

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the following Motions in Limine.

- 1. Bar Certain Testimony and/or Opinions of U.S. EPA's Fact Witness Michael Beedle;**
- 2. Preclude U.S. EPA's Evidence of "Prior History";**
- 3. Omnibus Motion In Limine on "Routine" Matters;**
- 4. Preclude Evidence or Testimony Relating to the "Prior History" of Scott Forster; and**
- 5. Bar Evidence of the Financial Worth or Assets of Scott Forster and Eric Lofquist.**

were sent on May 4, 2012, in the manner indicated, to the following:

Original and One Copy by hand delivery to:

LaDawn Whitehead, Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy by Overnight Delivery to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

Copy by hand delivery to:

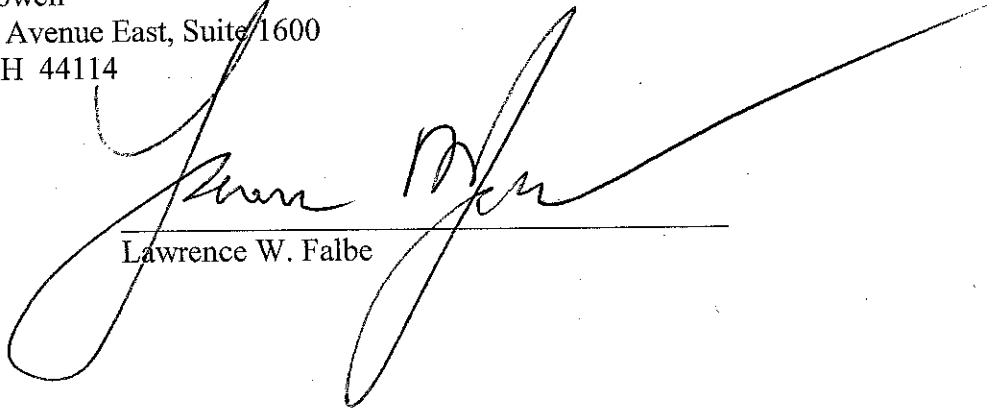
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May 4, 2012



Lawrence W. Falbe

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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In the Matter of:)
)
Carbon Injection Systems LLC;)
Scott Forster, President;)
Eric Lofquist, Vice President)
Gate #4 Blast Furnace Main Ave)
Warren Township, OH 44483)
)
EPA ID No. OHR000127910)
)
Respondents.)

Docket No. RCRA-05-2011-0009

**RESPONDENTS CARBON INJECTION SYSTEMS LLC,
SCOTT FORSTER AND ERIC LOFQUIST'S MOTION IN LIMINE
TO BAR CERTAIN TESTIMONY AND/OR OPINIONS OF U.S. EPA'S
FACT WITNESS MICHAEL BEEDLE**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, by and through their undersigned counsel, pursuant to Rule 22.4(c)(6) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) (the "Consolidated Rules"), and the Presiding Officer's Order dated April 10, 2012, move *in limine* for the entry of an Order requiring barring certain testimony by Complainant United States Environmental Protection Agency's ("U.S. EPA's") proffered fact witness Michael Beedle ("Beedle"). Specifically, the following testimony and/or opinions of Beedle should be barred: 1) any testimony of opinions concerning the calculation of U.S. EPA's demanded economic benefit penalty that go beyond use of the BEN computer model; 2) any opinions related to the U.S. EPA's "Beyond BEN" analysis; 3) any opinions regarding the "consistency" of the penalty demanded by U.S. EPA with the applicable EPA policy, or the "appropriateness" of the penalty demanded by U.S. EPA in this case; and 4) any testimony that Beedle "agrees" with the

testimony of any other U.S. EPA fact or expert witness. Per Respondents' inquiry to U.S. EPA's counsel, U.S. EPA does not agree to this motion.

In support thereof, Respondents state as follows:

1. U.S. EPA employee Michael Beedle has been identified by U.S. EPA as a fact witness who is expected by U.S. EPA to testify regarding his inspection of the Carbon Injection Systems and WCI Steel facilities on August 27, 2008, and his review of various (unspecified) documents related to the facilities. (U.S. EPA's Initial Prehearing Exchange, p. 3). In addition, U.S. EPA identifies Beedle as someone who is also "expected to present testimony regarding the calculation of the proposed penalty in this case, the consistency of the penalty with the applicable EPA policy, and the appropriateness of the penalty in this case." Id. Beedle's expected testimony should be excluded, in part, for the reasons set forth below.

2. It appears from U.S. EPA's pre-hearing exchange that Beedle is the U.S. EPA employee who developed USEPA's initial penalty calculation, in part, by applying the U.S. EPA BEN computer model. (See U.S. EPA's Rebuttal Pre-Hearing Exchange, dated November 18, 2011, p. 2). The BEN model itself is designed so that the user need not have any expertise in economics in order to plug in data and obtain a result. While Respondents do not object to Beedle testifying regarding what he did with respect to inputting data into the BEN computer model to obtain a result, any testimony that goes beyond simply explaining what he did and how he did it, is beyond any disclosed expertise of Beedle. Based on Beedle's resume and credentials (CX91), Beedle has no expertise, degree or other training in economics or accounting. To allow Beedle to go beyond testifying as to what he did to run the BEN model and obtain a result would be tantamount to elevating him to the status of an expert in economics or accounting, for which he is neither qualified, nor has been disclosed as such an expert witness.

