet, EPA presumes that for Biewer Toledo's waiver of an inability to pay issue to have been made in good faith, it was conceding that it had access to JAB resources. This represents confusion on EPA's part which need not be further addressed now. Footnote 4 in its Motion is another example. In it, EPA gets far ahead of itself, essentially complaining that certain moneys reflected in Biewer Toledo statements could have been used to pay for environmental liabilities EPA has presumed to exist. None of this aids the resolution of the issues in the Motion.

In its opposition, Respondent Biewer Toledo, Inc. (aka Eckle Junction, Inc.) addresses the issue of its relationship with JAB and Biewer Lumber. To start, Biewer Toledo acknowledges that it is a wholly owned subsidiary of one company, namely JAB. Respondent states that it ceased wood production operations in 1997 and thereafter changed its name to Eckle Junction, Inc. Opposition at 2. While operating, that is prior to 1998, Biewer Toledo hired its own plant manager, which manager had full authority over that entities' employees. Biewer Toledo issued its own invoices, had separate financial statements and its own profit sharing plan. Respondent states that the other entity EPA wants to add as a Respondent in the Complaint, Biewer Lumber, did not come into existence until February 9, 2006, which is a point in time after the events alleged in the Complaint occurred. Respondent states that Biewer Lumber has never engaged in treating or producing wood products. Instead, Biewer Lumber's only purpose is to market and sell lumber products created by other Biewer entities. *Id.* at 3.

Respondent also addresses, what it describes as "other speculative allegations" Complainant makes about JAB, Biewer Lumber and itself.[5] It notes that EPA concedes that the 2004 drip pad closure plan was prepared by the Mannik & Smith Group for Eckle Junction. Respondent paid for Mannik & Smith Group's report regarding the drip pad closure plan, using rental income funds it generated. According to an affidavit from Brian Biewer, Respondent's rental income also paid "work, taxes and insurance."[6] Respondent's Opposition at Exhibit A, Item 4.

As for EPA's claim that JAB is providing cash to keep Biewer Toledo running, Respondent points out that EPA has noted that Biewer Toledo derives some $53,500 in rental income annually. However, Respondent implicitly concedes that JAB has supplied Biewer-Toledo with money for taxes and other debts but it hastens to add that these are nothing more

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[5]Distinct from the EPA claims it describes as "speculative," Respondent maintains that several items EPA raises in its motion amount to "diversionary chaff." They note EPA's reference to Biewer Inc.'s payment of damages in 1985 stemming from environmental issues at Biewer Schoolcraft, Inc., and respond that the Schoolcraft litigation provides no material information to the issue in this motion. Other examples of immaterial information include EPA's reference to toxic inventory reports properly filed by *other* John Biewer subsidiary companies, and the number of Biewer companies which include the word "Biewer" in those corporate names. Respondent's point is that such statements do not advance the issue of the propriety of including either JAB or Biewer Lumber *in this litigation.* Opposition at 6. The Court agrees with Respondent that EPA's inclusion of these items is immaterial to the motion.

[6]If accurate, the Court would agree that the mere statement in the Mannik & Smith Group Report that *John A. Biewer* Company will reassess the remediation approach counts for little, because it was the John A. Biewer Company *of Toledo* that paid for the report, according to the affidavit of Brian Biewer. Respondent's Opposition, Exhibit A. More probative would be the check from Biewer Toledo (or Eckle Junction) to that Group for the Report. This is an example of the benefit of reasonable discovery, which the Court is permitting under this Order.

than typical loans which occur between parent companies and their subsidiaries and that both companies' balance sheets show the legitimacy of these debt and credit transactions.[7] *Id.* at 5.

Respondent offers additional reasons for denying EPA's Motion. As a procedural matter, it notes that, per 40 C.F.R. § 22.14, the Motion is defective in that it fails to include a statement of the factual basis for including the new respondents. Such a statement would need to assert the factual basis for including those respondents under the "veil-piercing" and the direct liability theories EPA relies upon in its Motion. It argues that simply allowing EPA to include JAB and Biewer Lumber would subvert the pleading requirement that such a claim must be well grounded and formed only after reasonable inquiry. Opposition at 8. In this connection, Respondent states that bypassing these requirements would allow EPA "to engage in a speculative fishing expedition into the records of JAB[] and Biewer Lumber, [without complying with the complaint's reasonable inquiry requirement]."[8] *Id.*

