UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S REPLY TO COMPLAINANT'S RESPONSE TO MOTION FOR A REVISED CASE SCHEDULE AND RENEWED MOTION FOR THIRD-PARTY DISCOVERY

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, for their Reply to Complainant's Response to Respondents' Motion for a Revised Case Schedule and Renewed Motion for Third-Party Discovery, respectfully state as follows:

1. Complainant's characterization of the issue of "whether the products purchased from IFF were hazardous wastes" as a disputed legal issue and not a disputed issue of material fact (Complainant's Response, p. 10), and therefore not a proper subject of discovery is simply incorrect. Whether the material purchased from IFF was a co-product or a waste raises disputed questions of fact. See United States v. Self, 2 F.3d 1071, 1082 (10th Cir. 1993)("Whether natural gas condensate was a RCRA hazardous waste was dependant on the factual question of whether the natural gas condensate was burned for energy."); Water Keeper Alliance, Inc. v. Smithfield Foods, Inc., No. 4:01-CV-27-H(3) and 4:01-CV-30-H(3), 2001 WL 1715730 (E.D.

N.C. Sept. 20, 2001)(whether animal waste applied to sprayfields was a solid waste under RCRA was a question of fact).

2. In this case, in addition to disputing that the utilization of high carbon material as a reductant and substitute for coke in the manufacture of iron is "burning for energy recovery," Respondents dispute that the products purchased from IFF were wastes. Complainant's own guidance provides that "differentiating between a by-product and a product (including a co-product) is sometimes difficult and involves consideration of many factors." (July 9, 1992 U.S. EPA Letter to John Chambers, RX-36, p. CIS-00499)(RX-36 is attached). The U.S. EPA generally considers such factors as whether the material is fit for end use (or requires only minimal processing to become useful), whether it is purposely manufactured, whether it is manufactured to meet product specifications, whether it generates revenues, whether it is managed to prevent releases, whether it is marketable and whether a market exists for the product. Id.; see also July 9, 1992 U.S. EPA Letter to John Chambers, RX-34 (whether a material is a co-product and therefore not subject to RCRA regulation depends on such factors as the historical use of the material and the fact that it is manufactured to specifications); Letter from Elizabeth A. Cotsworth, Director, Office of Solid Waste, to Christopher Jones, Director, Ohio EPA, RX-35 (whether a material is a co-product depends on whether it "is intentionally produced, produced to market specifications, and sold to the general public 'as is' without substantial processing.")(RX-34 and RX-35 are attached). The evaluation of such factors entails an intensely factual inquiry.

3. Complainant's assertion that IFF already has provided all the necessary information also is incorrect. Complainant states that "EPA has contacted IFF regarding the regulatory status of the same materials, and IFF has addressed these issues in the following

letters[.]" (Complainant's Response, p. 9). This is somewhat misleading. In fact, IFF's counsel wrote the two letters to Respondents' counsel in response to *Respondents'* inquiries, and IFF's June 6, 2011 letter to Catherine Garypie was an unsolicited attempt by IFF to correct U.S. EPA's mistaken position that the material shipped by IFF to CIS was hazardous waste and, in so doing, to clarify certain of the earlier responses that IFF had supplied to U.S. EPA's information requests. U.S. EPA's notice of violation to IFF did not request that IFF supply any additional information. Complainant consistently has taken the position that it has enough information to make a prima facie case against Respondents.[1] Complainant's own satisfaction with the information it has obtained to date from IFF is not grounds to deny Respondents the discovery they need to defend against Complainant's allegations.

4. Complainant also opposes the discovery and other depositions requested by Respondents on the grounds that due to federal government funding issues, "[i]t is *possible* that EPA travel funds may be unavailable in January 2012[.]" (emphasis added). Respondents likewise wish to avoid unnecessary expenses. However, Complainant chose to bring this enforcement action, not Respondents, and Complainant has repeatedly characterized this matter as serious and important. Complainant seeks close to $2 million in civil penalties from Respondents in their individual capacities. This case also is atypical in that the critical factual information needed to resolve the dispute is not within the control of either party. Although the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and