3. Similarly, Beedle should be barred from offering any opinions regarding the “Beyond BEN” component of U.S. EPA’s demanded economic benefit calculation. “Beyond BEN” is commonly understood as a framework to allow recapture of unfair economic advantage over a theoretically compliant competitor. The whole point of “Beyond BEN” is that the BEN computer program itself cannot calculate this component of such an alleged benefit and requires consideration of many additional factors including time value of money, discount rates, gross vs. net profit, marginal revenue and cost concepts, and other economic and accounting principles. Beedle has no such disclosed expertise, and has not been identified by U.S. EPA as an expert witness. Thus, any such testimony by Beedle should be excluded.¹

4. Beedle should also be barred from offering any opinions regarding the “consistency” of the penalty demanded by U.S. EPA with the RCRA Penalty Policy, or the “appropriateness” of such penalty demand. Consistency with the RCRA Penalty Policy, to the extent it may be considered by the Presiding Officer at hearing, is to be determined by the trier of fact. Any testimony that the U.S. EPA’s employee (who was apparently responsible for undertaking much of the penalty calculation) believes his own analysis to be “consistent” with the policy that a U.S. EPA employee is expected to follow, would be self-serving and unhelpful to the trier of fact, and prejudicial to the Respondents. Similarly, self-serving testimony that suggests that Beedle’s own penalty calculation is “appropriate” to the facts of the case should also be barred.

5. Finally, Beedle should be barred from testifying that he “agrees” with any other witnesses or experts offered by U.S. EPA (including, but not limited to Gail Coad). Such

¹ Note that the fact that Beedle apparently tried to calculate a “Beyond BEN” component of U.S. EPA’s penalty demand (see Penalty Computation Worksheet, CX115), but which calculation was apparently determined to be in error by U.S. EPA, and revised by U.S. EPA’s disclosed economic expert, Gail Coad (see “Beyond BEN calculation”, CX171), should nonetheless be admissible for impeachment or cross-examination purposes at hearing without opening the door to allowing affirmative testimony by Beedle as an economic expert.

testimony merely amounts to improper bolstering – for each witness to testify that he or she agrees with other witnesses’ opinions is to create a false impression of multiple consistent, favorable (redundant) opinions. Such testimony is not proper unless a proper foundation is laid that indicates that such opinions were not just reviewed by the opining expert, but were independently investigated and analyzed. This, of course, is not even possible unless it is shown that the opining expert’s background and credentials are adequate, and the opining expert has performed independent analysis and investigation to verify the work of the other expert. While any expert may testify that he or she is “relying” on the opinion of another expert, to testify as to an “agreement” implies an independent investigation in which such an opinion is vetted and confirmed by another qualified expert. Notwithstanding the fact that Beedle has not been disclosed as an expert witness by U.S. EPA in any respect, U.S. EPA has not shown this with respect to Beedle’s “agreement” with any other opinions offered by other U.S. EPA experts, and therefore any opinion that Beedle “agrees” with other U.S. EPA experts should be barred.

WHEREFORE, Respondents Carbon Injection Systems, LLC, Scott Forster and Eric Lofquist, respectfully request that the Presiding Officer enter an order *in limine* barring certain testimony (as stated above) of U.S. EPA’s witness Michael Beedle, and for such other and further relief as this Court deems just and proper.

Dated: May 4, 2012

Respectfully submitted,

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Systems LLC, Scott Forster, and Eric Lofquist*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
Carbon Injection Systems LLC;)
Scott Forster, President;)
Eric Lofquist, Vice President)
Gate #4 Blast Furnace Main Ave)
Warren Township, OH 44483)
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EPA ID No. OHR000127910)
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Respondents.)

Docket No. RCRA-05-2011-0009

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**RESPONDENTS CARBON INJECTION SYSTEMS LLC,
SCOTT FORSTER AND ERIC LOFQUIST'S MOTION *IN LIMINE*
TO PRECLUDE U.S. EPA'S EVIDENCE OF "PRIOR HISTORY"**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, (collectively referred to as "Respondents") by and through their undersigned counsel, move *in limine* for the entry of an Order barring the admission of evidence that the United States Environmental Protection Agency ("U.S. EPA") claims relates to the environmental compliance history of Respondents, specifically U.S. EPA's exhibits CX49 through CX53, and CX97 through CX111 and any testimony related to such exhibits.

I. INTRODUCTION

U.S. EPA has identified multiple exhibits in its Initial Prehearing Exchange that relate to a variety of RCRA and non-RCRA compliance matters that concerned other companies directly or indirectly owned by Respondents Eric Lofquist and Scott Forster. However, none of these other matters pertained to Carbon Injection Systems LLC ("CIS") and none involved the type of RCRA requirements that U.S. EPA alleges were

violated by Respondents in this case. Most were unadjudicated. Evidence related to these matters is not material, is of no probative value in this proceeding, and is prejudicial. The Consolidated Rules of Evidence provide that the Presiding Officer “shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.” 40 C.F.R. § 22.22(a). Here, admission of this evidence for any purpose would be contrary to the evidence standard provided in 40 C.F.R. § 22.22. Moreover, particularly with respect to unadjudicated matters which Respondents have not previously had an opportunity to defend, admission of such evidence would require that Respondents be provided a full and fair opportunity to contest the alleged prior violations, necessitating multiple “trials within a trial” on such matters. For these reasons, and as more fully explained below, Respondents request that all evidence related to the RCRA and non-RCRA compliance matters that concerned other companies directly or indirectly owned by Respondents Eric Lofquist and Scott Forster be excluded.

