UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

COMPLAINANT'S PREHEARING BRIEF

Comes now Complainant, the United States Environmental Protection Agency, Region 5 (Complainant or the Region), by and through its counsel, pursuant to this Court's April 16, 2012, Order on Agreed Motion for Modifying the Pre-Hearing Schedule, hereby files Complainant's Prehearing Brief.[1] In support of this Brief, Complainant states as follows:

I. Introduction

This case is about Respondents Forster and Lofquist who operated Carbon Injection Systems LLC ("CIS") by gambling that regulators would not detect the environmental violations of CIS and pursue enforcement of those violations. Rather than dice or cards, Respondents

[1] Complainant does not waive and hereby incorporates by reference the arguments made in Complainant's Motion for Partial Accelerated Decision as to Liability, Complainant's Response to Respondents' Motion for Accelerated Decision, and Complainant's Reply to Respondents' Memorandum in Opposition to Complainant's Motion for Partial Accelerated Decision. Complainant's Prehearing Brief is intended to provide the Court with a "roadmap" of what Complainant expects to present at hearing.

Forster and Lofquist used the CIS fuel facility to blend hazardous waste with used oil, and then ship the mixture directly to a blast furnace at a steel mill which burned that hazardous waste for energy recovery without a permit issued under Solid Waste Disposal Act, as amended, also known as the Resource Conservation and Recovery Act, as amended ("RCRA"), 42 U.S.C. §§ 6901-6992k. By so doing, hazardous wastes were stored and treated at the CIS facility without the required RCRA permit. Before and during these operations, Respondents Forster and Lofquist directly and indirectly questioned regulators about whether activities such as those that are the subject of this action were regulated by the hazardous waste provisions of RCRA. When the regulators responded that the activities *were* regulated as hazardous waste under RCRA, Respondents Forster and Lofquist gambled with human health (of CIS employees, WCI Steel employees, and nearby residents of a high priority environmental justice community) and the environment (the facility sits adjacent to the Mahoning River which is over 100 miles long and supports a wide variety of flora and fauna in its waters and riverbed, and along its banks) by ignoring the applicable regulations. It is in this way that all three of the Respondents came to violate RCRA in the manner described in the First Amended Complaint. The gamble was not successful, and Complainant is pursuing enforcement of the RCRA regulations. Now that they have been caught, EPA asks that they be ordered to return the "jackpot" they have already claimed: avoided costs, delayed costs, and illegal profits. EPA also asks that Respondents be ordered to pay a substantial penalty consistent with RCRA and EPA's applicable penalty policy, which will provide deterrence as well as fair and equitable treatment of the regulated community. EPA also asks that this Court order the Respondents to conduct closure and post-closure at the facility to ensure that any wastes remaining at the CIS facility will not pose a future threat to human health and the environment. In addition, EPA asks that the Respondents be required to

demonstrate that they have the financial resources to properly conduct that closure and post-closure.

II. EPA Will Present Evidence Proving Each Element of Its Prime Facie Case

Complainant intends to present evidence for each and every claim alleged in the First Amended Complaint as follows:

A. Respondents CIS, Scott Forster, and Eric Lofquist Are Each a "Person" Under the EPA Authorized Ohio Subtitle C Program

In their Answer, Respondents admit that they were and are "persons" as defined by OAC § 3745-50-10(A)(88). Respondents' Answer to U.S. EPA's First Amended Complaint and Compliance Order at ¶14. Therefore, EPA does not anticipate addressing this element at hearing.

B. CIS Was a "Facility"

Respondents have stipulated that CIS's facility consisted of ten 20,000 gallon vertical above-ground tanks connected by piping to an eleventh vertical above-ground tank called the "day tank." Therefore, EPA does not anticipate addressing this element at length in the hearing.

C. Hazardous Wastes Were Managed at the CIS Facility

As this Court is aware, for a material to be regulated under RCRA Subtitle C, it must be a hazardous waste. Under the applicable Ohio regulations, to be a hazardous waste, a material must be shown to be a waste (or, under the equivalent federal regulations, a "solid waste").[2]

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[2] Under OAC 3745-51-02(F), "Respondents in actions to enforce regulations adopted under Chapter 3734, of the Revised Code who raise a claim that a certain material is not a waste…must demonstrate that there is a known market or disposition for the material and that they meet the terms of the exclusion or exemption."