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[7]The Respondent also takes issue with a foundational aspect of this litigation: the nature of the charge against Biewer Toledo. Respondent finds it odd that, as the RCRA charges involve Respondent's failure to act to remove contaminated soils and failure to follow the cleanup steps listed in the Mannik & Smith Group Report, including JAB and Biewer Lumber amounts to claiming liability against those companies for what *they did not do.* Respondent suggests that approach is defective because the normal situation involves looking to the parent company when it has taken action on its own, effectively acting in the place of the subsidiary. Opposition at 5. While it is true that EPA seeks to include JAB and Biewer Lumber as Respondents that may be culpable for the failures cited in the Complaint, EPA's theory is that the Respondent was a mere ghost entity, which was a corporation in name only, and effectively run by those related Biewer corporations. The short answer to this issue, is that while it will likely have to be decided by the Court, now is not the time.

[8]Respondent also contends that, per *Foman v. Davis*, 371 U.S. 178 (1962), allowing EPA to amend the Complaint at this time would unduly prejudice the opposing party. Respondent maintains that "undue prejudice" exists "where granting the motion to amend would require [the] opponent to expend significant additional resources to conduct discovery and prepare for trial or significantly delay resolution of the dispute." Opposition at 10. Essentially, Respondent's argument is that EPA, having had much prior discussion and exchange of information with the Respondent as to the relationship between these entities, has waited too long to try and add them now. Oddly, Respondent then adds that while it is *now* too late to add Biewer Inc. and Biewer Lumber, it will not be too late at a more distant time in the future, as there is the chance that EPA could then seek to enforce any judgment against a parent corporation. Opposition at 13. While it is true that adding new respondents would require filing a new complaint and that answers and discovery then would ensue, these effects should be and have been considered by the Court. Upon weighing all the conflicting considerations, the Court concluded that EPA's Motion should be granted.

The Respondent does not correctly construe the provision. At this juncture, amendment of the Complaint requires that a motion first be filed in support of it. EPA has done this and the Court concludes that EPA has presented sufficient information to warrant the inclusion of JAB and Biewer Lumber as named Respondents and to conduct appropriate discovery. With that conclusion, EPA is now obligated by this Order to file an amended complaint which shall follow the content requirements of Section 22.14, adding those particulars with respect to JAB and Biewer Lumber.

Respondent addresses further the two theories EPA advances to hold JAB liable, that JAB was the operator in fact of Biewer Toledo and that JAB is liable through a veil-piercing theory. Opposition at 13. Both Respondent and EPA agree that the Supreme Court's 1998 decision in *Bestfoods* is instructive in resolving these issues, although they derive different lessons from the decision. From Respondent's perspective *Bestfoods* reinforces the principle that "mere control of a subsidiary" and "sharing of common directors between a parent and subsidiary" are inadequate bases for veil-piercing. Opposition at 15. Respondent notes the presumption that officers common to the parent and subsidiary are acting in those respective roles and accordingly one must show that the officers were in fact acting as officers of the parent when directing actions of the subsidiary if a veil-piercing claim is to be sustained. Opposition at 16. This, Respondent submits, is no easy hurdle as "it must be shown that the common officers acted 'plainly contrary to the interests of the subsidiary yet nonetheless advantageous to the parent.'" *Id.* at 17.

As to the alternative, direct activity, theory, Respondent offers that one must generally show direct control by the parent of the subsidiary's facility. Respondent distinguishes operation of the subsidiary from operation of the subsidiary's facility. Further, Respondent submits, that is not merely an inquiry into whether the parent engaged in the general operation of any aspect of the subsidiary's facility. Rather it must involve intervention into the facility's pollution and environmental compliance. *Id.* at 17.

While offering different interpretations of the decision, the parties at least do agree that *Bestfoods* should apply to this case, as there is no basis to assert that it is limited to CERCLA matters, applying equally to RCRA or other environmental statutes. Although RCRA applies to "persons" who violate its provisions, that translates into owners or operators of facilities for the treatment, storage, or disposal of hazardous wastes.