II. LAW AND ANALYSIS

A. Prior History is Not a Proper Criteria for Determining RCRA Civil Penalties.

Unlike other environmental statutes,¹ RCRA does not provide for the use of prior history as a penalty determination factor. *See* 42 U.S.C. § 6928. Ohio Revised Code Section 3734.13, which provides for civil penalties for hazardous waste violation in Ohio, similarly does not provide for the use of prior compliance history in determining the

¹ The Clean Air Act and the Clean Water Act both provide for the consideration of prior history of noncompliance in their respective enabling statutes. Similarly, in the Toxic Substances Control Act (“TSCA”), 15 U.S. C. 2615 explicitly requires the U.S. EPA to consider “any history of prior such violations” in determining a civil penalty. For this reason, the consideration of such information in Clean Air Act, Clean Water Act and TSCA cases provides no justification for the consideration of such information in RCRA cases.

amount of civil penalties. Despite this lack of statutory authority, U.S. EPA's June 2003 RCRA Civil Penalty Policy ("Policy") includes the history of a party's noncompliance as an upward-only adjustment factor in calculating civil penalties for RCRA violations. The Policy, however, is not a rule with binding effect, and administrative law judges are not bound by the provisions of such policies. A penalty assessment decision is ultimately constrained only by the statutory penalty criteria. *In re Employers Insurance of Wausau and Group Eight Technology, Inc.* 6 E.A.D. 735, 1997 WL 94743 (E.P.A. Feb. 11, 1977). RCRA's statutory penalty criteria do not contemplate reliance on prior history as a penalty factor and the Presiding Officer is not required to consider it in this matter. Absent statutory authority, the prior history of environmental noncompliance of a party should not be considered in order to justify an upward adjustment of a RCRA civil penalty.

B. Even the Policy Only Permits Use of the Prior Similar History of the Party for an Upward Adjustment.

Notwithstanding the lack of statutory authorization, the Policy upon which U.S. EPA relies provides for an "upward adjustment only" for "history of noncompliance" as follows:

Where a *party* previously has violated federal or state environmental laws at the same or a different site, this is usually clear evidence that the *party* was not deterred by the previous enforcement response. Unless the current or *previous violation was caused by factors entirely out of the control of the violator*, this is an indication that the penalty should be adjusted upward. . . . A violation should be considered "similar" if the Agency's or State's previous enforcement response should have alerted the party to a *particular type* of compliance problem. . . . Nevertheless, a history of noncompliance can be established even in the absence of similar violations, where there is a *pattern* of disregard of environmental requirements contained in RCRA or another statute.

(Policy, p. 37)(emphasis added). The Policy considers previous violations to include those where a formal or informal enforcement response has occurred, and explicitly includes any previous written notice of violation. (Policy, pp. 37-38, n.35).

Even if the Presiding Officers determines that prior compliance history should be taken into account when assessing a RCRA civil penalty, the terms of the Policy itself do not permit consideration of the environmental compliance evidence U.S. EPA has included in its Initial Prehearing Exchange. First, the prior history should be for the same party, not other companies. Additional factors to be considered when evaluating prior history for use as an upward adjustment in the penalty are: how similar the previous violation was; how recent the previous violation was; the number of previous violations; and the party's response to the previous violations in regard to correction of the problem. (See, Policy, p. 37). As detailed below, the evidence of alleged environmental noncompliance U.S. EPA seeks to include does not establish a history of noncompliance that warrants an upward penalty adjustment; as such the evidence should be excluded.

C. Due Process Requires That U.S. EPA Must Prove, and Respondents Must Be Given An Opportunity to Defend, Previously Unadjudicated Alleged Violations Before They Can Be Used to Support an Increased Penalty.

The consideration of mere notices of violation, which can be issued by the Administrator "on the basis of any information" and where there is no adjudication, to increase a civil penalty violates Respondents' due process rights. Before the government can impose severe civil and criminal penalties, due process entitles defendants to a full and fair hearing before an impartial tribunal at a meaningful time and in a meaningful manner. U.S.C.A. Const. Amend 5; *Tennessee Valley Authority v. Whitman*, 336 F.3d 1236 (11th Cir. 2003). Due process requires that U.S. EPA must establish that any

previous violation upon which U.S. EPA relies for an upward penalty adjustment in fact actually occurred. Respondents in turn, must be permitted an opportunity to be heard on whether the conduct actually took place and whether the alleged conduct amounts to a violation. Based on this due process violation, Respondents argue that U.S. EPA should not be permitted to present evidence regarding history of noncompliance in support of its penalty determination. *In re Employers Insurance of Wausau and Group Eight Technology, Inc.* 6 E.A.D. 735, 1997 WL 94743 (E.P.A. Feb. 11, 1977); *In re: Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 1998 WL 214543 (E.P.A Mar. 13, 1998)

U.S. EPA may argue that the introduction of evidence of prior notices of violation does not violate due process because it is relevant to establish that Respondents were notified of environmental requirements and continued to disregard them, as was the case in *In re: Ocean State Asbestos Removal, Inc.*, *supra*. In that case, the E.A.B. found that a prior notice of violation without more was relevant to the penalty issue because it was evidence of the respondent's knowledge of the requirement, and thus the degree of fault associated with the subsequent violation. *Id.* *In re: Ocean State Asbestos Removal, Inc.*, however, was a Clean Air Act ("CAA") case, and the CAA explicitly calls for consideration of the "full compliance history" of a party when calculating a civil penalty under the CAA. RCRA does not contain any language authorizing consideration of a party's compliance history. Moreover, using the evidence for the purpose of establishing notice merely brings the inquiry full circle to the other criteria in the policy that require that the prior history be for the same party, for same or similar violations or establishes a pattern. In the absence of these circumstances, evidence of prior unadjudicated

compliance matters fails to provide the requisite notice found to be relevant in *In re: Ocean State Asbestos Removal, Inc.*

Here, as explained in more detail below, none of the “prior history” evidence U.S. EPA intends to introduce as support for its upward penalty adjustment could reasonably have served to place Respondents on notice of U.S. EPA’s interpretation of the recycling exclusion and whether it would apply to CIS’s sale of injectants for use in a blast furnace to make iron.

