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[2]Delaware
[3]Illinois
[4]New York
[5]Ohio
[6]Wisconsin

February 8, 2010

RECEIVED
FEB 09 2010
REGIONAL HEARING CLERK
USEPA
REGION 5

Regional Hearing Clerk (E-19J)
United States Environmental Protection Agency
Region 5
77 West Jackson Blvd.
Chicago, IL 60604-3590

Re: John A. Biewer of Ohio, Inc.; RCRA-05-2008-0007

Dear Clerk:

Enclosed for filing you will find the original and one copy of the Respondent's Motion for Entry of Decision, Motion for Immediate Consideration, and Proof of Service.

Sincerely,

Douglas A. Donnell

Direct Dial/Fax: (616) 632-8035
E-Mail: ddonnell@mmbjlaw.com

jeb
Enclosures
cc: Hon. William B. Moran (by Fed Ex and e-mail)
Richard R. Wagner (by Fed Ex and e-mail)
Douglas S. Touma, Sr. (by First Class Mail)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0007

John A. Biewer Company of Ohio, Inc.
300 Oak Street
St. Clair, Michigan 48079-0497
(Washington Courthouse Facility)

RESPONDENT'S MOTION FOR ENTRY OF DECISION

U.S. EPA ID #: OHD 081 281 412

Respondent
_____/

INTRODUCTION

This case has produced its fair share of motions, briefs, and filings of all sorts, but none more bizarre than Complainant's recently filed Supplemental Pre-Hearing Exchange of the Administrator's Delegated Complainant, filed January 22, 2010 ("Complainant's Supp. Exchange"). In this filing, Complainant acknowledges the scheduled February 23, 2010 evidentiary hearing date and states:

> Complainant will be participating in the scheduled hearing under protest. In the interest of preserving her appeal rights, Complainant will present no evidence at the hearing, and will not make available for cross-examination any Agency personnel, or other witness. (Complainant's Supp. Exchange, p. 2)

What makes this statement surprising is not only the fact that it is Complainant, not Respondent, who carries the burden of presentation and persuasion in this matter, but this disclosure can be construed as nothing less than a flagrant disregard of this Court's December 23, 2009 decision in which the Court expressly and unequivocally ruled that Respondent was entitled to cross-examine EPA's penalty calculation witness. Strange as this position seems to Respondent, it is the position irrevocably taken by Complainant in that the time for disclosing witnesses to be presented and

documents to be introduced at the hearing has now expired. Thus, for the reasons set forth below, Respondent moves this Court for entry of a decision that Complainant is offering no evidence in support of any specified penalty amount, and thus the only permissible finding on the penalty amount is zero.

ARGUMENT

The Administrative rules set forth in 40 C.F.R Part 22 provide the procedural framework for administrative proceedings such as this. Relevant to the present issue is 40 C.F.R. § 22.19(a) relating to pre-hearing information exchange by the parties, which provides as follows:

> (1) In accordance with an order issued by the Presiding Officer, each party shall file a prehearing information exchange. Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify.

Consistent with this administrative rule, this Court entered a Pre-hearing Order dated June 27, 2008 setting forth various deadlines and requiring that any supplements to the parties' pre-hearing exchanges must be exchanged no less than 30 days before the date scheduled for hearing. That date passed several weeks ago, and Complainant's Supplemental Pre-Hearing Exchange is the last document setting forth Complainant's intended exhibits and witnesses at the hearing. Furthermore, 40 C.F.R § 22.22(a)(1) provides:

> If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties ***at least 15 days before the hearing date***, the Presiding Officer ***shall not admit*** the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so. (Emphasis added)

As of February 8, 2010, this deadline has also passed, and clearly there is no "good cause" for Complainant's refusal to produce any witnesses, including the person responsible for preparing EPA's proposed penalty in this matter.

Thus, Complainant's Supp. Exchange filed January 23, 2010 is more than a mere statement of intent. It is the document that now limits the proofs that can be introduced by Complainant at the hearing pursuant to the administrative rules governing these proceedings.

Counsel for Complainant states in Complainant's Supp. Exchange that the reason for this deliberate refusal to produce any evidence or witness at the hearing is "the interest of preserving her appeal rights." (Complainant's Supp. Exchange p. 2) It is indisputable that Complainant was not forced to present no evidence at the evidentiary hearing as the sole means of preserving her appeal rights. Appeals are taken all the time from rulings of a presiding officer that were not to the liking of the appellant without a refusal by the appellant to participate in the remaining proceedings. In other words, the so-called "interest of preserving her appeal rights" is not "good cause" that would permit even the late exchange of required information as permitted in 40 C.F.R. § 22.22(a)(1).

