



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:

February 2, 2012

C-14J

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Avenue, N.W.,
Mail Code 1900L
Washington, D.C. 20460

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

Dear Chief Judge Biro:

Please find enclosed a copy of Complainant's Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness and for a Revised Response Date for the Motion, filed on February 2, 2012, in the above-captioned matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "J. Matthew Moore".

J. Matthew Moore
Assistant Regional Counsel

Enclosures

cc: Keven D. Eiber (w/ enclosures)
Lawrence M. Falbe (w/ enclosures)

RECEIVED
FEB 02 2012

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

REGIONAL HEARING CLERK
USEPA
REGION 5

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 MOTION FOR AN ADMINISTRATIVE SUBPOENA TO ISSUE
FOR THE DEPOSITION OF A THIRD-PARTY WITNESS, AND FOR A REVISED
RESPONSE DATE FOR THE MOTION

Comes now the U.S. Environmental Protection Agency, Region 5 (EPA or Complainant), through its undersigned attorney, pursuant to Section 22.19(e)(1) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, codified at 40 C.F.R. Part 22, § 22.19(e)(1), and respectfully requests that this Court grant the instant "Complainant's Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness". Specifically, EPA respectfully requests that this Court issue a subpoena for Donald DuRivage, a former employee of International Flavors & Fragrances, Inc. (IFF), to appear and testify for depositions at the specified date, time and location noted in the attached subpoena or at such other times and locations upon which the parties and IFF may agree. EPA also requests that Mr. DuRivage produce certain documents, which are identified in the *duces tecum* request in the subpoena. Prior to filing this Motion, the undersigned contacted the

opposing parties as to the relief requested herein. While Respondents indicated that they agree to the time, date and place of the subpoena, they oppose the Motion. Due to the date for close of discovery in this matter, February 24, 2012, EPA also requests that this Court revise the response date for this Motion. The proposed subpoena for Mr. DuRivage is attached hereto as Exhibit A.

The standards for authorizing additional discovery after the completion of the pre-hearing exchange are set forth in 40 C.F.R. § 22.19(e). Discovery after the pre-hearing exchange may be ordered by the Presiding Officer only if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1). Also, before ordering a deposition, the Presiding Officer must make one of two additional findings that:

- (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
- (ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

40 C.F.R. § 22.19(e)(3).

As previously demonstrated by Respondents' "Motion for a Revised Case Schedule and Renewed Motion for Third-Party Discovery" and this Court's December 27, 2011 "Order on Motion for Third Party Discovery", the discovery sought by EPA satisfies these criteria. In Respondents' "Motion for a Revised Case Schedule and Renewed Motion for Third-Party Discovery", Respondents requested this Court to issue a subpoena for Donald DuRivage, among others, to appear and testify for depositions, as well as to produce certain documents.

Respondents asserted that third-party discovery was necessary to obtain probative evidence on the jurisdictional issue in this action – whether the Unitene materials that Respondents purchased from IFF were “wastes”, as defined by Ohio Administrative Code (OAC) § 3745-51-02. As Respondents noted, information concerning IFF’s manufacturing processes is available only through IFF, which has refused to allow EPA to directly communicate with Mr. DuRivage. Therefore additional discovery in the form of depositions is necessary to accurately characterize the Unitene materials produced at IFF.

In granting Respondents’ Motion, this Court found that Respondents’ request satisfied the criteria of 40 C.F.R. 22.19(e)(1). Specifically, this Court found that “the information sought has significant probative value and is most reasonably obtained from IFF, and that IFF has declined to provide that information voluntarily.” Order at 4. This Court also found that “some delay in this proceeding is justified by the need to gather information relevant to this key factual question in advance of hearing.” *Id.* Finally, this Court determined that the information sought could not be reasonably obtained by an alternative method of discovery.