D. U.S. EPA’s “Prior History” Evidence Does Not Even Meet the Criteria in the Policy, is Irrelevant, Prejudicial and Should Be Excluded.

1. ***Evidence of Nuisance Odor and Unadjudicated Air Pollution Matters at Other Companies’ Facilities Is Irrelevant and Should Be Excluded.***

U.S. EPA’s Prehearing Exchange includes a complaint brought by the State of Ohio that contained allegations that General Environmental Management LLC, ESG Holdings, LLC, Eric Lofquist and Scott Forster violated certain air permitting requirements and violated local City of Cleveland ordinances against nuisance odors. (See, CX99). Relying on outdated information submitted by the prior owner of the GEM facility, the State of Ohio alleged that the facility had failed to demonstrate that certain air emission sources met regulatory requirements for certain capture and destruction efficiencies and/or had failed to obtain required permits. The State of Ohio was wrong. All required permits were in place, and the units met all regulatory requirements. The State of Ohio voluntarily dismissed all claims related to these matters. The State of Ohio also agreed that the individuals were improperly named. The Consent Order and Final Judgment reflects this, and it pertains only to alleged violations of local nuisance odor ordinances. (See, CX100; RX14 - RX17).

Similarly, U.S. EPA's Prehearing Exchange includes a notice of violation that alleges that Recycling & Treatment Technologies of Detroit, LLC ("RTT-Detroit"), is operating without a Title V permit. (CX111). RTT-Detroit disputes that it is required to have a Title V permit for its Detroit facility, and apparently U.S. EPA agrees because it withdrew its claim in a subsequently issued notice of violation, which RTT-Detroit also disputes and which RTT-Detroit and U.S. EPA currently are discussing.

Evidence related to these matters is wholly irrelevant for any purpose in this case. None of these air pollution matters involve allegations of similar regulatory violations as those at issue in this case. The allegations arise out of very different types of operations at different facilities, owned by entities that are not parties in this proceeding. More importantly, none of these allegations resulted in an adjudication that any violation, in fact, occurred. GEM disputed that the State of Ohio's claims based on permitting regulations had any validity and the State of Ohio voluntarily dismissed them. RTT-Detroit vigorously disputes the allegations of air violations at its Detroit facility, but has not yet had an opportunity to refute them.

Moreover, the notice issued to RTT-Detroit does not pre-date the alleged violation in this case, and logically could not serve to have placed CIS on notice. *In the Matter of Indspec Chemical Corporation and Associated Thermal Services, Inc.*, 1999 WL 118178 (E.P.A. Jan. 26, 1999)(five exhibits alleged to address compliance history would not be considered for the penalty calculation as the events in the notices occurred four months after the date of violation at issue); see also *In re: Ocean State Asbestos Removal, Inc.*, *supra*.

Evidence of these matters should be excluded. These matters do not establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS's sale of injectants for use in a blast furnace to make iron for any purpose. Nor do they serve to establish a pattern of regulatory noncompliance. The introduction of evidence by U.S. EPA regarding these matters would require that Respondents be given their first full and fair opportunity to respond to the allegations, necessitating "trials within a trial" and greatly complicating what already likely will be a complex and lengthy hearing. For all of these reasons, evidence of these matters should be excluded.

2. *Evidence of Unadjudicated Notices of Violations Arising From An Unintentional Explosion and Fire at the General Environmental Management Facility Cased by a Contractor in 2006, and Other Evidence Related to the Explosion and Fire, Is Irrelevant.*

U.S. EPA's Prehearing Exchange includes a number of exhibits that relate to an unintended fire and explosion that occurred at the GEM facility in Cleveland. Although the cause of the fire was never finally established, it appeared to have been caused by a spark from a welding contractor's torch. Certain of these exhibits are no more than hearsay reports by unknown persons or first responders to the incident. (See CX 101, 102, 103, 104). This evidence should be excluded because it simply has no relevance to any issue in this proceeding, including any alleged history of noncompliance. These reports do not reflect any violations of environmental laws. They are merely hearsay accounts of an event, one of which is anonymous, that took place at a facility located over fifty miles from the CIS facility.

In addition, U.S. EPA's Prehearing Exchange contains a notice of violation issued by Ohio EPA as a result of the explosion and fire. (See, CX106, Nos. 4, 5 and 6). Ohio

EPA alleged that water used to put out the fire may have reached the Cuyahoga River. GEM was able to demonstrate to Ohio EPA's satisfaction that all water had been contained and that no release occurred, and Ohio EPA subsequently retracted these notices of violation. (See, CX107, RX13).

The 2006 explosion and fire at GEM's Cleveland facility was caused by factors entirely out of the control of the GEM or any party to this proceeding. The terms of the RCRA penalty policy specifically exclude violations caused by factors out of the party's control. Evidence related to the explosion and fire, and any alleged violations that resulted from it should be excluded. These matters do not establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS's sale of injectants for use in a blast furnace to make iron for any purpose. Nor do they serve to establish a pattern of regulatory noncompliance. The introduction of evidence by U.S. EPA regarding these matters would require that Respondents be given their first full and fair opportunity to respond to the allegations, necessitating "trials within a trial" and greatly complicating what already likely will be a complex and lengthy hearing. For all of these reasons, evidence of these matters should be excluded.