Also pertinent to these proceedings, is § 22.24(a) of the administrative rules, which provides as follows:

> (a) The ***complainant*** has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint ***and that the relief sought is appropriate.*** Following complainant's ***establishment of a prima facie case,*** respondent shall have the burden of presenting any defense . . . (Emphasis added)

Subparagraph (b) of this rule goes on to state:

> (b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

Section 22.24 makes it clear that Complainant bears the burden of presentation and persuasion as to her prima facie case. The rule further makes it clear that the presiding officer's decision must be based on the preponderance of the ***evidence***. Here, complainant has stated she

intends to introduce no "evidence," nor does she intend to present at the hearing a "prima facie case" as is her burden with respect to not only liability (which has been conceded in this case), but also as to the appropriateness of the relief sought (i.e., the appropriate penalty amount). Complainant having chosen to introduce no evidence, this Court has no choice but to find that Complainant has failed to factually support any penalty, and the Court must enter a decision awarding zero penalty. Strange as this result may seem, it is a result compelled by the voluntary refusal of Complainant to present a case.

The obligation to present a prima facie case in this context is no mere procedural formality, but one that has substance and meaning. Respondent, in its Motions for Accelerated Decision, provided more than ample evidence of Respondent's inability, rather than unwillingness to perform environmental investigation and work at its facility, even to the point of borrowing money it had little likelihood of being able to repay to do some of that work. Thus, Respondent has, from the outset, contested Complainant's proposed penalty calculation which, in part, is based on the willfulness of the violation. Moreover, in reviewing Complainant's proposed penalty calculation, Respondent has discovered what it believes are several errors in accurately applying EPA's own penalty policy. Hence, this Court properly ruled that Respondent was entitled to cross-examine the individual who prepared and who will defend EPA's proposed penalty calculation, so that the ***Court***, not this one individual who is not even subjected to cross-examination, makes the determination regarding the appropriateness of the relief sought. Any different result would render this entire proceeding a farce. Indeed, as this Court observed in its December 23, 2009 decision:

> In a real sense, if the Court were to adopt EPA's stance, the description of the penalty EPA seeks as its '*proposed* penalty' would be an enormous misnomer, because there would be no *proposed* aspect to it, and it would be akin to a penalty imposed by fiat. (Emphasis in original) Order on EPA's Motion for Accelerated Decision on Liability and Penalty, p. 20.

RELIEF REQUESTED

For the reasons set forth above, since Complainant has refused to introduce a prima facie case into evidence, this Court should rule that a penalty of zero dollars is appropriate. Furthermore, in consideration and respect for the Court's time, and the potential waste of time for all parties, including the Court in appearing in Toledo, Ohio for a hearing that won't really be an evidentiary hearing, Respondent respectfully requests this Court's early consideration of the present Motion so that the potential unnecessary expense of traveling to the hearing in Toledo on February 23 may be avoided.

Finally, Respondent requests this Court to consider an award of attorney's fees to Respondent under its authority in 40 C.F.R. § 22.4(c)(10). Though counsel for Respondent suspects than an award of attorney's fees is very uncommon, the position currently taken by EPA is simply untenable under any reasonable reading of the administrative rules and this Court's prior orders. Respondent, and previously Respondent's parent company, have been dragged through very expensive litigation ending with EPA essentially announcing that it simply refuses to follow the Court's rulings or the administrative rules. Given this indifference to well-established procedures, Respondent believes an award of actual attorney's fees would be justified and appropriate.

Respectfully submitted,

MIKA MEYERS BECKETT & JONES PLC
Attorneys for Respondents

Dated: February 8, 2010

By: _____

Douglas A. Donnell (P33187)
900 Monroe Avenue, NW
Grand Rapids, MI 49503
(616) 632-8000

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:

DOCKET NO: RCRA-05-2008-0007

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

CERTIFICATE OF SERVICE

U.S. EPA ID #: OHD 081 281 412

Respondents
_____/

I, Jane E. Blakemore, hereby state that I am an employee of Mika Meyers Beckett & Jones PLC, and that on February 8, 2010, I served a copy of:

> Respondent's Motion for Entry of Decision, and Motion for Immediate Consideration,

upon the following individual by Federal Express overnight mail:

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

I declare that the statements above are true to the best of my information, knowledge and belief.

Dated: February 8, 2010

Jane E. Blakemore
Jane E. Blakemore