

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of: )  
) Docket No. RCRA-05-2011-0009  
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. )

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U.S. EPA REGION 5  
2012 APR 23 PM 3:37

**RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER  
AND ERIC LOFQUIST'S MOTION FOR LEAVE TO FILE FIRST  
SUPPLEMENTAL JOINT PREHEARING EXCHANGE**

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, respectfully request leave to file their First Supplemental Joint Prehearing Exchange pursuant to Rules 22.16 and 22.19(f) of the Consolidated Rules, 40 C.F.R. Part 22. Respondents have made inquiry to Complainant United States Environmental Protection Agency ("Complainant" or "U.S. EPA"), but Complainant, through its counsel, has stated that it cannot indicate whether it agrees or does not agree to Respondents' motion by the time set for filing the motion (April 23, 2012). As grounds for this motion, Respondents state as follows:

**I. Standard of Review**

Section 22.19(f) of the Consolidated Rules provide that a party must supplement its prior prehearing exchange "when the party learns that the information exchanged or the response provided is incomplete, inaccurate or outdated, and additional or corrective

information has not otherwise been disclosed to the other party pursuant to this section.” 40 C.F.R. 22.19(f); See also *In the Matter of Service Oil, Inc.* Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16 (April 12, 2006) and *In the Matter of 99 Cents Only Stores*, Docket No. FIFRA-9-2008-0027, 2009 EPA ALJ LEXIS 9 (June 18, 2009). A motion to supplement, filed more than fifteen days prior to hearing is not required to show good cause for failing to supply the documents sooner, provided the evidence is not irrelevant, immaterial, unduly repetitive, unreliable, or of little probative value. 40 C.F.R. 22.22(a)(1); see also *In the Matter of Service Oil, Inc.* Docket No. CWA-08-2005-0010, 2006 EPA ALJ LEXIS 16 \*4, (April 12, 2006). Furthermore, motions to supplement a prehearing exchange should be granted unless there is evidence of bad faith, delay tactic, or undue prejudice. *Id.*

## **II. Supplemental Information**

Respondents’ First Supplemental Joint Prehearing Exchange will contain the following information:

### **A. Additional Witnesses**

Respondents are adding two fact witnesses to their witness list: John Dzugan and Scott Forster. The need for the testimony of these two fact witnesses became apparent during the briefing of the parties’ accelerated decision motions. Both of these individuals submitted affidavits in the parties’ cross motions for accelerated decision. The affidavits contain the information each would be expected to testify.

### **B. Additional Exhibits**

Respondents are adding seventeen documents as exhibits. A majority of these exhibits, RX101-RX112, have already been provided to U.S. EPA as authoritative

documents or exhibits in the parties' cross motions for accelerated motions. The exhibits already produced include the expert reports from three of Respondents' experts for this matter (who were previously identified in Respondents' Initial Joint Prehearing Exchange), as well as declarations from three of the experts which were relied on to clarify certain issues in the accelerated decision briefs. These exhibits also include six regulatory guidance letters that were included in Respondents' accelerated decision briefing. Respondents' supplemental exhibit RX99 is a supplement to CIS' April 28, 2010 response to U.S. EPA's Request for Information to CIS. CIS' original response to the U.S. EPA's Request for Information is already contained in Complainant's prehearing exchange as exhibit CX3. RX100 is an excerpt from a letter to Keven Eiber from Respondents' blast furnace expert Frederick Rorick. This letter provides two diagrams of a blast furnace that may be utilized during the hearing. RX113 are two photographs from the article "Manufacturing stays healthy in June" by Adam Geller, printed in the Cleveland Plain Dealer on July 2, 2004. The first photo is an interior picture of the WCI blast furnace. The second photo is an opening of one of the sixteen tuyeres in the bottom the WCI blast furnace. These photos may be utilized during the hearing to provide a visual of the blast furnace at issue. Also intended to provide clarification of the operations of CIS and the WCI blast furnace, RX114 is a PowerPoint presentation prepared and presented by Peter Wosotowsky, a former CIS employee. The last supplemental exhibit, RX115 is a book *How to Recognize a Hazardous waste (Even if it's Wearing Dark Glasses)*. Crouth, G. (2012). *How to Recognize a Hazardous waste (Even if it's Wearing Dark Glasses)* (11<sup>th</sup> Ed.) Tampa: OLAP World Press. This exhibit contains a flow chart explaining application of U.S. EPA's regulations that determine



whether a material is a waste. This chart that may be relied upon at the hearing for clarification purposes.

