

RECEIVED  
REGIONAL HEARING CLERK  
U.S. EPA-REGION 5  
2012 DEC -3 AM 10:21

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of: )  
)  
Carbon Injection Systems LLC, )  
Scott Forster, )  
and Eric Lofquist, )  
)  
)  
)  
Respondents. )  
\_\_\_\_\_ )

Docket No. RCRA-05-2011-0009

**COMPLAINANT'S RESPONSE TO RESPONDENTS' JOINT MOTION TO  
SUPPLEMENT THE RECORD, OR, IN THE ALTERNATIVE, COMPLAINANT'S  
MOTION TO SUPPLEMENT THE RECORD**

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant), by and through its counsel, pursuant to Rule 22.16 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (Consolidated Rules or Rules), hereby files Complainant's Response to Respondents' Joint Motion to Supplement the Record, or, in the Alternative, Complainant's Motion to Supplement the Record. 40 C.F.R. § 22.16.

**I. Standard for Motions to Reopen the Hearing and Admission of Evidence**

Through their Joint Motion to Supplement the Record ("Motion"), Respondents are requesting that the Court supplement the record with additional written evidence. A hearing can be reopened to include additional evidence pursuant to Rule 22.28(a) of the Consolidated Rules:

§ 22.28 Motion to reopen a hearing

(a) Filing and content. A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of

the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

40 C.F.R. 22.28(a). *See In re: City of Detroit et al.*, TSCA Appeal No. 89-5, 1991 EPA App. LEXIS 8 at \*3 (July 9, 1991) (“Motions to supplement the record are addressed in Section 22.28 of the [1990] Consolidated Rules”); *In re: Martex Farms, S.E.*, Docket No. FIFRA-02-2005-5301, 2005 EPA ALJ LEXIS 67 at \*12 (Oct. 21, 2005) (“the Rules provide for a motion to reopen the hearing to address new evidence. 40 C.F.R. § 22.28.”); *In re: Environmental Protection Services, Inc.*, Docket No. TSCA-03-2001-0331, 2003 EPA ALJ LEXIS 44 at \*4 (June 11, 2003) (“the governing procedural rules in this administrative enforcement action do provide a mechanism for the reopening of this hearing. *See* 40 C.F.R. 22.28.”); *In re: Strong Steel Products, LLC*, Docket No. CAA-5-2003-0009, 2005 EPA ALJ LEXIS 8 at \*4 (Feb. 15, 2005) (“ the Rules provide for a motion to reopen the hearing to address new evidence. 40 C.F.R. § 22.28.”).

Assuming a hearing is reopened, the next question is whether or not the evidence submitted should be admitted. Rule 22.22 of the Consolidated Rules provides that “[t]he 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). *See In re: Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2012 EPA ALJ LEXIS 11 at \*8 (Feb. 2, 2012) (relying in part on 22.22(a) to deny Respondent’s Motion to Limit Testimony); *In re: Mercury Vapor Processing Technologies, Inc., et al.*, Docket No. RCRA 05-2010-0015, 2011 EPA ALJ LEXIS 16 at \*\*10-11 (July 1, 2011) (relying in part on 22.22(a) to decide whether or not evidence was admissible); *In re: Liphatech, Inc.*, Docket No. FIFRA-05-2010-0016, 2011 EPA ALJ LEXIS 7 at \*8 (June 2, 2011); *In re: Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9

2011); *In re: Aguakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, 2010 EPA ALJ LEXIS 9 at \*\*18-19 (June 2, 2010) (referring to 22.22(a) as the appropriate standard to use in determining whether or not evidence was admissible).

## II. Discussion

### A. Respondents' Joint Motion to Supplement the Record Should Be Denied

Significantly, Respondents' Motion does not reference the Consolidated Rules. Further, Respondents' Motion does not, as required by Rule 22.28, "show that such evidence is not cumulative". Whether or not the evidence is cumulative is not addressed in the Motion. For this defect, the Motion should be denied.

