UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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PROTECTION AGENCY

In the Matter of:

Carbon Injection Systems LLC,
Scott Forster,
and Eric Lofquist,

Respondents.

Docket No. RCRA-05-2011-0009

ORDER ON RESPONDENTS' MOTION IN LIMINE TO BAR CERTAIN TESTIMONY AND/OR OPINIONS OF U.S. EPA'S FACT WITNESS MICHAEL BEEDLE

The hearing in this matter is scheduled to commence on June 18, 2012. On May 4, 2012, Respondents filed a Motion *in Limine* to Bar Certain Testimony and/or Opinions of U.S. EPA's Fact Witness Michael Beedle ("Motion" or "Mot."). On May 17, 2012, Complainant filed its Response to Respondents' Motion *in Limine* to Bar Certain Testimony and/or Opinions of Michael Beedle ("Response" or "Resp."). In their Motion, Respondents argue that the following testimony and/or opinions of Mr. Michael Beedle ("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.

Mot. at physical pages 1-2.

In support of their Motion, Respondents argue that Beedle has been identified as a "fact witness" who is "'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.'" Mot. at physical page 2 (quoting Complainant's Initial Prehearing Exchange ("PHE") at 3). Respondents argue that Beedle's experience and training, as evidenced by his curriculum vitae (Complainant's proposed Exhibit 91 ("CX" 91)), does not demonstrate any expertise in economics or accounting. *Id.* Therefore, Respondents conclude that Beedle's testimony should be limited to the process of applying the BEN computer

model, but nothing regarding the calculations that the BEN model performs nor any opinions regarding the "Beyond BEN" component that addresses the alleged unfair economic advantage, which may require consideration of certain factors including the time value of money, discount rates, gross vs. net profit, etc. *Id.* at physical page 3.

Additionally, Respondents argue that any testimony addressing the "appropriateness" of the proposed penalty or its "consistency" with EPA policy would be "self-serving and unhelpful to the trier of fact, and prejudicial to the Respondents." Accordingly, Respondents argue that this type of testimony must also be barred. *Id.* Finally, Respondents argue that Beedle should be precluded from testifying that he "agrees with any other witnesses or experts offered by U.S. EPA (including, but not limited to Gail Coad)." *Id.* Respondents argue that such testimony would be "improper bolstering" and would give the "false impression of multiple consistent, favorable (redundant) opinions." *Id.* at physical page 4. Respondents assert that such testimony would not be proper unless a proper foundation is laid to establish that such opinions were independently investigated and analyzed by the agreeing witness. Respondents make the distinction between "relying" on other testimony and "agreeing" with it, arguing that the latter is an impermissible act for non-experts or experts who have not conducted an independent expert evaluation of the opinion. *Id.*

In its Response, Complainant argues that EPA Administrative Law Judges generally consider EPA witnesses who testify as to the calculation of the penalty as akin to expert witnesses for purposes of offering opinion testimony at hearing. Resp. at 3 (citing OALJ Practice Manual at 20; *Strong Steel Products, LLC* ("*Strong Steel*"), EPA Docket Nos. RCRA-5-2001-0016, CAA-5-2001-0020, & MM-5-2001-0006, 2003 EPA ALJ LEXIS 191 at *16-19 (ALJ, Oct. 27, 2003) (Order on Motions for Leave to File Amended Complaint and to Strike Defenses and Motions in Limine)). Complainant concludes that because Beedle should be treated like an expert witness, opinion testimony should not be barred. Resp. at 4.

With respect to testimony that Beedle "agrees" with Ms. Coad, Complainant argues that such a bar is meaningless "given that [Beedle's] adoption of [Coad's] calculations must indicate agreement." *Id.* at 5. Complainant concludes that Beedle should be "free to explain his rational[e] for adopting her calculations, including stating his agreement with her conclusions." *Id.*

I. Legal Standard

A motion *in limine* is the appropriate vehicle for excluding testimony or evidence from being introduced at hearing on the basis that it lacks relevancy and probative value. "[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000). Motions *in limine* are generally disfavored. *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so questions of foundation, relevancy, and potential prejudice may be resolved

in proper context." *Id.* at 1400-01. Thus, denial of a motion *in limine* does not mean that all evidence contemplated by the motion will be admitted at trial. Rather, denial of the motion *in limine* means only that, without the context of trial, the court is unable to determine whether the evidence in question should be excluded. *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989).