OAC § 3745-51-02. EPA will show at hearing that the JLM Chemicals, Inc. ("JLM") and International Flavors & Fragrances Inc. ("IFF") wastes shipped to the CIS facility were both "wastes" and "hazardous wastes."

1. The JLM and IFF Materials Were "Wastes"

a) JLM Material

As this Court noted in its May 18, 2012, Order on Motions for Accelerated Decision, "while not explicitly conceding the issue, Respondents do not argue that the November 2005 shipment from JLM did not consist of "hazardous waste" as that term is defined in RCRA…(*conditionally* conceding that CIS did store a "single test shipment of K022 listed hazardous waste" which "would be waste" if it was determined to have been burned for energy recovery)." Order at 8. Although EPA is quite confident on this issue (especially considering the ruling in the JLM matter found at CX54), the Respondents have not stipulated as to this issue and so EPA will present evidence showing that the JLM material is a "waste." In particular, the evidence will show that JLM has admitted that the material falls within the K022 code.

b) IFF Material

Complainant will present evidence that the IFF material is a "waste" under OAC § 3745-51-02. The applicable regulation defines waste as any material that is discarded by being either abandoned, inherently waste-like, a certain military munitions, or recycled. OAC § 3745-51-02 (A)(1). In this case, Respondents *recycled* material. Specifically, the material was recycled by being burned for energy recovery. OAC § 3745-51-02(C)(2). To be a recycled material burned for energy recovery, the material must be:

(a) Materials noted with an asterisk in column 2 of the table[3] contained in OAC § 3745-51-02 and

(i) Burned to recovery energy; or

(ii) Used to produce a fuel, or are otherwise contained in fuels (in which case the fuel itself remains a waste)

(b) However, commercial chemical products listed in rule 3745-51-33 of the Administrative code are not wastes if they themselves are fuels.

OAC § 3745-51-02(C)(2)(a)-(b). The table contained in OAC § 3745-51-02 separates materials into seven categories, including by-products (listed in OAC § 3745-51-31 or 3745-51-32), by-products exhibiting a characteristic of hazardous waste, and commercial chemical products listed in OAC § 3745-51-33).

(i) The IFF Material Is a By-Product

The evidence will show that Unitene LE and Unitene AGR are by-products under the table contained in OAC § 3745-51-02. Complainant will prove this by presenting the relevant regulations and the information obtained in the course of EPA's investigation of the CIS matter– including information request responses, materials EPA obtained from Georgia Department of Natural Resources ("GDNR"), and the depositions of four current and former IFF employees. In addition, David Clark, an expert in organic chemical manufacturing, chemical process engineering, will offer his opinion that the material is a by-product.

(ii) Even if Deemed a Product, the IFF Material is a Commercial Chemical Product

Even if deemed a "product," the evidence will nonetheless show that the material is a commercial chemical product under the table contained in OAC § 3745-51-02, which was recycled in a manner that differed from normal use – it was burned for energy recovery. Again, Complainant will prove this by presenting evidence regarding the relevant regulations and the

[3] The table in OAC 3745-51-02 can be found at CX160 at EPA024578.

information obtained in the course of EPA's investigation of the CIS matter– including information request responses, materials EPA obtained from GDNR, and the depositions of four current and former IFF employees. In addition, Mr. Clark, an expert in organic chemical manufacturing, chemical process engineering, will offer his opinion that the material was recycled in a manner that differed from its normal use.

EPA also notes that if the Court concludes that the material is a commercial chemical product, the material is not a fuel itself under OAC § 3745-51-02(C)(2)(b). The evidence regarding the regulations at issue as well as EPA's investigation of the facts in this matter will show this to be the case. Mr. Clark, also an expert in fuels, will provide evidence regarding traditional fuled and the use of the IFF materials as fuel.

(iii) The IFF Materials Were Burned for Energy Recovery

The evidence will show that the IFF materials were burned for energy recovery. Specifically, Dr. Richard Fruehan, an expert in the process of steel making, including the mechanics and science of blast furnace operations, as well as the reactions (including chemical reactions) that occur in the iron making process, will provide evidence regarding this issue. He will describe how a blast furnace works, and what happened to the JLM and IFF material once it entered the blast furnace.

