

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
John A. Biewer Company of Toledo, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Perrysberg Facility))
)
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

**ORDER ON CROSS MOTIONS
FOR ACCELERATED DECISION ON DERIVATIVE LIABILITY**

Pursuant to 40 C.F.R. §§ 22.1(a)(4), 22.20, and 22.37, Complainant filed a Motion for Accelerated Decision on Derivative Liability on July 2, 2009, seeking a determination of liability on the part of Respondents John A. Biewer Company, Inc., (“JAB Company”) and Biewer Lumber LLC (“Biewer Lumber”) for the violations that Complainant alleges occurred at a facility owned by Respondent John A. Biewer Company of Toledo (“JAB Toledo”). Respondents JAB Company and Biewer Lumber also filed a Motion for Accelerated Decision on that date, seeking a holding that neither entity is liable for the alleged violations under either direct or indirect theories of liability. The parties proceeded to file responses and replies to these Motions.¹

In the companion case of John A. Biewer Company of Ohio (“JAB Ohio”), Complainant and the Respondents similarly filed opposing Motions for Accelerated Decision on July 2, 2009, as well as subsequent responses and replies, with respect to the liability of JAB Company and Biewer Lumber for the violations alleged in that proceeding. The Court issued an Order on Cross Motions for Accelerated Decision on Derivative Liability in the JAB Ohio matter on October 5, 2009, in which the Court denied Complainant’s Motion, granted the Respondents’ Motion, and held that JAB Company was not liable for the alleged violations under either direct

¹ Those submissions include Complainant’s Objection to Respondents JAB Company and Biewer Lumber LLC’s Motion for Accelerated Decision, Respondents’ Reply thereto, Respondents’ Memorandum in Opposition to EPA’s Motion for Accelerated Decision on Derivative Liability, and Complainant’s Reply thereto.

or indirect theories of liability.² The Court also directed the parties “to advise it of any material differences, if they genuinely believe there are any, regarding the...case of JAB Toledo, which material differences the parties contend could produce a different outcome, and to provide such information within two weeks from the date of issuance of [the] Order.” Order on Cross Motions at 37.

Pursuant to the Order, Respondents JAB Company and Biewer Lumber timely submitted a Memorandum in which Respondents advised the Court that no material differences exist between the JAB Ohio and JAB Toledo matters. Respondents indicated that the only notable factual difference between the two cases is that, unlike the property at issue in the JAB Ohio case, the property at issue in the JAB Toledo case “has been the source of a modest stream of rental income during the time period relevant to the parties’ cross motions, some of which was used to pay for environmental investigation and remediation.” Memorandum at 2. Respondents asserted that this difference is immaterial, however, as “the financial and corporate affairs of JAB Toledo were handled in the same manner as the financial and corporate affairs [of] JAB Ohio, which [the] Court has already found were consistent with typical parent-subsidiary norms.” *Id.* As such, Respondents requested that the Court grant its Motion for Accelerated Decision and hold that JAB Company and Biewer Lumber are not liable for the alleged violations in the Biewer Toledo matter.

Complainant also timely submitted a letter to the Court in response to the Order of October 5. There, the Complainant advised the Court that some factual differences exist between the JAB Ohio and JAB Toledo matters. However, Complainant failed to identify these differences. Rather, Complainant stated its opinion that, “given the statements made in the [Court’s] October 5, 2009, order, no factual difference is likely to produce an outcome [in the JAB Toledo case that is] different than the outcome [the Court] arrived at in the [JAB Ohio] case.” Letter at 1. With this submission Complainant effectively tried to pre-empt the Court of its role in deciding whether the factual differences referenced by Complainant were material to its ruling on the parties’ Motions in this proceeding. Accordingly, in a conference call conducted with the parties on October 21, 2009, the Court again directed the Complainant to comply with its direction to identify the factual differences that it alluded to, but did not list, in its letter. Complainant subsequently complied, in a letter dated October 27, 2009, and named the following factual differences:

- (1) JAB Toledo is a Michigan corporation, while JAB Ohio is an Ohio corporation;
- (2) JAB Toledo and JAB Ohio conducted their operations at different locations within Ohio;
- (3) JAB Toledo conducted its operations from 1983 to 1997, while JAB Ohio conducted its operations from 1976 to 2001;
- (4) an environmental consultant conducted remediation activities at JAB Toledo’s facility, which were “described as being done on behalf of Biewer Lumber” in correspondence between Brian Biewer and the environmental consultant, while no such activities were conducted and no such correspondence exists with regard to JAB Ohio’s facility;

² The Court did not address the liability of Biewer Lumber as, prior to the issuance of the Order, Complainant informed the Court in its Reply to Respondents’ Memorandum in Opposition to EPA’s Motion for Accelerated Decision that it no longer intended to pursue Biewer Lumber as a respondent in the JAB Ohio matter. In this proceeding, Complainant similarly indicated in its Reply to Respondent’s Memorandum in Opposition to EPA’s Motion for Accelerated Decision that it no longer intends to pursue Biewer Lumber as a respondent. Accordingly, the Court will not speak to the liability of Biewer Lumber in this Order as EPA has dropped its effort to hold that entity accountable. However all of the Court’s remarks concerning Biewer Lumber in its Biewer Ohio Order are fully applicable to this Order.

(5) environmental consultants issued invoices to “Biewer Lumber,” documenting payment owed to them for services rendered at JAB Toledo’s facility, and documentation exists of payment being made on those invoices by JAB Company, while no such documents exist with regard to JAB Ohio’s facility; and

(6) JAB Toledo has leased a portion of the facility since closing it, earning some income, while JAB Ohio has not earned any income.

Letter at 1-2.

Having considered the submissions, the Court finds that no material differences exist between the JAB Toledo and JAB Ohio matters as concerns derivative liability. Therefore, the Court incorporates by reference the relevant portions of its Order on Cross Motions for Accelerated Decision on Derivative Liability issued on October 5 in the JAB Ohio matter and hereby DENIES Complainant’s Motion for Accelerated Decision on Derivative Liability and GRANTS the opposing Motion filed by Respondents in this matter.

So ordered.

William B. Moran
United States Administrative Law Judge

Dated: December 23, 2009
Washington, D.C.

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Cross Motions for Accelerated Decision on Derivative Liability**, dated, December 23, 2009 was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd., E-19J
Chicago, IL 60604-3590

Copy by Regular Mail and facsimile to:

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Office of Regional Counsel
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Knolyn R. Jones
Legal Assistant

Dated: December 23, 2009