II. Discussion & Conclusion

Respondents request a general bar to certain aspects of Mr. Beedle's anticipated testimony based on the narrative description of his testimony found in Complainant's Initial PHE, the additional information contained in Complainant's Rebuttal PHE, and Mr. Beedle's curriculum vitae, found at CX 91. Respondents rely, in part, on the assertion that Mr. Beedle is a fact witness and, therefore, cannot properly offer any opinion testimony. Respondents also seek a specific prohibition on testimony that addresses Mr. Beedle's opinion as to the appropriateness of the proposed penalty, its consistency with EPA penalty policies, and his agreement with other witnesses for Complainant.[1] Mot. at physical page 3-4.

Generally, where a witness has been tasked with calculating the proposed penalty in an administrative enforcement action as part of that witness's official duties, that witness will be treated in many ways like an expert witness and will be allowed to present "opinion" testimony that explains how and why the EPA reached the proposed penalty. *See, e.g., Kuhlman Diecasting Co.*, Docket No. RCRA-83-H-004, 1983 EPA ALJ LEXIS 10 (ALJ, Nov. 7, 1983); *Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522 (EAB 1998). This "treatment as an expert" is not limited to EPA inspectors or other employees who initially calculated the penalty based on personal knowledge of the alleged violations, but can be extended to witnesses who recalculate the penalty based on their own application of the relevant EPA penalty policy to the facts of the case as shown in the case file at the time of recalculation. *Strong Steel*, 2003 EPA ALJ LEXIS at 55.

Nevertheless, in this case Complainant still bears the burden of establishing that its proffered expert penalty witness has the necessary expertise with respect to RCRA penalty assessments.[2] *Id.* Complainant's contention that "Mr. Beedle may properly offer opinions on all of the topics that Respondents object to with respect to the calculation of the proposed penalty" is

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[1] Respondents' fourth request, that Mr. Beedle be barred from offering "any testimony that [he] 'agrees' with testimony of any other U.S. EPA fact or expert witness," is overly broad and unworkable as written. As Respondents concede, such testimony may be proper if Complainant lays a proper foundation at hearing. Therefore, it is premature to bar "any testimony" in which Mr. Beedle expresses agreement with another EPA witness, including Ms. Gail Coad.

[2] I note that Complainant has already included Mr. Beedle's curriculum vitae in its initial PHE, providing Respondents with early notice that his expertise will be a relevant consideration at hearing.

not clearly supported by the record before me. Resp. at 3. For example, his curriculum vitae does not address his experience or training in economics or accounting, which may prove a necessary foundation for opinions related to the Beyond BEN analysis. However, because Complainant may establish, at hearing, a proper basis upon which to elicit a broad range of opinion testimony from Mr. Beedle on the subject of RCRA penalty calculation, it would be premature to grant Respondents' Motion on that basis.

With respect to Respondents' specific request that Mr. Beedle be precluded from expressing his opinion as to the appropriateness of the proposed penalty or its consistency with EPA penalty policy, I disagree with Respondents' contention that such testimony is necessarily improper or would be unhelpful to the trier of fact. In these proceedings, the complainant bears the burden of demonstrating the appropriateness of the proposed penalty. *New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB 1994). Moreover, the Environmental Appeals Board has recognized that consistency in the application of penalty policies is important and a relevant part of the penalty witness's testimony. *FRM Chem, Inc., a/k/a Indus. Specialities*, 12 E.A.D. 739, 754 (EAB 2006) (penalty policies are designed to provide a consistent framework and methodology for application of statutory penalty criteria). The presiding Administrative Law Judge, as the trier of fact, may find testimony, such as the proposed testimony of Mr. Beedle, helpful in understanding the Complainant's position with respect to penalty. Respondents have the choice to call their own experts and to cross-examine Mr. Beedle at hearing. I find no basis at this time for prohibiting Mr. Beedle from offering his assessment of the appropriateness of the proposed penalty or its consistency with the relevant penalty policies, or expressing his agreement with other witnesses called by Complainant. Such testimony, if admitted, will be accorded whatever weight is appropriate in the context of all the evidence in the record.

Accordingly, the Motion is **DENIED**. Respondents retain the right to object to specific testimony at hearing, where it will be evaluated in accordance with the Rules of Practice.

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 31, 2012
Washington, D.C.

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CERTIFICATE OF SERVICE

I certify that the foregoing **Order On Respondent's Motion In Limine To Bar Certain Testimony And/Or Opinions Of U.S. EPA's Fact Witness Michael Beedle,** dated May 31, 2012, was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Maria Whiting-Beale
Staff Assistant

Dated: May 31, 2012

Original and One Copy By Regular To:

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