If the hearing is nonetheless reopened, the evidence should not be admitted since it is irrelevant, immaterial, and of little probative value in this matter. 40 C.F.R. § 22.22(a). The evidence Respondents seek to add is a "RCRA Closure Report" dated November 14, 2012 ("Report"). Respondents assert that the Report "evidences that any potential hazardous waste management unit was properly closed pursuant to Ohio law" and therefore is relevant to the relief sought in the Complaint.<sup>1</sup>

However, proper closure pursuant to Ohio law and regulation requires the following steps:<sup>2</sup>

---

<sup>1</sup> To the extent Respondents are attempting to prove that they are responsible business owners by supplementing the record with evidence of "responsible" post-hearing behavior, such a motion is as inappropriate as an attempt by EPA to prove that Respondents are not responsible business owners by supplementing the record with evidence of irresponsible post-hearing behavior— an attempt which EPA has *not* made. See [http://www.newsnet5.com/dpp/news/local\\_news/oh\\_lake/painesville-township-firefighters-battling-large-fire-at-hardy-industrial-technologies](http://www.newsnet5.com/dpp/news/local_news/oh_lake/painesville-township-firefighters-battling-large-fire-at-hardy-industrial-technologies) (video and photographs of the massive fire which burned for 24 hours in October 2012 at the Forster/Lofquist facility in Painesville, Ohio).

<sup>2</sup> Normally, closure/post-closure is handled by making the proposed closure plan a component of the RCRA TSD permit application, and the plan is approved before the facility obtains its

1. Submit a closure/post-closure plan for approval by the Ohio Environmental Protection Agency (“OEPA”);
2. Obtain OEPA approval of the closure/post-closure plan;
3. Implement the plan upon obtaining OEPA approval of the closure/post-closure plan; and
4. Submit a written certification demonstrating to the satisfaction of OEPA that the facility has performed all required obligations.

As demonstrated by CX197, the facility submitted a Closure Plan to OEPA (step 1).

However, the facility never obtained approval of that closure plan by OEPA (step 2). Whether or not the CIS (now Main Street Commodities or “MSC”) facility proceeded to close its facility and/or submit a written certification to OEPA is irrelevant, since it was not done pursuant to a plan *approved* by OEPA. See OAC 3745-55-13 (referring to undertaking closure “in accordance with the approved closure plan”).

**B. Alternatively, Complainant’s Motion to Supplement the Record Should Be Granted**

If the hearing is reopened and the Report is admitted, Complainants moves to supplement the record with evidence that proves the CIS/MSC facility was not properly closed pursuant to applicable laws and regulations. This evidence consists of:

1. CX202: Closure Plan Review Guidance for RCRA Facilities (October 2009);
2. CX203: Email exchange between M. Mathews (OEPA) and L. Smith (GT Environmental) (May 30-31, November 21, 2012);

---

RCRA TSD permit. The facility can close at anytime following the closure plan (with prior notification to OEPA). A facility such as CIS (now MSC) is an illegal treatment, storage or disposal facility under RCRA. This type of facility will typically be required to follow these steps through an agreed administrative order signed by the facility and OEPA, once OEPA is satisfied that any underlying enforcement matter has been resolved. This was explained by OEPA in May 2012 to both the closure consultant hired by MSC (Larry Smith, GT Environmental) and to counsel for the Respondents (Keven Eiber, Brouse McDowell).

3. Testimony of Erik Hagen. Mr. Hagen is expected to testify regarding the process for closure of hazardous waste storage, treatment and disposal facilities in Ohio, as well as the need to do so pursuant to oversight by Ohio EPA; and
4. Testimony of Mitch Mathews, Environmental Specialist 3, Compliance Assurance Section, Division of Materials and Waste Management, Ohio EPA. Mr. Mathews is expected to testify regarding closure of illegal hazardous waste storage, treatment and disposal facilities in Ohio, the status of closure at the MSC facility, his interactions with MSC's contractor, GT Environmental, and the interactions of counsel for Respondents, Keven Eiber, with OEPA legal staff.