In analyzing EPA’s current motion under 40 C.F.R. 22.19(e)(1) and (3), this Court’s rationale should be predominantly unchanged. First, EPA requests discovery that will neither unreasonably delay the proceeding nor unreasonably burden Respondents. Because the proceeding is already delayed for the purpose of additional discovery pursuant to this Court’s December 27, 2011 Order, the deposition of Mr. DuRivage will result in no further delay. Additionally, because Respondents initially requested the deposition of Mr. DuRivage, and later chose not to depose him because the necessity of his deposition allegedly became uncertain, EPA believes that this renewed request will result in no burden to Respondents.

Second, the information sought from Mr. DuRivage continues to have significant probative value and can be most reasonably obtained from Mr. DuRivage. The information given in the depositions of Theresa Barry, Thomas Guido and David Shepherd, conducted on January 31, 2012 and February 1, 2012, did not diminish the value of Mr. DuRivage's testimony for several reasons. In fact, testimonies from those depositions indicate that Mr. DuRivage was the Environmental Health and Safety Manager at IFF's Augusta plant from 2006 to 2008: the same years that IFF began marketing and selling the Unitene products to Respondents. Additionally, Theresa Barry, Thomas Guido and David Shepherd each indicated that Mr. DuRivage would likely have information related to the decision to market Unitene materials, the discussions leading to that decision and other details concerning the production of Unitene. Mr. DuRivage's involvement in these decisions is best exemplified by an internal memorandum drafted by Mr. DuRivage in which he explains how IFF concluded that the Unitene materials fell outside the regulatory jurisdiction of RCRA. CX9 EPA7235. In addition, Mr. DuRivage is no longer an employee of IFF. Therefore, his testimony is more likely to be uninhibited by his employer's oversight. EPA has contacted counsel for IFF, who also represents Mr. DuRivage, and his counsel will not make Mr. DuRivage available for questioning on an informal basis. Evidence of this communication is attached hereto as Exhibit B.

Finally, the information sought from Mr. DuRivage still cannot be reasonably obtained by an alternative method of discovery. At the time of Respondents' Motion for a Revised Case Schedule and Renewed Motion for Third-Party Discovery, Respondents possessed all of the information concerning IFF's processes that EPA possessed. In response to their request, this Court explained that written interrogatories were a suboptimal method of discovery because Respondents essentially did not know what questions to ask. Since that time, EPA has gained no

information, outside the deposition for which Respondent's counsel was present, regarding IFF's processes to fill the "technical knowledge gap" to which this Court referred in its Order. Moreover, according to the testimonies of Ms. Barry, Mr. Guido and Mr. Shepherd, Mr. DuRivage is the only person that can provide insight as Environmental Health and Safety Manager at IFF during the time of alleged production changes. Therefore, EPA currently finds itself in the same position in which this Court has already declared alternative forms of discovery cannot be reasonably obtained.

As noted above, EPA contacted counsel for Respondents regarding this request, and counsel does not agree with this request. Pursuant to 40 C.F.R. §22.16(b), Respondents have fifteen (15) days from service of this motion to respond to the motion. For this Motion, the date will be February 21, 2012. EPA therefore requests that this Court shorten the time frame for the required response to this Motion, to allow sufficient time for the following to occur prior to the close of discovery on February 24, 2012: the filing of a response by Respondents; the issuance of a decision this Motion by the Court; the issuance of a subpoena by the Court; service of the subpoena on the witness; and completion of the deposition.

For all of the reasons set forth above, EPA respectfully requests that this Court grant the instant Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness and for a Revised Response Date for The Motion.

Respectfully submitted,

Counsel for EPA:



J. Matthew Moore, Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA Region 5

77 West Jackson Blvd.
Chicago, IL 60604
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Email: moore.matthew@epa.gov

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EXHIBIT A

**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

SUBPOENA DUCES TECUM

TO: Mr. Donald DuRivage
269 Weaver Road
Johnston, SC 29832-2750

YOU ARE HEREBY COMMANDED, pursuant to Section 3007(a) of the Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. § 6928(a), TO APPEAR IN PERSON at the following place and times:

DATES AND TIMES: 9:00 AM on Wednesday, February 22, 2012

**PLACE: United States Attorney's Office
District of South Carolina
1441 Main Street
Suite 500
Columbia, South Carolina 29201**

YOU ARE FURTHER COMMANDED:

TO APPEAR IN PERSON at the above dates, time and place;

TO TESTIFY then and there under oath, and make truthful response to all lawful inquiries and questions put to you by the Parties to the proceedings; and

TO REMAIN IN ATTENDANCE until expressly excused.