3. ***Violations of RCRA Housekeeping Requirements By Non-Parties Are Irrelevant.***

U.S. EPA's Prehearing Exchange includes several notices of violations of various RCRA housekeeping requirements directed to GEM, RTT-Detroit and Recycling and Treatment Technologies of Ohio (RTT-Ohio). These include an August 4, 2004 notice of a single violation to GEM for failure to have closed a labeled 12 five-gallon pails, abated at the time of the inspection (CX 97); a notice of a violation related to the retention time

for holding drummed waste issued to GEM (CX98); a notice of violation related to the condition of a roll-off box containing waste issued to GEM (CX105); a notice of various isolated violations related specifically to GEM's operations (CX106, nos. 2, 7-11, CX107, CX108); a notice of a single violation regarding labeling used oil tanks issued to RTT-Ohio (CX109); and a June 18, 2008 letter of warning from the Michigan Department of Environmental Quality ("MDEQ), regarding various issues related to the condition of containers and labeling (CX110), all of which had been corrected by August 26, 2008.

The matters addressed in these various notices or warnings reflect occasional isolated incidents related primarily to housekeeping matters that were abated at the time of inspection, or for which no further action was required. None of these matters involve the CIS facility. None of them establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS's sale of injectants for use in a blast furnace to make iron for any purpose. The introduction of evidence by U.S. EPA regarding these matters would require that Respondents be given their first full and fair opportunity to respond to the allegations, necessitating a series of "trials within a trial" and greatly complicating what already likely will be a complex and lengthy hearing. For all of these reasons, evidence of these matters should be excluded.

4. ***Notices of Violations Related to GEM's Operations Are Irrelevant and Should be Excluded.***

U.S. EPA's Prehearing Exchange includes three related notices of violation that all pertain to the certain aspects of GEM's former operations of GEM that are irrelevant to the type of violation that is at issue in this proceeding. (See CX106, CX107 and CX108). The issues raised by Ohio EPA in these notices involved wastewater treatment

and refinery waste exemptions for listed wastes that were applicable to GEM's wastewater treatment and used oil operations. GEM vigorously denied the alleged violations, and submitted voluminous information to Ohio EPA and met with Ohio EPA in order to demonstrate to Ohio EPA why it was wrong. GEM provided documentation and supporting evidence demonstrating its compliance with the hazardous waste regulations allegedly in violation. (See RX3, RX5 and RX9). Ultimately, Ohio EPA did not pursue any enforcement action. Because no enforcement action ensued, the violations were never adjudicated and GEM was never provided with a full and fair opportunity to refute the charges.

The matters addressed in these notices concern issues that were unique to GEM's operations.² None of these matters involve the CIS facility. None of them establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS's sale of injectants for use in a blast furnace to make iron for any purpose. The introduction of evidence by U.S. EPA regarding these matters would require that Respondents be given their first full and fair opportunity to respond to the allegations, necessitating a series of "trials within a trial" and greatly complicating what already likely will be a complex and lengthy hearing. For all of these reasons, evidence of these matters should be excluded.

² CX106 was addressed to CIS, but on its face it concerned only an inspection of GEM's Cleveland facility. As pointed out by GEM, there was no factual basis to include CIS as a "co-operator" of GEM. (See RX5). Ohio EPA did not pursue this issue and CIS was dropped from all later correspondence related to the issues. (See CX107, CX108).

5. *Evidence Related to U.S. v. General Environmental Management LLC, Docket No. 1:08-CR-441, Should Be Excluded.*

U.S. EPA's Prehearing Exchange includes three exhibits related to a criminal case brought against GEM in 2008. (See CX49, 51 and 53) In that case, the United States alleged that GEM violated RCRA in connection with the manner in which it held drummed waste at its Cleveland facility.³ Count II related to a former practice at the GEM facility that entailed transferring drummed hazardous wastewater to the custody of a "second transporter," pending acceptance of the wastewater by GEM. The United States charged that reflecting the transfer to the second transporter on manifest amounted to a false statement because, in fact, the second transporter did not take custody of and transport the drums. Rather, they were held for a short time in the second transporter's trailer at the GEM facility. As GEM explained at the time, the problem was one of logistics. A non-TSD facility cannot accept, for any period of time, hazardous waste, except, a wastewater treatment facility can accept hazardous waste in the form of wastewater. In order for the exemption to apply, the hazardous wastewater must be received directly into a wastewater treatment unit. The receiving facility also is subject to categorical wastewater treatment regulations, however, and cannot accept any wastewater, but must test it to insure that its acceptance will not cause it to violate the categorical wastewater treatment standards that are applicable to the facility. In the case of wastewater received by tanker truck, the facility can take a sample from the truck, the truck can be staged for the time necessary to obtain analytical results, and the waste can then be either received, or redirected to another receiving facility. In the case of

wastewater received in drums, however, the facility needs a way to stage the drums from the transporter, sample them and hold them for the time necessary to obtain analytical results. The rules pertaining to second transporters theoretically can be used to provide a legally permissible mechanism for solving this practical dilemma.

GEM had discussed its drum handling practices with Ohio EPA representatives. When GEM was later advised that Ohio EPA did not approve of its drum handling practices, it immediately ceased accepting all drummed hazardous waste and it sent written notifications to its customers. GEM did not have any financial interest in accepting hazardous waste in drums, and did so only as an accommodation to its customers. GEM was not interested engaging in a practice that the Ohio EPA questioned.