This evidence is relevant to the issue of whether closure is still required at the Facility. Specifically, CX202 will prove the written guidance which OEPA has available to the public, including Respondents and MSC, regarding proper closure of illegal hazardous waste storage, treatment and disposal facilities in Ohio. CX203 will prove that Respondents' contractor had knowledge of how closure is achieved in Ohio pursuant to applicable laws and regulations. The testimony of Erik Hagen will prove what is required for proper closure of hazardous waste storage, treatment and disposal facilities in Ohio. The testimony of Mr. Mathews will also prove what is required for proper closure of illegal hazardous waste storage, treatment and disposal facilities in Ohio. Additionally, Mr. Mathews will explain the current status of closure at the MSC facility, as well as the fact that Respondents and their counsel knew the proper steps to take in order to achieve closure consistent with applicable laws and regulations, yet failed to take those steps.

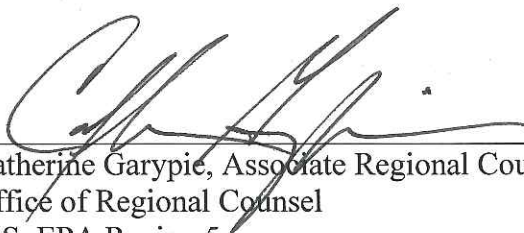
**III. Conclusion**

The hearing should not be reopened because Respondents' Motion ignores the Consolidated Rules and does not, as required by Rule 22.28, "show that such evidence is not cumulative". However, if the hearing is reopened, the record should not be supplemented with the Report, because the Report is irrelevant. In the alternative, if the hearing is reopened and the record is supplemented with the Report, the record should also be supplemented with evidence offered by Complainant: several exhibits as well as the testimony of two OEPA employees.

Respectfully Submitted,

Counsel for EPA:

12/3/12  
Date

  
Catherine Garypie, Associate Regional Counsel  
Office of Regional Counsel  
U.S. EPA Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604  
PH (312) 886-5825  
Email: garypie.catherine@epa.gov

J. Matthew Moore, Assistant Regional Counsel  
Office of Regional Counsel  
U.S. EPA Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604  
PH (312) 886-5932  
Email: moore.matthew@epa.gov

Jeffrey A. Cahn, Associate Regional Counsel  
Office of Regional Counsel  
U.S. EPA Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604  
PH (312) 886-6670  
Email: cahn.jeff@epa.gov

RECEIVED  
REGIONAL HEARING CLERK  
U.S. EPA REGION 5  
2012 DEC 4 3 AM 10: 41

**CERTIFICATE OF SERVICE**

**In the Matter of Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist  
Docket No. RCRA-05-2011-0009**

I certify that the foregoing "Complainant's Response to Respondents' Joint Motion to Supplement the Record, or, in the Alternative, Complainant's Motion to Supplement the Record", dated December 3, 2012, was sent this day in the following manner to the addressees listed below:

Original and one copy hand-delivered to:

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

Copy via overnight mail to:

Attorneys for Respondents:

Carbon Injection Systems LLC, Scott Forster, Eric Lofquist  
c/o Keven D. Eiber  
Brouse McDowell  
600 Superior Avenue East  
Suite 1600  
Cleveland, OH 44114

Carbon Injection Systems LLC, Scott Forster, Eric Lofquist  
c/o Lawrence W. Falbe  
Quarles & Brady LLP  
300 N. LaSalle Street, Suite 4000  
Chicago, IL 60654

Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge  
U.S. EPA Office of the Hearing Clerk  
1099 14th St. NW  
Suite 350, Franklin Court  
Washington, DC 20005

12/03/12  
Date

  
\_\_\_\_\_  
Charles Rodriguez, Student Aide

RECEIVED  
REGIONAL HEARING CLERK  
U.S. EPA-REGION 5  
2012 DEC -3 AM 10:41