[1] Perhaps Complainant recognizes that any additional information supplied by IFF is unlikely to support Complainant's allegations in this case. Although Complainant named several IFF employees or former employees as witnesses, to Respondents' knowledge, Complainant has not, in fact, spoken with those witnesses. Rather, Complainant's statement of their expected testimony is based solely on the documents provided by IFF in response to information requests and IFF already has told Complainant that it has misunderstood those responses. Not surprisingly, Complainant appears determined to preclude any discovery of IFF or the IFF witnesses.

the Revocation/Termination or Suspension of Permits, 40 C.F.R. § 22.1 *et seq.*, contemplate the more normal situation where the relevant facts are within the purview of the parties, the Presiding Officer has flexibility under the Consolidated Rules to allow the discovery sought by Respondents. It is patently unfair for Complainant to bring such an action, and then oppose Respondents' reasonable efforts to defend it, claiming that it lacks the resources to participate in such efforts. If Complainant lacks the financial resources properly to handle this case, this case should be dismissed. Otherwise, due process requires that Respondents be given a full and fair opportunity to defend the charges against them.

5. Complainant also misconstrues Respondents' request for an order permitting the depositions of other third-party witnesses to record their testimony for the hearing, and providing for subpoenas to be issued for such depositions, if necessary. First, the "other third-party witnesses" are not "unnamed" -- they are the individuals associated with third-parties as previously identified by Complainant and Respondents in their respective prehearing exchanges. They are explicitly named in footnote 4 of Respondents' motion. Additionally, Respondents are not requesting an order permitting the *discovery* of these witnesses. Respondents are seeking an order permitting the *depositions* of these witnesses. The point of taking these persons' depositions is not to obtain discovery, but to perpetuate their testimony for use at the hearing, *both* by Respondents and by Complainant. The Federal Rules provide that at a hearing or trial, a party may use for any purpose the deposition of a witness, whether or not a party, if that witness is more than 100 miles from the place of hearing or trial or upon motion and notice, when in the interests of justice exceptional circumstances warrant it. Fed.R.Civ.P. 32. The use of recorded testimony is suggested by Respondents in order to avoid these particular witnesses having to

attend a lengthy hearing, which would serve to minimize the inconvenience to these individuals and their employers, and would potentially significantly streamline the hearing.

6. Complainant opposes Respondents suggestions for potentially streamlining the hearing by taking depositions and by bifurcating the hearing into liability and penalty phases on the grounds that "travel funds may be unavailable" and "bifurcation would prove to be a serious expense and inconvenience to EPA's witnesses." (Complainant's Response, pp. 8, 12). Complainant apparently failed to see the connection between the two suggestions. The witnesses that Complainant claims are expected to testify both on liability and penalty issues are the exact same witnesses who, if deposed, would not have to incur any expense attending either hearing. Furthermore, Complainant's response presupposes that it will be successful on liability. If, however, it is not successful in establishing liability, there would be no second hearing on penalty.

For the reasons articulated in its motion and for the additional reasons discussed above, Respondents request that the case schedule established by the November 28, 2011 Order Scheduling Hearing, and the August 15, 2011 Order on Joint Motion for Stay of Proceedings be revised and extended for approximately 90 days for the purpose of permitting certain third-party discovery, third-party witness depositions, motions for accelerated decisions, and for bifurcating and rescheduling the administrative hearing.

Dated: December 15, 2011

Respectfully submitted,

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Attorneys for Respondents Carbon Injection Systems LLC, Eric Lofquist and Scott Forster

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

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Reply to Complainant's Response to Respondents' Motion for A Revised Case Schedule and Renewed Motion for Third-party Discovery was sent on December 15, 2011, 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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Copy by E-mail and Regular Mail to:

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December 15, 2011

Lawrence W. Falbe

9441.1993(10)

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

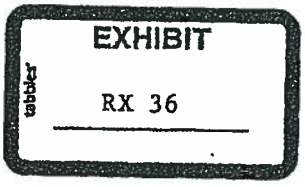
John C. Chambers
McKenna & Cuneo
1575 Eye Street N.W.
Washington, D.C. 20005

Dear Mr. Chambers:

This letter responds to your January 15, 1993 request for an EPA determination regarding the regulatory status of disulfide oil produced by your client, Merichem Company, and which is burned in a sulfuric acid furnace. Based on the information contained in your letter and information provided in the March 9, 1993 meeting between you, Mr. Kirby Boston and members of my staff, I concur wish your view that the disulfide oil used in the manufacture of sulfuric acid is not a solid waste.