2. The JLM and IFF Materials Are Not Exempt From the Definition of "Waste"

The evidence will show that the JLM and IFF materials are not exempt from the definition of "waste" under OAC § 3745-51-02(E). Specifically, Complainant will prove that the materials were not used or reused as ingredients in the blast furnace. Similarly, the evidence will show that the materials were not used or reused as effective substitutes in the iron-making process. Rather, they were burned for energy recovery, as Dr. Fruehan will explain.

3. The JLM and IFF Wastes Were "Hazardous Wastes"

The evidence will show that both the JLM and IFF wastes were designated as characteristic hazardous waste (in the case of IFF's Unitene LE), listed hazardous waste (in the case of the JLM waste), or *both* characteristic *and* listed hazardous waste (in the case of IFF's Unitene AGR).

4. The JLM and IFF Materials Are Not Excluded From RCRA (Either the Definition of "Waste" or the Definition of "Hazardous Waste")

Complainant will prove that although the applicable regulations contain many exclusions for both "waste" and "hazardous waste," the JLM and IFF material did not fall under *any* of the exclusions.

D. Hazardous Wastes Were *Stored* and *Treated* at the CIS Facility

As noted in the Order, the Respondents have conceded that storage occurred at the CIS facility. Order at 8; Respondents' Answer to U.S. EPA's First Amended Complaint and Compliance Order at ¶22. Complainant will prove that treatment also occurred at the CIS facility. In particular, EPA will prove that blending of used oil and hazardous waste occurred at the facility, and that activity constitutes treatment of hazardous wastes.

III. When Managing Hazardous Waste at the CIS Facility, Respondents Violated Various Provisions of RCRA

As described in the First Amended Complaint, when the Respondents managed hazardous waste at the CIS facility, they violated a variety of RCRA regulations. Complainant will prove violations by Respondents of the following:

1. storage and treatment of hazardous waste without a permit in violation of Section 3005 of RCRA, 42 U.S.C. § 6925(a) and the requirements of OAC §§ 3745-50-40 to 3745-50-66 [40 C.F.R. §§ 270.1(c) and 270.10(a) and (d), and 270.13] (Count 1 of the Complaint);
2. failing to hold a public meeting in violation of OAC §§ 3745-50-39(A)(2), 3745-50-40(A)(2)(a) [40 C.F.R. § 124.31(b)] (Count 2 of the Complaint);

3. failing to develop and follow a sufficient written waste analysis plan from May 2005 to March 2010, in violation of OAC § 3745-54-13(B) and (C) [40 C.F.R. § 264.13(b) and (c)] (Count 3 of the Complaint);
4. from May 2005 to March 2010, having facility personnel who failed to successfully complete a program of classroom instruction or on-the-job training that taught them to perform their duties in a way that ensured the facility's compliance with the requirements of the standards for owners and operators of hazardous waste, treatment, storage and disposal facilities, in violation of OAC § 3745-54-16(A)(1) [40 CFR § 264.16(a)(1)], and failing to maintain documents and records related to this training, in violation of OAC § 3745-54-16(D) [40 CFR § 264.16(d)] (Count 4 of the Complaint);
5. failing to attempt to make: (a) arrangements to familiarize police, fire departments, and emergency response teams with the layout of the facility, properties of hazardous waste handled at the facility and associated hazards, places where facility personnel would normally be working, entrances to and roads inside the facility, and possible evacuation routes; (b) where more than one police and fire department may respond to an emergency, agreements designating primary emergency authority to a specific police and a specific fire department and agreements with any others to provide support to the primary emergency authority; (c) arrangements with Ohio EPA emergency response teams, emergency response contractors, and equipment suppliers; and (d) arrangements to familiarize local hospitals with the properties of hazardous waste handled at the facility and types of injuries or illnesses which could result from fires, explosions, or releases at the facility, in violation of OAC § 3745-54-37(A) [40 C.F.R. § 264.37(a)] (Count 5 of the Complaint);
6. violating OAC § 3745-54-76 [40 CFR § 264.76] by accepting hazardous waste (K022) on November 21, 2005, hazardous waste (D001) at the facility for treatment and storage on forty (40) occasions between August 9, 2006 and February 27, 2009, and hazardous waste (D001, D035, F003 and F005) on one hundred forty nine (149) occasions between November 16, 2006 and February 10, 2009 without an accompanying manifest and failing to prepare and submit an unmanifested waste report in the form of a letter to the director of OEPA within fifteen days after receiving the waste (Count 6 of the Complaint);
7. owning or operating the facility from May 2005 to March 2010, and failing to have a written closure plan that identifies the steps necessary to perform partial or final closure of the facility at any point during its active life, in violation of OAC §§ 3745-55-10 through 3745-55-20 [40 C.F.R. §§ 264.110-120] (Count 7 of the Complaint);
8. owning or operating the facility from May 2005 to March 2010, and failing to have and maintain a detailed written estimate, in current dollars of the cost of closing hazardous waste management units, in violation of OAC 3745-55-42 [40 C.F.R. § 264.142], and failing to comply with applicable financial assurance requirements, in violation of OAC § 3745-55-43 [40 C.F.R. § 264.143] (Count 8 of the Complaint);
9. owning or operating the facility from May 2005 to March 2010, and failing to obtain and keep on file at the facility a written hazardous waste tank assessment, in violation of OAC § 3745-55-92 [40 C.F.R. § 264.192] (Count 6 of the Complaint); and
10. failing to determine and provide land disposal notification and certification pursuant to the land disposal requirements of OAC § 3745-270-07 [40 C.F.R. § 268.7] (Count 10 of the Complaint).