### **C. Revised Affirmative Defenses**

Respondents have included an additional affirmative defense in their Answer to Complainant's First Amended Complaint. Respondents' seventh affirmative defense is that Complainant's claims regarding the single test shipment of K022 waste from JLM Chemicals are barred by the fair notice doctrine. Respondents' fair notice doctrine defense, which the Judicial Officer correctly noted is different than the late notice defense that Respondents previously asserted and that was dismissed, was briefed by the parties in connection with the cross motions for accelerated decision. It also is relevant to the issue of penalty mitigation.

Respondents have also revised their fifth affirmative defense pertaining to ability to pay to only cover CIS's ability to pay the proposed penalty.

### **III. Discussion**

The information provided in Respondents' First Supplemental Joint Prehearing Exchange is relevant and of probative value to the matter before this Tribunal and will provide more complete and updated information, as required by 40 C.F.R. 22.19(f). The need of testimony from John Dzugan and Scott Forster did not become apparent to Respondents' until briefing began on their motion for accelerated decision. John Dzugan acted as plant manager of CIS from 2004-2008 and has valuable information, relevant to this proceeding that cannot be obtained elsewhere. Scott Forster, president of CIS and a respondent in this matter also has background knowledge of the facility and its operations that is both relevant and probative in this matter.

The additional exhibits that are included in the supplemental prehearing exchange are all documents that support the arguments Respondents anticipate at the hearing. As already noted, thirteen of the seventeen additional exhibits were already provided to U.S. EPA. The expert reports of three of Respondents' previously identified experts are being submitted as supplements, because the reports were not yet completed when Respondents' initial prehearing exchange was provided to U.S. EPA. See RX108-RX110. Declarations from the three experts are also included. These declarations became necessary as a result of additional issues that arose during briefing of the cross motions for accelerated decision. See RX101-RX103. These declarations offer further clarification on matters discussed in the expert reports of Dr. Bruce Sass and Frederick Rorick and arguments presented by U.S. EPA. The relevancy of the additional regulatory guidance letters included in the supplemental exchange only became apparent when briefing the motions for accelerated decision based on arguments made in the cross motions. See RX104-RX107, RX111-RX112. These regulatory guidance letters provide accounts of U.S. EPA's decisions regarding material and processes similar those at issue in this matter and are relevant to Respondent's defense. RX99 is being provided to complete CIS' response to U.S. EPA's request for information, already provided as CX3. The next four exhibits are intended to provide visual context during the hearing of the facility and its operations. See RX99, RX113-RX115. Exhibit RX116 is a diagram obtained by Mr. Rorick from the German Iron and Steel Institute (VDEh), created by Prof. Scholz of the Technical University Clausthal in Germany, which directly supports the idea of the chemical raw material nature of the injectants and coke in the context of the blast furnace. The final three exhibits (RX117-RX119) are videos from the actual

interior of a blast furnace. The first two videos (RX117 and RX118) are of experimental work injecting oxygen directly with the injectant and creating actual burning in the tuyere.<sup>1</sup> In comparison, video exhibit RX119 shows the typical injectant in a tuyere not burning.

All of these exhibits support Respondents' denial of the factual allegations as set forth in Respondents' answer, specifically, to the allegation that CIS treated, stored and disposed of a hazardous waste without a permit.

As already noted, the additional affirmative defense discussed in the supplemental joint prehearing exchange was included in Respondents' Answer to Complainant's First Amended Complaint. It is within Respondents' right to include the additional affirmative defense in their answer to the amended complaint. 40 C.F.R. 22.15(b). Respondents are required to correct their initial prehearing exchange if it becomes outdated. 40 C.F.R. 22.19(f). Inclusion of the new affirmative defense in the prehearing exchange is necessary to reflect the current affirmative defenses being relied upon, otherwise the prehearing exchange would be incomplete. This additional affirmative defense was briefed by the parties in connection with the cross motions for accelerated decision and is relevant to the issue of penalty mitigation. As such, U.S. EPA has had notice of this affirmative defense. Additionally, the revision to the ability to pay affirmative defense is only intended to clarify the record and does not require any additional research or consideration by U.S. EPA.

