

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

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IN THE MATTER OF: )  
) DOCKET NO. RCRA-05-2008-0006  
John A. Biewer Company of Toledo, Inc. )  
300 Oak Street )  
St. Clair, Michigan 48079-0497 )  
(Washington Courthouse Facility) )  
)  
U.S. EPA ID #: OHD 081 281 412; and )  
)  
John A. Biewer Company, Inc. )  
812 South Riverside Street )  
St. Clair, Michigan 48079; and )  
)  
Biewer Lumber LLC )  
812 Riverside Street )  
St. Clair, Michigan 48079 )  
)  
Respondents )  
\_\_\_\_\_ )

**COMPLAINANT'S OBJECTION TO RESPONDENT'S MOTION  
TO AMEND PREHEARING DISCLOSURE**

Complainant hereby objects to Respondent's Motion to Amend Prehearing Exchange ("the Motion"), in that, as a matter of law, the Motion is untimely and should be denied. In support of her objection, Complainant states as follows:

**BACKGROUND**

- (1) That on January 15, 2010, a notice was filed in this matter by the Presiding Officer, scheduling a hearing in this matter February 23, 2010, in Toledo, Ohio.
- (2) That in three attempts to file a pre-hearing exchange in this matter -- on August 27, 2008; September 15, 2008; and November 20, 2008 -- Respondent identified one witness, Brian Biewer, whom it would call to testify at any hearing.

- (3) That on February 19, 2010, Complainant received an e-mail message from the law firm of Respondent's counsel stating as follows: "Mr. Donnell has asked that I forward to you the attached documents. Hard copy will follow by Federal Express Mail." Attached to that message was the Motion, and a certificate of service.
- (4) In the Motion Respondent states as follows:
- Counsel for Respondent has learned in this last week that as of sometime in January, 2010, Brian Biewer was no longer employed by Respondent and is unable to testify in this matter. For this reason, Respondent respectfully requests the Court's permission to utilize Gary Olmstead, who is also familiar with the matters set forth in Respondent's Supplement Witness Disclosure, to testify regarding those very same facts as were outlined in Respondent's Supplemental Witness Disclosure. Mr. Olmsrtead will rely upon the same documents previously identified, and his testimony will cover exactly the same topics that were described for Brian Biewer's testimony.
- (5) By rule, the Administrator provides that a party may supplement is pre-hearing exchange when it "learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional of corrective information has not otherwise been disclosed to the other party pursuant to this section." 40 C.F.R. § 22.19(f).

### **ARGUMENT**

In the Motion, Respondent fails to cite 40 C.F.R. § 22.19(f), and to make any demonstration that the information provided in its three attempts to file a pre-hearing exchange is "incomplete, inaccurate or outdated." While Respondent asserts that Brian Biewer is "no longer employed by Respondent" and concludes that he "is unable to testify in this matter," no affidavit is attached to the Motion setting forth facts to support the conclusion made by Respondent, nor is any other effort made by Respondent to set forth facts supporting the Motion.

The mere fact that Brian Biewer is no longer employed by Respondent does not, in and of itself, make Brian unavailable as a witness. While 40 C.F.R. § 22.19(f) does not specifically address the unavailability of a witness, 40 C.F.R. § 22.22(d) does address the unavailability of a witness for purposes of the admission of an affidavit of the absent witness' testimony, citing Rule 804(a) of the Federal Rules of Evidence ("Rule 804(a)"). In the Motion, Respondent makes no attempt to address Rule 804(a) or to otherwise demonstrate that Brian Biewer is unavailable.

In a published decision of the Administrator, the Board has held that "by compelling the parties to provide [all evidence to be used at hearing and other related information] in one central submission, the prehearing exchange clarifies the issues to be addressed at hearing and allows the parties and the [Presiding Officer] an opportunity for informed preparation for hearing." In Re JHNY, Inc., 12 E.A.D. 372, 397 (2005). Respondents bald attempt to substitute a witness less than two business days prior to hearing precludes Complainant from having "an opportunity for informed preparation for hearing." As with Brian Biewer in Respondent's initial three attempts to file a prehearing exchange, Complainant and the Presiding Officer are not informed in the prehearing exchange of the position the new witness, Gary Olmstead, holds with Respondent. While Complainant and the Presiding Officer are informed that Respondent's witness will testify regarding certain financial documents, there is no notice as to whether the witness to be called by Respondent is an expert in accounting rules and procedures.<sup>1</sup> Preparation for cross-examination

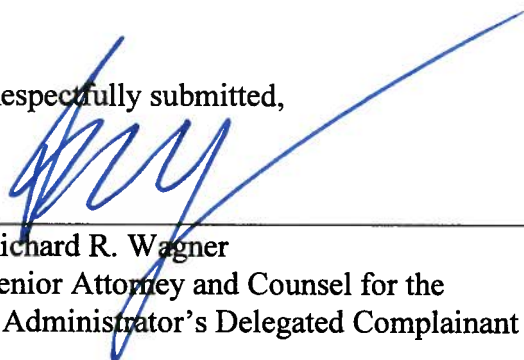
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<sup>1</sup>Elsewhere in this proceeding, Respondents have indicated that Brian Biewer is, or was, the Secretary-Treasurer of Respondent, and its parent company, John A. Biewer Company, Inc., and that Gary Olmstead is, or was, Chief Financial Officer of John A. Biewer Company, Inc., and/or Biewer Lumber LLC.

and rebuttal of a witness who is a certified public accountant differs significantly from preparation and rebuttal for cross-examination and rebuttal of a lay witness.

In Harris v. Secretary, US Department of Veterans Affairs, 126 F.3d 339, 345 (D.C. Cir. 1997), the Circuit Court for the District of Columbia recognized that “[s]trategic or merely lazy circumventions of a legal process grounded in a sound policy have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike.” To allow Respondent to substitute a witness less than two business days prior to hearing, without any demonstration by Respondent that the witness originally listed in its pre-hearing exchange is unavailable, is a “circumventions of a legal process grounded in a sound policy” and will “have the effect of eroding the regularized, rational character of litigation to the detriment of practitioners and clients alike.” It will allow a result that is a detriment to Complainant as, unfairly, Complainant is denied any realistic opportunity to prepare for cross-examination of the newly identified witness, and rebuttal.

Respectfully submitted,



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

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

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**CERTIFICATE OF SERVICE**

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

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

Honorable William B. Moran  
U.S. Environmental Protection Agency  
Office of Administrative Law Judges  
1200 Pennsylvania Ave., NW  
Washington, D.C. 20005

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

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*Darlene Weatherspoon* 2/22/10

February 22, 2010

*Darlene Weatherspoon*

Darlene Weatherspoon (C.14J)  
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(312) 353-6719