IV. Respondents Forster and Lofquist Are Directly Liable as Operators of CIS

The evidence will show that a number of facts are present which allow one to conclude that Respondents Forster and Lofquist are directly liable as operators of CIS. Complainant will present evidence regarding a number of topics which will prove the direct liability of the officers, including:

-role in the corporation
-percent of stock ownership in the corporation
-involvement in the activity at issue
-authority in making financial decisions for the facility
-involvement and authority in decision-making as to the facility's operation and compliance with laws and regulations at issue
-documents submitted to EPA identifying the individual as facility operator and not just corporate representative

V. None of the Respondents Have a Viable Affirmative Defense

Respondents have the burdens of presentation and persuasion to prove the affirmative defenses raised in Respondents' Answer to U.S. EPA's First Amended Complaint and Compliance Order. Complainant will present evidence to successfully rebut any evidence presented by Respondents with regarding to these defenses.

VI. The Proposed Penalty of $1,791,810 is Appropriate In This Case

Complainant will present evidence showing that by combining application of the RCRA statutory penalty factors as well as the applicable EPA penalty policy, a penalty of $1,791,810 is appropriate in this case. Complainant will detail the EPA penalty calculation in this matter, including proving the following:

- Count 1 (into which EPA compressed counts 2, 3, 5, 6, 7 and 9) was a "Major/Major" violation with a multi-day component and a five percent increase for history of noncompliance – and an economic benefit (avoided/delayed/illegal profit) can be shown;
- Count 4 was a "Major/Moderate" violation with a multi-event component and a five percent increase for history of noncompliance;

- Count 8 was a "Moderate/Major" violation with a multi-day component and a five percent increase for history of noncompliance – and an economic benefit (avoided/delayed) can be shown; and
- Count 10 was a "Major/Major" violation with a multi-event component and a five percent increase for history of noncompliance.

VII. EPA's Proposed Compliance Order Is Appropriate

Respondents are expected to present evidence that the company now operating the former CIS facility (an entity named Main Street Commodities LLC, which is controlled by Respondents Forster and Lofquist) submitted a RCRA Closure Plan dated Mary 24, 2012, to the Ohio Environmental Protection Agency ("OEPA"). EPA believes this submittal is related to the current owner and operator of the WCI Steel facility (RG Steel) filing for bankruptcy protection on May 31, 2012, and that company's notification to workers that layoffs will be starting on June 4, 2012. In addition, OEPA has not approved that closure plan, and to EPA's knowledge, no closure activities have taken place. Further, EPA has no information regarding any attempt by the Respondents to comply with the post-closure and financial assurance provisions of the RCRA regulations with respect to the CIS facility.

VIII. Conclusion

In conclusion, Complainant will present evidence demonstrating that the Respondents are liable for each violation of RCRA in the First Amended Complaint, and will show that the proposed penalty of $1,791,810 and the proposed compliance order are both warranted and appropriate under the facts and circumstances in this case.

Respectfully Submitted,

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5/31/12
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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 Prehearing Brief", dated May 31, 2012, was sent this day in the following manner to the addressees listed below:

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