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<sup>1</sup> As will be explained by Mr. Rorick at the hearing (and in contrast to the opinion of Dr. Fruehan), in actual operations, the injectant is not actually combusted because the heat generated is too great for the tuyere and blowpipe to handle, and the great additional volume generated by the combustion in the tuyere creates very high back-pressure on the blast delivery system, resulting in a loss of productivity, even if the high temperature problems could be solved.



Further, this motion is being submitted well in advance of fifteen days prior to the start of the hearing and prior to the deadline for motions to supplement prehearing exchanges as provided in the Order on Agreed Motion for Modifying the Pre-Hearing Schedule (April 10, 2012). Complainant has ample time to review the information provided in the First Supplemental Joint Prehearing Exchange, a majority of which has already been made available to Complainant. The motion to supplement is not in bad faith, nor will U.S. EPA suffer any prejudice from the addition of two fact witnesses and the seventeen additional exhibits. This supplemental information is necessary to complete Respondents' prehearing exchange.

**IV. Conclusion**

For the above stated reasons, Respondents respectfully request their Motion for Leave to File Respondents' First Supplemental Joint Prehearing Exchange be granted.

Respectfully submitted,



Lawrence W. Falbe  
Quarles & Brady LLP  
300 N. LaSalle St., Suite 4000  
Chicago, Illinois 60654  
Telephone: (312) 715-5223  
Facsimile: (312) 632-1792  
[larry.falbe@quarles.com](mailto:larry.falbe@quarles.com)

Keven Drummond Eiber  
Meagan L. Moore  
Brouse McDowell, L.P.A.  
1001 Lakeside Ave., Suite 1600  
Cleveland, Ohio 44114  
Telephone: (216) 830-6830  
Facsimile: (216) 830-6807  
[keiber@brouse.com](mailto:keiber@brouse.com)

[mmoore@brouse.com](mailto:mmoore@brouse.com)

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



**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 Motion for Leave to File First Supplemental Prehearing Exchange was sent on April 23, 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

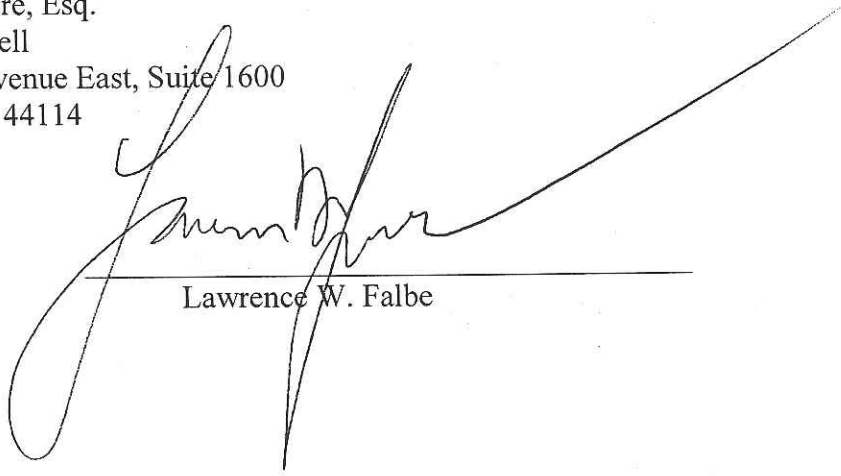
Steven Sarno (sarno.steven@epamail.epa.gov)  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1099 14th Street, N.W., Suite 350  
Washington, DC 20005

Copy by hand delivery to:

Catherine Garypie, Esq.  
Jeffrey Cahn, Esq.  
Matthew Moore, Esq.  
Office of Regional Counsel  
U.S. EPA Region 5  
77 West Jackson Blvd.  
Chicago, IL 60622

Copy by E-Mail to:

Keven Drummond Eiber, Esq.  
Meagan L. Moore, Esq.  
Brouse McDowell  
600 Superior Avenue East, Suite 1600  
Cleveland, OH 44114

A large, stylized handwritten signature in black ink, appearing to read 'Lawrence W. Falbe', is written over a horizontal line. The signature is highly cursive and extends significantly above and below the line.