The United States also alleged that GEM's monthly sewer reports that it filed with the Northeast Ohio Regional Sewer District (NEORS) were inaccurate, and that this constituted false statements (Count III), and that a letter written to the NEORS contained a false statement (Count I). Count III was even more complicated than Count II due to irreconcilable discharge, sampling and reporting requirements contained in GEM's industrial discharge permit. Count I, was more straightforward, but for purposes here, it concerned GEM's acceptance of a non-hazardous wastewater, which was approved by NEORS after the fact, and there were never any allegations that involved hazardous wastes or any adverse environmental impact.

GEM vigorously denied that any of the conduct complained of amounted to noncompliance with any environmental requirement. However, the financial impact of

³ The activities that formed the basis for this charge are the same activities that formed the basis for one of Ohio EPA's notices of violation. (CX98). GEM ceased accepting drummed material from customers at Ohio EPA's direction.

the 2006 explosion and fire caused GEM to go out of business by 2008, and in 2009, it agreed to plead guilty to the two charges, for which it was assessed no penalty.

The matters addressed in the federal case also were unique to GEM's operations and did not involve the CIS facility. The facts of the case will not establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS's sale of injectants for use in a blast furnace to make iron for any purpose. The introduction of evidence by U.S. EPA regarding the federal case would require that Respondents be given a full and fair opportunity to explain the facts underlying the case, necessitating another "trial within a trial" and greatly complicating what already likely will be a complex and lengthy hearing. For all of these reasons, evidence of this case also should be excluded.

III. CONCLUSION

All of the exhibits U.S. EPA attempts to include and rely on as evidence of prior history are irrelevant and immaterial to this proceeding and to any penalty calculation. If U.S. EPA is allowed to include these documents and any supporting testimony, Respondents must be provided with the opportunity to defend each alleged noncompliance. For these reasons, Respondents Carbon Injection Systems, LLC, Scott Forster and Eric Lofquist, respectfully request that the Presiding Officer enter an order *in limine* excluding U.S. EPA's exhibits CX49 through CX53, CX97 through CX111, and any testimony related thereto, and for such other and further relief as this Court deems just and proper.

Dated: May 4, 2012

Respectfully submitted,

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Systems LLC, Scott Forster, and Eric
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:)
)
Carbon Injection Systems LLC;)
Scott Forster, President;)
Eric Lofquist, Vice President)
Gate #4 Blast Furnace Main Ave)
Warren Township, OH 44483)
)
EPA ID No. OHR000127910)
)
Respondents.)

Docket No. RCRA-05-2011-0009

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**RESPONDENTS CARBON INJECTION SYSTEMS LLC,
SCOTT FORSTER AND ERIC LOFQUIST'S
OMNIBUS MOTION IN LIMINE ON "ROUTINE" MATTERS**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, by and through their undersigned counsel, pursuant to Rule 22.4(c)(6) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) (the "Consolidated Rules"), and the Presiding Officer's Order dated April 10, 2012, respectfully move *in limine* on the following "routine" issues to exclude improper evidence or testimony expected to be offered by U.S. EPA at hearing in this matter, or address other typical procedural and/or evidentiary issues intended to streamline the hearing and preserve the resources of the Court and the parties.

1. **U.S. EPA should be precluded from introducing any documents, exhibits, or witness testimony that have not been included or identified in U.S. EPA's Prehearing Exchange (as supplemented or amended).**

Rule 22.19(a)(1) of the Consolidated Rules provides that "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.” 40 CFR 22.19(a). Under this rule, any documentary evidence that has not been properly submitted by U.S. EPA to Respondents in the course of the pre-hearing exchange must be excluded from the hearing. Similarly, any witnesses not identified in U.S. EPA’s pre-hearing exchange must also be excluded from providing testimony (either written or oral) at the hearing.

2. U.S. EPA should be precluded from introducing opinion testimony from anyone not previously identified and disclosed as an expert.

Respondents anticipate that U.S. EPA may attempt to elicit opinion testimony regarding various issues in this case from lay or fact witnesses that have not been specifically identified and disclosed as experts, and are otherwise not qualified to testify regarding such matters. Rule 22.19(a)(2) of the Consolidated Rules provides that “Each party’s prehearing information exchange shall contain: (i) The names of any expert of other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony....” *See also* Fed. R. Evid. 701. Under the plain language of the applicable rule, any witness that has been disclosed by U.S. EPA who has not been specifically identified as offering opinion testimony should be barred from doing so.

3. U.S. EPA should be precluded from introducing evidence regarding the activities of the Respondents after the relevant events in this case.

Respondents anticipate that U.S. EPA may attempt to introduce information regarding the conduct or activities of Respondents after the relevant events in this case in an attempt to prejudice the Presiding Officer against Respondents. Such information is irrelevant to the issues in this matter and should be precluded.

4. **U.S. EPA should be precluded from introducing any speculation or argument about the substance of the testimony of any witness who is absent or unavailable, or whom Respondents did not call to testify.**

In addition to precluding U.S. EPA from speculating as to the testimony of witnesses not called at trial, U.S. EPA should be precluded from making any reference to the fact that Respondents failed to call any witness equally available to either party in the case.

5. **Any reference to Respondents' refusal to agree or stipulate to any matter should be excluded.**

The parties have conferred in good faith and reached agreement on numerous documents and facts that are intended to streamline the hearing and conserve the resources of the Court and the parties. However, Respondents' refusal to agree to stipulate to any specific fact or document that was not the subject of an agreement between the parties is irrelevant to the material issues in this matter and should not be made reference to at the hearing.