Regarding EPA's attempt to add Biewer Lumber, Respondent reiterates that it cannot be a parent of the Respondent, as JAB owns all of Respondent's stock and there is no other corporate relationship between Biewer Lumber and Respondent. *Id.* at 22, citing Exhibits F and G. Further, Biewer Lumber did not exist until after the alleged violations occurred. Simply put, Respondent maintains that veil-piercing cannot be claimed for violations predating Biewer Lumber's existence. *Id.* at 22. It follows that Biewer Lumber could not have actually operated the Respondent's business at a time prior to Biewer Lumber's corporate creation. *Id.*

Although the parties look to the Supreme Court's decision in *Bestfoods*, the application of that decision to this case is premature. While it is true that the decision provides essential guidance in parent corporation liability determinations,[9] discovery and perhaps the hearing must occur before those issues can be resolved.

In this regard it is noted that EPA's reaction to the Respondent's contention that granting the motion would be futile, as neither JAB or Biewer Lumber could be liable under either the "veil-piercing" or "operator" theory, is that these contentions cannot be resolved until discovery is completed. Thus EPA's central contention at this stage is that it need not conclusively establish that JAB and/or Biewer Lumber are liable for any violations under either of those theories, but rather that it has put forth a sufficient basis to warrant the inclusion of those entities as named respondents on the Complaint. Application of the general rule that complaints and pleadings are to be liberally construed and easily amended remains appropriate at this stage of the proceedings. None of the reasons to deny an amendment exist at this stage, as there has been no undue delay, bad faith shown nor will any undue prejudice result. *Foman v. Davis*, 371 U.S. 178 (1962). While the Court's determination allowing discovery will result in a postponement of the hearing, this delay is

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[9]It is noted that the issue before the Court in *Bestfoods* was "whether a parent corporation *that actively participated in, and exercised control over*, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Id.* at 55 (emphasis added). The Court held that there are two bases for parental liability to occur in such circumstances. First, there is *derivative liability*, which occurs when the corporate veil may be pierced. In such circumstances, the parent corporation may be held liable. The second basis for liability is *direct liability*. This arises if the parent corporation actively participated in and exercised control over the operations *of the facility itself*. If that obtains, then the parent may be held directly liable. The Court affirmed that only when the corporate veil may be pierced may the parent corporation be charged with derivative liability for its subsidiary's actions. It also stated that nothing in CERCLA bars a parent corporation from *direct liability* for its own actions in operating a facility owned by its subsidiary. *Id.* at 64. That involves situations when the parent is directly a participant, through the actions of its agents, in the alleged wrongdoing. Thus, that theory is about the parent's *own* actions regarding the wrongdoing. Speaking to the direct liability basis, the Court noted that, under CERCLA, any such violative act in operating a corporate subsidiary's facility, done on behalf of the parent corporation, makes the parent liable, because that act applies to "any person" who operates a polluting facility. *Id.* at 65. Accordingly, those that actually participate in the wrongful conduct are liable when they act as operators. The Court makes a point of this by quoting approvingly from a law review article presenting the circumstance where "the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator . . . [as when] a parent who strictly observed corporate formalities, avoided intertwining officers and directors, and adequately capitalized its subsidiary, yet provided active, daily supervision and control over hazardous waste disposal activities of the subsidiary. Such a parent should not escape liability just because its activities do not justify a piercing of the subsidiary's veil." *Id.* at 66, n.12.

outweighed by the importance of determining the appropriate respondents.

The Court agrees with EPA's expression of its burden at this stage of the proceeding and it is noted that other courts have applied the same approach. Thus, in *Aerotel, Ltd. v. Sprint*, 100 F. Supp. 2d 189, 193-194 (S.D. N.Y. 2000), the court allowed additional discovery "to determine the precise level of interrelatedness between parent and subsidiaries." At this stage only pleading in good faith is required. By seeking to add JAB and Biewer Lumber, upon filing an amended complaint, EPA will have satisfied the notice required at this stage by identifying the respondents and the theories for their liability. Later, after discovery is completed, there must be sufficient facts to establish a *prima facie* showing of parental liability. *Ball v. Metallurgie Hoboken-Overpelt*, 902 F. 2d 194, 196-197 (2d Cir. 1990). For now, the Court employs its discretion to allow EPA the opportunity to learn the degree of interrelatedness between the Respondent and the other entities it seeks to hold responsible as respondents in this matter. *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). *See also*, *Melikian v. Corradetti*, 791 F.2d at 281-282 (3d Cir. 1986). A ruling on the relationship and activities and consequent potential liability of those entities vis-a-vis Respondent Biewer Toledo will occur either in subsequent, post-discovery, motions or perhaps a final ruling will need to be deferred until after the evidentiary hearing has been completed.