YOU ARE FURTHER COMMANDED TO BRING WITH YOU AND PRODUCE at said the earliest time and place identified above the following books, papers, letters or other documentary evidence in your possession:

1. all documents referencing the production of Unitene products at the International Flavors & Fragrances (IFF) facility in Augusta, Georgia;
2. all documents demonstrating communication (e.g. letters, emails) between IFF and CIS;
3. all documents demonstrating communication (e.g. letters, emails) between IFF, Scott Forster, or Eric Lofquist and Aquafuels;
4. all documents demonstrating communication (e.g. letters, emails) between CIS and Aquafuels;
5. all documents demonstrating communication (e.g. letters, emails) between IFF, Scott Forster, or Eric Lofquist and Innovative Waste Management;
6. all documents demonstrating communication (e.g. letters, emails) between CIS and Innovative Waste Management;
7. all documents demonstrating communication (e.g. letters, emails) between IFF and the United States Environmental Protection Agency;
8. all documents demonstrating communication (e.g. letters, emails) between IFF and the Ohio Environmental Protection Agency;
9. all documents regarding any process changes in the production of Unitene products at the IFF Augusta, Georgia facility; and
10. all documents related to the marking and sale of Unitene by IFF.

PURSUANT TO THE AUTHORITY OF SECTION 3007(a) OF THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6927(a), FAILURE TO COMPLY WITH THIS SUBPOENA MAY RESULT IN INITIATION OF COURT PROCEEDINGS IN A UNITED STATES DISTRICT COURT AGAINST THE RECIPIENT OF THE SUBPOENA TO COMPEL COMPLIANCE WITH THE SUBPOENA AND ANY FAILURE TO OBEY SUCH ORDER OF THE COURT MAY BE PUNISHED BY SUCH COURT OF CONTEMPT THEREOF.

ISSUED in Washington, D.C., this ____ date of ____, 2012.

Susan L. Biro
Chief Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

This Subpoena is to be served in accordance with Section 22.05(b)(1)(i) of the Consolidated Rules of Practice, 40 C.F.R. § 22.05(b)(1)(i).

Person at whose request this Subpoena was issued:

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
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Jeffrey A. Cahn, Associate Regional Counsel
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Chicago, IL 60604
PH (312) 886-6670
Email: cahn.jeff@epa.gov

EXHIBIT B



RE: CORRECTION RE: Donald DuRivage

Levin, Mara to: Catherine Garypie
Cc: Jeff Cahn, Joe Leightner, Matthew Moore

01/25/2012 04:49 PM

History: This message has been forwarded.

Dear Ms. Garypie,

Mr. DuRivage was employed by IFF for less than two years (from 5/25/06 through 1/5/08). He has very little (if any) recollection of the events surrounding the production of Unitene and no recollection of any dealings with CIS or its principals.

In light of both the Notice of Violation received by IFF in September 2011 and the January 17, 2012 Order of Chief Administrative Law Judge Susan Biro, I would feel uncomfortable making Mr. DuRivage available on an informal basis for questioning. To that end, I believe this matter should be addressed by the Administrative Law Judge who has already touched on this issue in her Order. I am certainly willing to accept a subpoena on Mr. DuRivage's behalf. My understanding is that he is located in South Carolina and would have to be produced there for deposition.

I apologize that I can't be more helpful.