In reaching this determination, we evaluated many aspects of both Merichem's process that produces the disulfide oil and the use of the material in the production of sulfuric acid. There are several aspects of this situation that appear to have RCRA implications, many of which focus on the regulatory distinction between a by-product and a co-product. An analysis of these aspects will illustrate this point.

To begin, differentiating between a by-product and a product (including a co-product) is sometimes difficult and involves consideration of many factors. The disulfide oil, and its subsequent usage, have characteristics of both a by-product and a co-product. For example, the Agency generally considers a product to be a material that is fit for end use (or which requires only minimal processing to become usable). A material that must itself be further processed would generally be considered a by-product. While Merichem has stated that the disulfide oil is a product fit for end use in the production of sulfuric acid because of its sulfur content, the Agency would normally consider such "use" to be better characterized as further processing, in which case the material is more like a by-product. However, other factors must



also be considered and weighed before a final determination is made because this material does not fit neatly into any single category.

In evaluating the disulfide oil as a by-product material being reclaimed, the material would not represent a typical situation because it provides both material value (sulfur content) and fuel value (an average of 16,000 BTU/lb) in its use as a feedstock.

Because of this characteristic, the regulatory status (by-product v. co-product) of the material has particular importance. Under current regulations (see Table I in 40 CFR 261.2), a characteristic by-product that is reclaimed (or used as an ingredient) is not a solid waste. However, a characteristic by-product that is burned for energy recovery is a solid waste and subject to regulation as a hazardous waste, subsequently requiring a RCRA permit for an industrial furnace to be able to burn the by-product. And, while you have stated that the main purpose of burning the disulfide oil is as a raw material providing sulfur value, it would seem that, because the sulfuric acid manufacturer has more to gain from its use as a fuel, the disulfide oil would more appropriately be considered a material burned for energy recovery.

In evaluating the material as a product (or, more specifically, a co-product), the disulfide oil provides Merichem with revenues and is managed to prevent release (i.e., it is managed as a valuable commodity). As for its marketability, the disulfide oil is uniquely suited for its use as a feedstock in the manufacture of sulfuric acid, providing both energy and material value. As such, the disulfide oil appears to have a guaranteed market. Based on the information you provided, the only Appendix VIII constituents present in the disulfide oil are those commonly found in commercial fuels, thus raising little concern of unforeseen hazardous contaminants being burned. And, as you have indicated, the disulfide oil must meet product specifications as required by the sulfuric acid manufacturer.

After considering all of the above factors, the Agency has determined that the disulfide oil does not meet the definition of solid waste when used in the manufacture of sulfuric acid (although its use is not necessarily limited to sulfuric acid manufacturing). Therefore, the burning of the disulfide oil would not require a RCRA permit. This determination is also based on the understanding

that the material will continue to be handled to prevent releases and otherwise managed in a manner indicative of a product.

I hope this letter adequately addresses your concerns. As you know, State regulatory programs may be more stringent than the federal program. Therefore, I suggest you also get confirmation of the regulatory status of the disulfide oil from the appropriate State regulatory agencies. Thank you for your interest in the RCRA program.

Sincerely,
Jeffrey D. Denit
Deputy Director
Office of Solid Waste

9441.1992(20)

United States Environmental Protection Agency
Washington, D.C. 20460
Office of Solid Waste and Emergency Response

July 9, 1992

Mr. John C. Chambers, Jr.
McKenna & Cuneo
1575 Eye St. N.W.
Washington, D.C. 20005

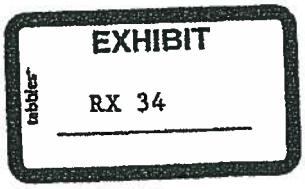
Dear Mr. Chambers:

Thank you for your letter of May 14, 1992 regarding the regulatory status of coal tar distillates manufactured by Koppers Industries, Inc. I apologize for the delay in responding to your earlier inquiries.

According to the facts stated in your letter, the coal tar distillate produced by Koppers is sold to steel manufacturing facilities for material recovery value and fuel use. In a typical coal tar manufacturing operation, several product streams are produced, including distillate oils. Some of the distillate oils are formulated to meet fuel specifications and sold into fuel markets. You stated that Koppers had been selling the oils ("middle oils") into the fuel market for over fifty years, and that the heat value typically ranged from 149,000 btu to 155,000 btu per gallon.