6. **The Court should preclude any reference to the receipt by Respondents, or their entitlement to receive, benefits of any kind from a collateral source such as insurance coverage.**

While it is black-letter law that the trier of fact may not consider insurance coverage in rendering her decision, U.S. EPA should be precluded from introducing any evidence or speculation about insurance coverage that Respondents have or may have.

7. **Any evidence of settlement negotiations between the parties should be excluded.**

Rule 22.19(a)(1) of the Consolidated Rules provides that "Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence." As the Presiding Officer is

aware, both parties have engaged in extensive settlement negotiations, including engaging the services of a private mediator, in an attempt to reach a resolution to this matter. Those efforts have, to date, been unsuccessful; however, any evidence relating to any such settlement negotiations, including but not limited to the mediation efforts of the parties, must be excluded from the hearing.

8. Non-party fact and expert witnesses, excepting a party's designated representative, should be excluded during the hearing (except when testifying).

Respondents anticipate that U.S. EPA may desire to include various non-party fact and/or expert witnesses at the hearing. Among other issues, the presence of such witnesses could give an unfair advantage to such witnesses or otherwise influence their testimony by informing them of relevant testimony from other witnesses. In addition, the anticipated introduction into evidence of Confidential Business Information ("CBI") from several different entities (including several non-parties) suggests that the presence of individuals aside from the court personnel, the parties, and their counsel, should be kept to a minimum. Respondents do not object to U.S. EPA having one (and only one) designated representative witness, not including its counsel of record, present in the courtroom throughout the hearing, if U.S. EPA desires. Respondents anticipate that either Scott Forster or Eric Lofquist will serve as the designated corporate representative for Respondent CIS.

9. Non-Party witnesses should be represented by counsel, if desired.

Numerous non-party witnesses who have been identified by both parties as individuals with relevant knowledge are expected to give testimony at the hearing in this matter. Several of these individuals are employed by companies that, while not direct

defendants, have nevertheless a high degree of involvement in this case and may be subject to future enforcement actions asserted by Complainant. For example, while not a defendant in the present proceeding, International Flavors and Fragrances (“IFF”), has received a Notice of Violation (“NOV”) from Complainant. Several IFF employees have been identified by both parties as having relevant information and are expected to be subpoenaed to provide testimony at trial. Counsel for Respondents are in no position to represent the interests of these individuals or their employers, and therefore, each such individual should be allowed to have counsel present in the courtroom while testifying, if so desired.

10. The identification and expected sequence of witnesses and exhibits should be provided by each party prior to hearing.

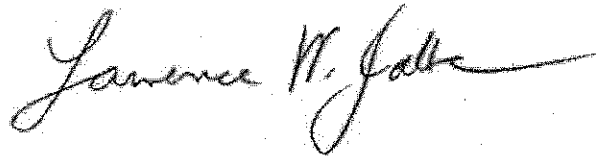
The hearing in this matter will involve the testimony of the parties or their representatives, numerous fact witnesses (many of whom are not parties to this case) and various expert witnesses. The issues are complex, and preparing the testimony (as well as the cross-examination) of all of the witnesses requires preparation on the part of the attorneys. In order to promote judicial economy and to benefit the Presiding Officer and the parties concerned, as well as provide as much notice and convenience as possible to the numerous non-party witnesses who are expected to be involved, the Presiding Officer and counsel should know in advance the witnesses and the dates or sequence of their expected testimony. The order sought will allow the parties to adequately prepare their examination of the witnesses, have the pertinent documents in the hearing room, and allow for the reasonable convenience and travel of the non-party witnesses.

WHEREFORE, Respondents Carbon Injection Systems, LLC, Scott Forster and Eric Lofquist, respectfully request that the Presiding Officer grant their "routine" motions *in limine*, and further that counsel for U.S. EPA be directed to instruct all of its witnesses regarding the existence of such orders entered *in limine* and caution them to refrain from making any comments or giving any testimony that would tend to violate any of the orders *in limine*.

Dated: May 4, 2012

Respectfully submitted,

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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Docket No. RCRA-05-2011-0009

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**RESPONDENTS CARBON INJECTION SYSTEMS LLC,
SCOTT FORSTER AND ERIC LOFQUIST'S MOTION *IN LIMINE*
TO PRECLUDE EVIDENCE OR TESTIMONY RELATING TO THE "PRIOR
HISTORY" OF SCOTT FORSTER**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, (collectively referred to as "Respondents") by and through their undersigned counsel, move *in limine* for the entry of an Order barring the admission of evidence or testimony relating the Scott Forster's individual environmental compliance history, specifically Complainants' exhibits CX49, CX50, and CX52 and any testimony related to such exhibits for the reasons stated below.

The U.S. Environmental Protection Agency ("U.S. EPA" or "Complainant") has identified three exhibits in its Initial Prehearing Exchange related to a criminal action against Scott Forster. This evidence does not relate to the matters currently before this Presiding Officer. Evidence related to these matters is not material, is of no probative value in this proceeding, and is prejudicial. The Consolidated Rules of Evidence provide that the Presiding Officer "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value." 40 C.F.R. § 22.22(a). Here,

admission of this evidence for any purpose would be contrary to the evidence standard provided in 40 C.F.R. § 22.22.

RCRA's penalty policy provides for the inclusion of the history of a party's noncompliance as an adjustment factor in calculating a civil penalty for violations of RCRA. The civil penalty policy specifically provides for consideration of previous violations, which can include acts or omissions for which a formal or informal enforcement action has been taken by the state or U.S. EPA. However, prior compliance history of a party for a penalty assessment is bound by certain considerations, including the similarity of the violations. There are no parallels between the criminal action against Scott Forster and the RCRA charges currently pending against Respondents.