Mara B. Levin, Esq.
HERRICK, FEINSTEIN LLP
Two Park Avenue | New York, New York 10016
TEL. 212.592.1458 | FAX. 212.545.3358
mlevin@herrick.com
www.herrick.com

-----Original Message-----

From: Catherine Garypie [mailto:Garypie.Catherine@epamail.epa.gov]
Sent: Wednesday, January 25, 2012 2:41 PM
To: Levin, Mara
Cc: Jeff Cahn; Joe Leightner (joseph.leightner@iff.com); Matthew Moore
Subject: CORRECTION RE: Donald DuRivage

Thank you for responding so quickly. EPA would like to ask Mr. DuRivage questions regarding his time working at IFF, including questions about a number of documents contained in the IFF information request responses. Because of the nature of the questions and the nature of the documents, it is not practical to submit written questions for him to answer. We are therefore requesting a meeting with Mr. DuRivage. Please let me know by COB Friday (1/27/12) what his availability in the first two weeks of February. Thank you.

Catherine Garypie, Associate Regional Counsel Office of Regional Counsel U.S.
Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604
PH 312-886-5825
FAX 312-692-2513
email: garypie.catherine@epa.gov

CONFIDENTIAL: This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Office of Regional Counsel. If you think you received this email in error, please notify the sender immediately.

From: "Levin, Mara" <mlevin@herrick.com>
To: Catherine Garypie/R5/USEPA/US@EPA, Matthew
Moore/R5/USEPA/US@EPA
Cc: Jeff Cahn/R5/USEPA/US@EPA, "Joe Leightner
(joseph.leightner@iff.com)" <joseph.leightner@iff.com>
Date: 01/25/2012 12:02 PM
Subject: RE: Donald DuRivage

Ms. Garypie and Mr. Moore,

IFF will be representing Donald DuRivage for all purposes in connection with the pending CIS proceeding.

I am sure you can understand that while IFF would like to allow informal questioning by EPA for ease of the transmittal of information, it is concerned about doing so both as a result of the Order issued this week in that proceeding, and the Notice of Violation served upon IFF by EPA in September.

We would suggest that EPA prepare written questions which we will have Mr. DuRivage answer and, if based on those answers you would like to speak directly to him, we could then revisit what type of forum would be most appropriate for that questioning.

Thank you for understanding.

Mara B. Levin, Esq.
HERRICK, FEINSTEIN LLP
Two Park Avenue | New York, New York 10016
TEL. 212.592.1458 | FAX. 212.545.3358
mlevin@herrick.com
www.herrick.com

-----Original Message-----

From: Catherine Garypie [mailto:Garypie.Catherine@epamail.epa.gov]
Sent: Wednesday, January 25, 2012 12:35 PM
To: Levin, Mara
Cc: Matthew Moore; Jeff Cahn
Subject: Donald DuRivage

Mara - EPA has not yet heard from you regarding a possible call with Donald DuRivage. Additionally, it was unclear in our last call whether or not IFF (or IFF's outside counsel) is representing him. Therefore, please be advised that EPA intends to contact him directly if we have not heard from you by COB today. Thank you for your attention to this matter.

Catherine Garypie, Associate Regional Counsel Office of Regional Counsel U.S.
Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604
PH 312-886-5825
FAX 312-692-2513
email: garypie.catherine@epa.gov

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The information in this message may be privileged, intended only for the use of the named recipient. If you received this communication in error, please immediately notify us by return e-mail and delete the original and any copies. To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (and its attachments), unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of

(i) avoiding tax-related penalties under the Internal Revenue Code or
(ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

The information in this message may be privileged, intended only for the use of the named recipient. If you received this communication in error, please immediately notify us by return e-mail and delete the original and any copies. To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (and its attachments), unless expressly stated otherwise, was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any tax-related matter(s) addressed herein.

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

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REGION 5

CERTIFICATE OF SERVICE

I certify that the foregoing "Complainant's Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness" dated February ___, 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 Federal Express Overnight Mail to:

Attorneys for Respondents:

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

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

Presiding Judge:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460

2/2/12
Date


Charles Rodriguez, Student Aide