Lawrence W. Falbe

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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AND ERIC LOFQUIST'S FIRST SUPPLEMENTAL JOINT PREHEARING  
EXCHANGE**

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, pursuant to Rule 22.19(f) of the Consolidated Rules, submit the following information for their First Supplemental Joint Prehearing Exchange:

A. Respondents' Additional Witnesses

1. Dzugan, John. John Dzugan was the plant manager of CIS from 2004-2008. Mr. Dzugan will testify regarding the overall operations of CIS, including the specifications for the materials use in the blast furnace. He will also testify as to his responsibilities at the facility, including hiring and firing employees. Mr. Dzugan also will testify regarding tank cleaning and inspection at the facility, as well as CIS's Waste Analysis Plan and CIS's Contingency Plan.

2. Forster, Scott. Respondent Scott Forster is the president of CIS. Mr. Forster will testify regarding the investigation into the possible purchase of certain hazardous waste streams, and ultimate decision not to purchase such materials. He will also testify as to the various, separate businesses he and Eric Lofquist own, as well as his involvement in the operations of CIS.

Respondents also intend to cross-examine the witnesses called by the Complainant United States Environmental Protection Agency (“Complainant” or “U.S. EPA”).

B. Respondents’ Additional Exhibits

Respondents incorporate by reference as if fully set forth herein the list of Complainant’s exhibits set forth in its Initial Prehearing Exchange and in its First Supplemental Prehearing Exchange. Respondents may present any or all of such exhibits in their defense. Complainant’s exhibits have been produced by Complainant and therefore are not being separately produced by Respondents. In addition, Respondents identify, and produce contemporaneously with this First Supplemental Joint Prehearing Exchange, the following joint Respondents’ exhibits:

RX99: April 11, 2012 letter to M. Beedle from M. Moore supplementing CIS’

April 28, 2010 response to U.S. EPA’s Request for Information

RX100: Undated letter to K. Eiber from F. Rorick

RX101: April 2, 2012 Expert Rebuttal Report and Counter Declaration of Dr.

Bruce M. Sass \*CBI

RX102: March 29, 2012 Joseph Poveromo Declaration

RX103: April 2, 2012 Frederick Rorick Declaration



- RX104: March 1, 1990 Regulatory Guidance Letter to C. Jaekel
- RX105: December 5, 1994 Regulatory Guidance Letter to M. Benoit
- RX106: October 12, 1995 Regulatory Guidance Letter to S. Kuhn
- RX107: September 19, 1985 Regulatory Guidance Letter to T. Manthey
- RX108: Frederick Rorick Expert Report \*CBI
- RX109: March 15, 2012 Dr. Bruce M. Sass Expert Report \*CBI
- RX110: March 13, 2012 Christopher McClure, CPA Expert Report \*CBI
- RX111: June 25, 1987 Regulatory Guidance Letter to Preservation Products
- RX112: November 28, 1990 Regulatory Guidance Letter to K. Ream
- RX113: July 2, 2004 photographs from Cleveland Plain Dealer, "Manufacturing stays healthy in June," by Adam Geller
- RX114: Peter Wosotowsky Power Point Presentation and Narrative \*CBI
- RX115: *How to Recognize a Hazardous Waste (Even if it's Wearing Dark Glasses)* 11<sup>th</sup> Edition, By Gary Crouth, page 38 (March 19, 2012)
- RX116: Blast furnace diagram created by Prof. Scholz of the Technical University Clausthal in Germany.
- RX117-RX119: Blast furnace videos.