Based on the foregoing, EPA is directed to file an amended complaint, adding as respondents JAB and Biewer Lumber, along with the inclusion in that complaint of the necessary essential allegations against those entities. Following that, discovery is to commence promptly with the goal of completing it within sixty days. Although the Court may ultimately conclude that Biewer Lumber is not an appropriate Respondent in this proceeding, EPA is entitled to learn through discovery of the nature of the relationship of that entity with JAB and the Respondent. Other matters, such as the details of contract(s) and contact(s) between the respondents and the Mannik & Smith Group, inquiries into those who were directing and operating Biewer Toledo, and the entity for which they were acting as officers when engaged in such actions, and the movement of funds in and among these entities would all seem to be examples of appropriate areas of inquiry. A new date for the start of the hearing will be made following discovery and orders on any motions which may ensue in its wake.[10] Although the subject of a distinct docket,

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[10]As alluded to *supra* at note 2, EPA's Senior Attorney and Counsel, Mr. Wagner, filed a motion to strike the Respondent's sur-reply, contending that it is unfair to EPA to permit the Respondent to submit a sur-reply because EPA carries the burden in its motion and also because the consolidated rules, 40 C.F.R. Part 22, do not expressly provide for them. EPA Counsel believes that "consideration of [a] Respondent's sur-reply is contrary to the intent of the Administrator's Rule that a motion be fully briefed." Motion to Strike at 3. Yet, as explained, the Court made this decision to achieve that very goal – that the motion be fully briefed. EPA also asserts that the Respondent raised a new argument itself in its sur-reply and that it is now EPA that is prejudiced, left without the opportunity to respond to it. According to EPA, the Respondent's "new" argument is that EPA was required to submit a proposed amended pleading with its motion to amend the complaint but failed to do so. EPA Motion to Strike Respondent's

the case of John A. Biewer of Ohio, Inc., RCRA 05-2008-0007, shared the same core issues in a parallel motion filed in that case. While separately considered, the outcomes for inclusion of respondents, at least for now, and the direction for discovery, are the same.

Accordingly, Complainant's Motion to Amend the Complaint and Compliance Order is GRANTED, according to the terms of this Order.

William B. Moran

William B. Moran
United States Administrative Law Judge

Dated: January 23, 2009
Washington, DC

Sur-Reply at 3. However, the Respondent did raise this in earlier filed memorandum in opposition to EPA's motion, noting that if the amendment were granted "[a]n amended complaint . . . would need to be filed." Respondent's Opposition at 12. Thus, it was not a new argument. Beyond that, EPA has lost sight of the fact that the Court limited the sur-reply to new issues raised by EPA. Therefore, EPA suffered no prejudice. As noted, the Court's decision to allow the Respondent to file a sur-reply was based on its goal of fairness in these proceedings. Guided by that it determined that fairness would best be achieved by allowing a full airing of the parties' positions on a complex matter by permitting Respondent Biewer Ohio to respond to any new issues raised by EPA in its Reply. While EPA suggests that something is out of the ordinary because it "received no notice that its objection and the overruling of the objection appear of record in this matter in the file of the Region 5 Hearing Clerk," this is nonsensical. Counsel's very assertion confirms that he had notice that a sur-reply was allowed. Rather, EPA's Counsel seems to think that oral orders are not permitted or that they do not constitute notice until a written confirmation of the ruling is made and filed with the Regional Hearing Clerk. However, the Consolidated Rules do not prohibit oral orders. Rather, those rules require that where *documents* are issued, they are to be so filed. 40 C.F.R. § 22.6. For simple and brief procedural determinations involving the Court's discretion, oral orders are a practical, and fully effective, method of communicating those decisions.

In the Matter of John Biewer of Toledo, Inc
Docket No. RCRA-05-2008-0006

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on EPA's Motion to Amend Complaint and Compliance Order and Notice of Hearing Postponment** dated, January 23, 2009, was sent this day in the following manner to the addressees listed below:

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Dated: January 23, 2009