From the facts that you have provided us, we have concluded that coal tar distillate marketed for fuel use is a co-product rather than a waste. This judgement is based upon the historical use of the substance as a fuel and the fact that it is apparently manufactured to specifications.

We also wish to clarify that this interpretation is consistent with the Agency's pending proposal to list certain coke by-product residues as hazardous wastes. As we understand your description of the material, it is different from wastes the Agency proposed to list as hazardous in the coke by-products listing determination (56 FR 35787, July 26, 1991). In that notice, the Agency proposed to list various storage and distillation residuals (i.e., tank



bottoms, distillation bottoms, etc.) and not distillate products. Your client's product is a coke by-product process distillate, not a residue. Moreover, unlike the residues EPA proposed to list, it has an historical use as a fuel product Thus, the interpretation in this letter does not reflect any inconsistency with interpretations discussed in the proposed coke by-products listing determination.

In addition, this letter addresses only the status of the distillate itself. If the distillate were to be mixed with hazardous waste, the mixture would normally become a hazardous waste-derived fuel subject to applicable regulations found principally in 40 CFR Part 266 Subpart H.

This interpretation reflects only the federal regulations. States with authorized RCRA programs have the authority to make regulatory determinations about the materials which constitute solid and hazardous wastes under their programs, and they may impose more stringent requirements. I urge you to contact each State in which your company conducts operations to ascertain their requirements.

I thank you very much for your patience. If you have any questions, please contact Marilyn Goode of my staff at (202) 260-8551.

Sincerely,
Sylvia K. Lowrance, Director
Office of Solid Waste

Mr. Christopher Jones, Director
Ohio EPA
Lazarus Government Center
122 S. Front Street
Columbus, Ohio 43215

Dear Mr. Jones:

This letter is in response to your August 9, 2001 letter seeking a regulatory determination as to whether purge monomer generated from NOVA Chemicals' ("NOVA") polystyrene manufacturing process is a regulated hazardous waste when it is burned on-site for energy recovery. The issue is whether the purge monomer produced by NOVA is a byproduct, subject to regulation under RCRA when burned for energy recovery or a co-product not subject to RCRA subtitle C jurisdiction. We have reviewed the information you provided in your letter as well as additional information provided in a meeting between NOVA and my staff. Based upon this information, we have determined that NOVA's purge monomer is a co-product, produced for the general public's use and ordinarily used in the form it is produced by the process (see 40 CFR 261.1(c)(3)).

Our evaluation centered on whether the purge monomer is intentionally produced, produced to market specifications, and sold to the general public "as is" without substantial processing[1]. The production process in which raw liquid styrene monomer is polymerized to produce both the polystyrene product and the purge monomer is run under strictly controlled conditions of temperature and pressure. NOVA controls the conditions of the reaction so as to optimize both the production of the polystyrene and the production of the purge monomer. The purge monomer has value as both a feedstock for a lesser grade of polystyrene and as a fuel both in NOVA's process heaters and off-site by other parties.

Secondly, there is a history of marketing the material for an intended use with no contrary evidence of discard. NOVA's manufacturing process was specifically designed to produce a purge monomer that can be used in three ways: (1) as a chemical intermediate or raw material feedstock as part of a separate on-site manufacturing process that produces a different

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[1]Letter from Michael Shapiro to Mr. Bruce S. Gelber, January 31, 1995 (faxback 11936); and 40 CFR 261.1(b)(3)

type of styrene product; (2) as a feedstock sold to third parties and used as a raw material to produce a competitive polystyrene product, such as to Deltech Corporation in Baton Rouge, Louisiana or (3) as a fuel in NOVA's on-site polystyrene production process. Recently, NOVA has identified a purchaser for their purge monomer who will use this material as a fuel. The ultimate use of the purge monomer by NOVA depends on market forces.

Also, data provided by NOVA shows that when the purge monomer is used as a fuel, it displays essentially the same characteristics as other fuel sources, such as natural gas. There is no ready inference that the purge monomer is burned to destroy unwanted and unnecessary hazardous constituents.

Please let me know if I can be of further assistance.

Sincerely yours,

Elizabeth A. Cotsworth, Director
Office of Solid Waste

RO 14589