The complaint against Scott Forster and General Environmental Management, LLC ("GEM") stemmed from GEM's wastewater treatment operations. GEM had a permit from the North East Ohio Regional Sewer District ("NEORS") allowing GEM to discharge into the NEORS sewer system. The permit required that all wastewater received for processing at GEM must be preapproved by the NEORS. GEM had accepted an industrial wastewater stream from a Columbus facility between August 23, 2004 and August 25, 2004. At the time of acceptance, GEM had not sought preapproval from the NEORS. When approached with this issue, Scott Forster, of behalf of GEM, advised the NEORS that the material never entered GEM's wastewater treatment system and that it was solidified and landfilled. As detailed in exhibit CX50, the material was processed at GEM and discharged into the NEORS sewer system. The complaint alleged Scott Forster violated 18 U.S.C. § 1001(a)(2) by making a false statement to a federal officer.

Scott Forster cooperated fully with the investigation into the matter, and he accepted full responsibility for it. Scott Forster admitted that he was wrong when he represented to NEORSD that the initial loads were not treated at the GEM facility at all. His statements, however, concerned a one-time incident that resulted in no environmental harm and was quickly corrected when the NEORSD approved the waste stream.

The matter against Scott Forster is not similar to the charges against Respondents. The matter does not involve the CIS facility. The facts in this matter will not establish that Respondents were on notice of U.S. EPA's interpretation of the recycling exclusion and whether it would apply to CIS' sale of injectants for use in a blast furnace to make iron. The introduction of evidence by U.S. EPA regarding this action against Scott Forster would require that Respondents be given a full and fair opportunity to explain the facts underlying the complaint against him, necessitating another "trial within a trial" and greatly complicating what is already expected to be a complex and lengthy hearing. For all of these reasons, evidence of this matter should be excluded.

If CX49, CX50 and CX51 are permitted at the hearing, inclusion must be limited to impeach testimony from Scott Forster, as provided for in the Rules of Evidence, and for no other purpose. Further, it cannot be used against the other Respondents in this case.

WHEREFORE, Respondents Carbon Injection Systems, LLC, Scott Forster and Eric Lofquist, respectfully request that the Presiding Officer enter an order *in limine* barring certain testimony and exhibits (as stated above) and for such other and further relief as this Court deems just and proper.

Dated: May 4, 2012

Respectfully submitted,

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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**RESPONDENTS CARBON INJECTION SYSTEMS LLC,
SCOTT FORSTER AND ERIC LOFQUIST'S MOTION IN LIMINE
TO BAR EVIDENCE OF THE FINANCIAL WORTH OR ASSETS OF SCOTT
FORSTER AND ERIC LOFQUIST**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, by and through their undersigned counsel, pursuant to Rule 22.4(c)(6) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. Part 22) (the "Consolidated Rules"), and the Presiding Officer's Order dated April 10, 2012, move *in limine* for the entry of an Order barring the introduction of any evidence by Complainant United States Environmental Protection Agency ("U.S. EPA") concerning the financial worth or assets of Respondents Scott Forster and Eric Lofquist.

In support thereof, Respondents state as follows:

1. This administrative action has been brought by U.S. EPA under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and its associated regulations, asserting that the Respondents have violated RCRA and are liable to the government for civil penalties. In addition to Respondent Carbon Injection Systems, Inc., U.S. EPA brought claims against Respondents Scott Forster and Eric Lofquist as individuals.

2. Under RCRA, proof of a respondent's ability to pay a civil penalty is not part of the complainant's burden of proof. See RCRA § 3008(a)(3); 42 U.S.C. § 6928(a)(3); In re Dearborn Refining Company, RCRA-05-2001-0019, 2004 WL 3214475 (E.A.B. September 10, 2004). Rather, a respondent's ability to pay a penalty may be presumed until it is put at issue by a respondent by means of asserting an affirmative defense. See In re CDT Landfill Corp., 11 E.A.B 88, 2003 WL 21500412 (June 5, 2003)(citing cases).

3. While Respondents originally raised ability to pay as a defense for each Respondent (CIS, Scott Forster and Eric Lofquist), as later noted in Respondents' Initial Prehearing Exchange, Respondents stated that they did not intend to present any evidence at hearing of the ability of Scott Forster or Eric Lofquist to pay a civil penalty. Moreover, this affirmative defense as it applied to Scott Forster and Eric Lofquist was stricken by the Court's Order dated February 14, 2012. Respondents subsequently revised their affirmative defenses in their Answer to U.S. EPA's First Amended Complaint to drop this defense as to Scott Forster and Eric Lofquist.

4. Because Respondents have withdrawn their affirmative defense based on ability to pay for Respondents Scott Forster and Eric Lofquist, any evidence as to either individual's financial worth or assets in regard to their ability to pay a civil penalty (or any other issue related in any way to calculation of or assessment of a penalty) is now irrelevant to this proceeding. Such evidence includes but is not limited to U.S. EPA's proposed Exhibits CX75 through CX79 (real estate information for various properties owned by Forster or Lofquist). Respondents therefore request an Order in limine barring U.S. EPA from adducing any evidence at hearing as to any financial information regarding either individual respondent.

WHEREFORE, Respondents Carbon Injection Systems, LLC, Scott Forster and Eric Lofquist, respectfully request that the Presiding Officer enter an order *in limine* barring the introduction of any evidence at hearing regarding the financial condition and/or assets of Respondents Scott Forster and/or Eric Lofquist, and for such other and further relief as this Court deems just and proper.

Dated: May 4, 2012

Respectfully submitted,

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