C. Respondents' Additional Affirmative Defense

Respondents have included an additional affirmative defense in their Answer to Complainant's First Amended Complaint. Respondents' seventh affirmative defense is that Complainant's claims regarding the single test shipment of K022 waste from JLM Chemicals are barred by the fair notice doctrine. The fair notice doctrine precludes the

imposition of civil liability with respect to the single test shipment of K022 waste from JLM Chemicals, Inc. prior to Respondents' receipt of Ohio EPA's final determination regarding its interpretation of the "burning for energy recovery" exception to the recycling exclusion. By reviewing the regulations and other public statements issued by the agencies, Respondents, acting in good faith, were not able to identify, with "ascertainable certainty," the standards with which the agencies expected them to conform. Under such circumstances, which must be viewed from the perspective of the regulated party, the agency has not fairly notified the party and may not deprive the party of property by imposing civil or criminal penalties. Respondents' fair notice doctrine defense, which the Judicial Officer correctly noted is different than the late notice defense that Respondents previously asserted and that was dismissed, was briefed by the parties in connection with the cross motions for accelerated decision. It also is relevant to the issue of penalty mitigation.

Respondents have also revised their fifth affirmative defense pertaining to ability to pay to only cover CIS's ability to pay the proposed penalty. As noted in Respondents' Initial Joint Prehearing exchange, Respondents did not intend to present any evidence at the hearing regarding Scott Forster's or Eric Lofquist's ability to pay a civil penalty. In fact, this affirmative defense, as it applies to Scott Forster and Eric Lofquist was stricken in the Judicial Officer's February 14, 2012 Order.

The Judicial Officer previously has ruled that certain of Respondents' affirmative defenses raised issues that are relevant to penalty mitigation, irrespective of whether they amount to a defense to liability. Respondents reserve their right to present evidence regarding such matters for such purpose on the remaining affirmative defenses

Respectfully submitted,

Keven Drummond Eiber  
Meagan L. Moore  
BROUSE MCDOWELL  
600 Superior Avenue East  
Suite 1600  
Cleveland, OH 44114  
Tel: (216) 830-6816  
Fax: (216) 830-6807  
keiber@brouse.com  
mmoote@brouse.com



Lawrence W. Falbe  
QUARLES & BRADY LLP  
300 N. LaSalle Street, Suite 4000  
Chicago, IL 60654  
Tel: (312) 715-5223  
Fax: (312) 632-1792  
larry.falbe@quarles.com

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

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**CERTIFICATE OF SERVICE**

I, Lawrence W. Falbe, an attorney, hereby certify that the Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's First Supplemental Joint Prehearing Exchange was sent on April 23, 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:

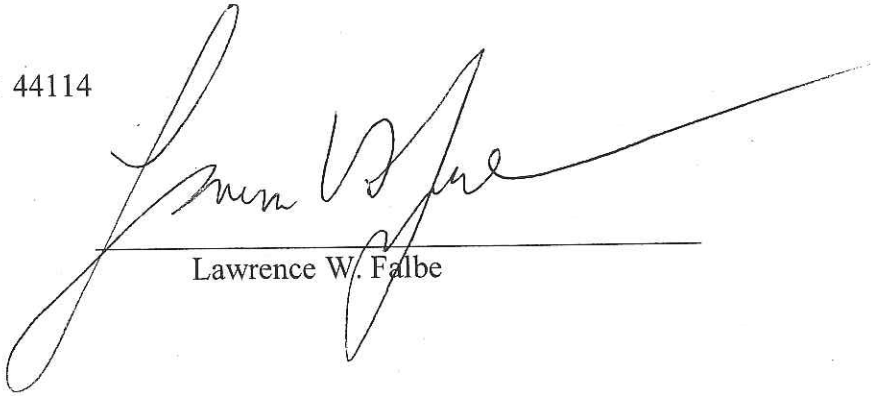
Catherine Garypie, Esq.  
Jeffrey Cahn, Esq.  
Matthew Moore, Esq.  
Office of Regional Counsel  
U.S. EPA Region 5  
77 West Jackson Blvd.  
Chicago, IL 60622

Copy by E-Mail to:

Keven Drummond Eiber, Esq.  
Meagan L. Moore, Esq.  
Brouse McDowell  
600 Superior Avenue East, Suite 1600



Cleveland, OH 44114

A handwritten signature in cursive script, appearing to read "Lawrence W. Falbe". The signature is written in black ink and is positioned above a horizontal line.

Lawrence W. Falbe